

The Horse Racing Fantasy Sports Wagering Exception Under the UIGEA

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HISTORICALLY, WAGERING ON HORSE RACING has been preferred by state governments over other forms of gambling, such as lotteries, wagering on sports, or casino gaming. In the 1930s, when most other gambling fell out of favor due to corruption and organized crime, horse racing and wagering were seen as bringing entertainment to the masses during difficult economic times.¹ Beginning with the historic and storied racing career of a small and poorly bred horse named *Seabiscuit*, horse racing enjoyed growth in popularity and handle for several decades.²

Unlike the sports that form the basis of traditional fantasy sports, such as baseball or football, horse racing is heavily regulated at the state level, by 38 individual state racing commissions.

State regulatory power is borne out of the state's police power, which allows the state to regulate the health, safety, welfare, and morals of its constituents. As the court in *Hubel v. West Virginia Racing Commission* held in 1974, "[t]he power of the legislature to regulate or even abolish horse racing is, of course, well established [...]. The exercise of the state's police power in this area of endeavor is to minimize the potential evil that attends the practice of horse racing."³ The potential evil is, of course, gambling, and, more specifically, the possibility of the fixed race and swindled public. As West Virginia's highest court has held:

The simple proposition is that in permitting horse racing in this State, and in permitting

wagers thereon the Legislature has weakened in its battle against gambling and all wagers. As enacted, our racing laws delegated the management thereof to a Racing Commission, and gave it complete power to adopt rules and regulations therefor...(Patrons) of race tracks who, under the pari-mutuel system, make wagers on horse races, shall be given assurance that they will not be deprived of their money through fraudulent practices.⁴

Only one federal law specifically addresses horse racing, and that is the civil act titled the Interstate Horseracing Act, which, as amended, allows the transmission of pari-mutuel wagering on horse racing across state lines. Until the recent moves by several states to permit intrastate online wagering on sports or other games, horse racing enjoyed a monopoly in this legal online wagering space.⁵ Since the passage of this Act in 1978, wagering on horse

¹Joan S. Howland, *Let's not "Spit the Bit" in Defense of "The Law of the Horse:" The Historical and Legal Development of American Horse Racing*, 14 MARQ. SPORTS L. REV. 473, 499 (2004).

²*Id.* at 500.

³*Hubel v. West Virginia Racing Com.*, 376 F. Supp. 1, 4 (S.D. W.Va. 1974) (internal citations omitted).

⁴*State ex rel. Morris v. West Virginia Horse Racing Com.*, 55 S.E. 2d 271, 274-275 (W. Va. 1949).

⁵Laura A. D'Angelo and Kerry O. Irwin, *States Prepare to bet the House on Online Gaming*, BUSINESS LAW TODAY, Apr. 2012. Online wagering on sports is already allowed in a few states under the Professional and Amateur Sports Protection Act, but New Jersey Governor Chris Christie has filed suit to challenge the right of the federal government to prevent other states, such as New Jersey, from authorizing intrastate online sports wagering. The federal district court rejected New Jersey's lawsuit, which was opposed by sports organizations, and New Jersey has appealed to the 3rd Circuit Court of Appeals. See *NCAA v. Christie*, 2013 U.S. Dist. LEXIS 27782 (D.N.J. Feb. 28, 2013).

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racing has all but moved off the track, initially with “off-track” wagering that had to occur at another racetrack or licensed off-track betting parlor, and later to phone and Internet wagering. Nearly 90% of all wagers on horse racing are now made in a location other than the racetrack hosting the live race.⁶

The Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.* (IHA), regulates the transmission of data between states by way of electronic media, including the Internet. Under the IHA, interstate wagering on horse racing is lawful as long as the wager is legal in both the state where the wager is placed and the state where the wager is received. The IHA also requires that an entity obtain permission from the host track and the local horsemen’s group (via a properly executed simulcast contract that contains the fee to be paid for the signal to the host racetrack) before it accepts an interstate off-track wager on a horse race.

