THE SPECIAL EXEMPTION FOR FANTASY SPORTS

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I. INTRODUCTION

The legality of particular sports betting transactions is defined under federal or state laws. The most applicable federal law is the Wire Wager Act. It prohibits bets or wagers on any sporting event or contest. The next most relevant federal statute is the Professional and Amateur Sports Protection Act ("PASPA"). It prohibits any person from operating a betting scheme that is based on any competitive game in which amateur or professional athletes participate, or on the performance of such athletes in such games. As for state law, most states prohibit gambling unless the state has passed a specific statute or constitutional amendment permitting it. Gambling is generally defined as a transaction that involves the classic elements of consideration, chance, and

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2. See id. § 1084(a) ("Whoever . . . assist[s] in the placing of bets or wagers on any sporting event or contest . . . shall be fined under this title or imprisoned not more than two years, or both.").
4. See id. § 3702 ("It shall be unlawful for . . . a person to . . . operate . . . [a] betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes . . .").
5. See, e.g., 720 ILL. COMP. STAT. ANN. § 5/28-7 (West, Westlaw through P.A. 99-3 of the 2015 Reg. Sess.) ("Gambling contracts [are] void."); IND. CODE ANN. § 35-45-5-3 (West, Westlaw current with all 2015 Regular Session of the 119th General Assembly legislation effective through June 28, 2015) ("A person who . . . commits professional gambling [is guilty of] a Level 6 felony."); KY. REV. STAT. ANN. § 372.010 (West, Westlaw current with all immediately eff. legislation signed from the 2015 Reg. Sess.) ("Every contract . . . lost or bet in any game, sport, pastime, or wager . . . is void."); N.Y. PENAL LAW § 225.10 (West, Westlaw through L.2015, chapters 1 to 18, 50 to 61) (stating that gambling is a Class E felony); OHIO REV. CODE ANN. § 3763.01 (West, Westlaw through 2015 Files 1 to 6 of the 131st GA (2015-2016)) ("All promises . . . bet at or upon a game of any kind, . . . sport or pastime, or on a wager . . . are void.").
6. See, e.g., CAL. CONST. art. IV, § 19 (West, Westlaw through Ch. 4 of 2015 Reg. Sess.) ("[S]lot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated . . ."); KY. REV. STAT. ANN. § 238.510 (West, Westlaw current with all immediately eff. Legislation signed from the 2015 Reg. Sess.) (permitting charitable gaming); see also Mississippi Gaming Control Act, MISS. CODE ANN. § 75-76-33 (West, Westlaw through 2015) (allowing