Any person accepting any interstate off-track wager in violation of the IHA “shall be civilly liable for damages to the host state, the host racing association, and the horsemen’s group.”⁷

BEWARE OF THE CANNIBALS

While *actual* Internet wagering on horse racing must comply with the IHA, any real-money wagering on horse racing over the Internet that falls outside the scope of the parameters of the IHA may be a violation of federal law. This includes certain online “fantasy” racing games, if the games involve real money plays on individual horse races.

For example, an online racing game might charge players a fee to pick the winner of a race at Saratoga, including certain “head-to-head” games. Without obtaining consent from the New York Racing Association or from the horsemen’s group in New York, required by the IHA, and without paying a fee to the host track, the game plays are merely wagers taking place outside the ordinary channels and would violate the requirements of the IHA and possibly other federal criminal and state laws.

Such unregulated, untaxed wagers preempt legitimate on-track and off-track wagers on these horse races, cannibalizing handle at the track and taking money away from the horsemen and the state. They are, in fact, simply exotic wagers being placed outside the system.

Genuine *fantasy* horse racing sites operate under a narrow exemption found in the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5361 *et seq.* (UIGEA). Specifically, the UIGEA exempts certain activities from its definition of “bet or wager,” including:

Participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28 [28 USCS § 3701]) and that meets the following conditions:

- i. All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of fees paid by those participants.
- ii. All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by the accumulated statistical results of the performance of individuals (athletes in the case of sport events) in multiple real-world sporting or other events.
- iii. No winning outcome is based —
 1. On the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
 2. Solely on any single performance of an individual athlete in any single real-world sporting or other event.⁸

In an unusual move, Congress inserted a “Sense of Congress” wherein it stated:

SENSE OF CONGRESS—It is the sense of Congress that this subchapter shall not change

⁶The Jockey Club, *Jockey Club 2013 Online Factbook, Pari-Mutuel Handle*, JOCKEY CLUB, <<http://www.jockeyclub.com/factbook.asp?section=8>> (last visited Apr. 8, 2013).

⁷15 U.S.C. § 3005.

⁸31 U.S.C. § 5362(1)(E)(ix).

which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.⁹

This language recognized and memorialized the ongoing dispute between horse racing and the Department of Justice (DOJ), taking no position on which party was correct. Despite an express act of Congress in the form of the IHA, DOJ has long taken the position that prior criminal statutes (namely, the Wire Act) override a subsequent civil act although no enforcement action by the DOJ has been forthcoming.¹⁰

A fantasy horse racing website can award cash prizes, but in order to do so it must comply with the requirements in 3701 (i)–(iii) above. The site must establish and make known all prizes and awards offered to winning participants in advance of the game. The value of the prizes and awards cannot be determined by the number of participants or the amount of fees paid by the participants.¹¹ The winning outcomes must reflect the knowledge and skill of the participants and must be determined predominately by the accumulated statistical performances of horses in multiple real-world races. And the winning outcome cannot be based on the performance of any single real-world horse, or solely on any single performance of an individual horse in any single real-world horse race.

Most importantly, a winning outcome also must be determined by “accumulated statistical results” of multiple real-world races. In other words, the winning outcome must be determined by aggregate component *inputs* of a horse race.

Horse racing does not have the traditional “accumulated statistical results” that are the hallmark components of genuine fantasy baseball games (e.g., home runs, ERA [earned run average], etc.) and genuine fantasy football games (e.g., touchdowns, passing yards, etc.), so it is more difficult for a fantasy horse racing game to fit under this nar-

row exemption. Moreover, it is clear from the text of the UIGEA that Congress was fully aware that interstate horse racing is already regulated by both state and federal law, and that Congress did not intend: (a) for the UIGEA to preempt those laws, and (b) for the narrow UIGEA fantasy sports exemption that applies to genuine fantasy baseball and football games to apply to horse racing contests that charge fees and award cash prizes, especially if they are structured so that players pay a fee to bet on individual races.

The UIGEA states that it “shall not change which activities related to horse racing may or may not be allowed under Federal law.”¹² It is a fundamental rule of statutory construction that a statute is to be read as a whole. In addition, statutory language should be read in its pertinent context rather than in isolation. It is well settled that specific statutory language prevails over general statutory language.¹³

Congress specifically stated that the UIGEA did not modify or change federal law relating to interstate horse racing and wagering on such horse racing. When the UIGEA is read as a whole and the fantasy sports statistical exception is read in the context of the football and baseball fantasy games that existed at the time of the enactment,¹⁴ rather than read in isolation, it is clear that Congress did

⁹31 U.S.C. § 5362(10)(D)(iii).

¹⁰See Robert Penchina, *What does the DOJ have Against the Interstate Horse Racing Act*, 10 GAMING L. REV. 446 (2006); Laura A. D'Angelo and Kerry O. Irwin, *Department of Justice Improves the Odds of Online Gambling*, BUSINESS LEXINGTON, Jan. 19, 2012.

¹¹Laura A. D'Angelo and Daniel I. Waxman, *No Contest? An Analysis of the Legality of Thoroughbred Handicapping Contests under Conflicting State Laws*, 1 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 1 (2008–2009).

¹²31 U.S.C. § 5362(10)(D)(iii).

¹³See, e.g., *Metropolitan Life Ins. Co. v. Fowler*, 922 F. Supp. 8, 13 (E.D. Mich. 1996).

¹⁴Horse racing has traditionally been distinguished from other sports, such as football and baseball, in the context of wagering. This distinction is based on a fundamental difference between these events themselves. At a horse racing event, a “window” exists where an attendee can make a wager on the race. In contrast, no “window” exists for such wagering at a football or baseball game. Wagering on the outcome of a horse race is a fundamental part of a horse racing event in a way that it is not at a football or baseball event. Additionally, in economic terms, wagering is endogenous to horse racing (i.e., growing or originating from inside the event), but exogenous to other sports such as baseball or football (i.e., growing or originating from outside the event). Thus, it makes perfect sense that Congress would treat these fundamentally different events differently under the UIGEA.

not create a loophole in the state and federal regulation of horse racing with the fantasy sports exemption. Some fantasy horse racing games qualify for the UIGEA exemption; others are clearly unregulated online wagering circumventing the standard contractual relationships with the racetracks and the horsemen.

FANTASY WAGERING ON HORSE RACING

There are categories of fantasy horse racing games that clearly qualify as fantasy sports under the UIGEA: free online fantasy handicapping games, free online horse racing leagues, and certain live and online handicapping contests that charge a modest registration fee that is not linked to the prizes.

In the first category are games such as the Breeders' Cup Fantasy 'Capping game, available at <https://www.fantasycapping.com>. In this free game, players place a fantasy wager on one race a week over the months leading up to the Breeders' Cup championship races in November. Players can form leagues and compete against each other in addition to participating in the main league for possible cash prizes.

The prizes and awards are established and made known in advance of the game or contest, and the value is not determined by the number of participants or the fees paid by the participants, since the game is free to play. Winning outcomes reflect the knowledge and skill of participants at handicapping and are determined predominantly by the accumulated statistical results of the performance of horses in multiple real-world horse races.

A similar game is Major League Horse Racing, available at <http://www.majorleaguehorseracing.com>, which is run by the Jockey Club. Major League Horse Racing is also free to play and involves wagering virtual money on real horse races over a season of races. In this game, players can purchase virtual items or goods, but those purchases are independent of the fantasy wagers.

The second category of genuine fantasy horse racing games is free online racing leagues, such as Road to the Roses, available at <http://www.roadtotheroses.com>, or MyFantasyStable.com, available at <http://www.myfantasystable.com>. For several years, Churchill Downs's online wagering platform, TwinSpires, has run a contest called "Road to the Roses," a fantasy horse racing league

game. Road to the Roses is a free online contest that allows players to manage a stable of Kentucky Derby contenders during the three months prior to the Kentucky Derby.

Players earn points based on how well their fantasy stable performs in a series of Kentucky Derby prep races. Players create their fantasy stables by selecting ten horses from a complete list of horses that have been nominated for the Triple Crown races (the Kentucky Derby, Preakness Stakes, and Belmont Stakes). Players also add two trainers and two jockeys to their stables. Fantasy stable managers must "activate" horses for each weekend's races and have the option to add additional horses at a later date. Fantasy horse racing leagues resemble traditional fantasy sports, as the player acts as a virtual owner, selecting real horses, trainers, and jockeys for his or her fantasy roster.

A third category of contests that falls into the UIGEA fantasy exemptions are certain online or live handicapping contests that charge a modest registration fee. In these contests, the registration fee is not linked to the prizes, and the winning outcomes of the contests are based on the players' accumulated handicapping statistics over a series of races, often at multiple tracks. The wagers in these handicapping contests are "mythical" wagers and players wager no money on the outcome of any of the races.

The free online fantasy handicapping, the racing league games, and the handicapping contests with modest entry fees clearly fit the UIGEA fantasy exemption. All prizes are advertised, and the players either do not pay an entry fee or pay a modest entry fee not linked to the prizes. Prize value is not determined by the number of contestants. Winning outcomes of the contest reflect the skill of the players in either handicapping or in managing fantasy stables over several months of races, so the outcome is not tied to the performance of one horse in one race. In none of these games is real money placed on the outcome of races.

In contrast, some "fantasy" horse racing sites, accept real money for each "game play," effectively allowing players to wager on individual races or a combination of individual races. These games do not fit into the UIGEA fantasy exemption, even if such a game posted the prizes for each contest before the contest began and the prizes were not based on the number of participants or the amount of fees paid by participants, because it is doubtful

that pay-to-play racing sites fulfill the remaining requirements of the fantasy sports exemption.

It is doubtful that a contest based on the performances of selected horses in a limited number of races in a single day results in sufficient accumulated statistical results—or indeed, *any* statistical results—upon which to base the winning outcome. In a head-to-head contest, there are no statistics being accumulated: chosen horses either win or lose, and the player either wins or loses the contest as a result. Even if contests were based on several races in a day, rather than a single race, there would not be any true statistical results upon which to award prizes.

Rather, the outcome of such contests rests on the performances of individual horses, in violation of 31 U.S.C. § 5362(1)(E)(ix). This structure is in marked contrast to other fantasy sports or league play. In fantasy baseball and football, for instance, fictional teams compete and the contest outcome is based on individual statistics accumulated over a full season of games; in fantasy baseball and football, players are not wagering on the outcome of any specific football games. Similarly, in *Road to the Roses*, fictional “stables” of horses, jockeys, and trainers compete, and the contest outcome is based on the statistics accumulated over several months of races. In contrast, head-to-head “fantasy sites”

involve players wagering on the outcome of specific real horse races.

Ultimately, rather than resembling genuine fantasy sports, pay-to-play “fantasy” horse racing games more closely resemble exotic pari-mutuel wagers on horse racing. For example, in Kentucky, “any pari-mutuel wager placed on a live or historical horse race other than a win, place, or show wager placed on a live horse race” is an “exotic wager.”¹⁵ Any exotic pari-mutuel wagers must be approved by the Kentucky Horse Racing Commission.¹⁶

In essence, pay-to-play fantasy horse racing contests are exotic wagers that have not been approved by any racing commission. In some cases, the wagers offered on some pay-to-play sites go beyond pari-mutuel wagers and actually resemble exchange wagers in the form of head-to-head wagers in which one player wagers against another player, with the host site taking a percentage of the winnings. Moreover, they are likely also interstate off-track wagers in violation of the IHA in addition to state pari-mutuel laws.

While there is a niche for true fantasy horse racing games, online horse racing contests that accept wagers on individual races or a combination of individual races are not fantasy games. Where *real* money and *real* wagers are at issue, such games only facilitate unregulated gambling in its purest form and the cannibalization of the sport of horse racing itself.

¹⁵810 KY. ADMIN. REGS. 1:011 § 1(24).

¹⁶810 KY. ADMIN. REGS. 1:011 § 9(1)(c).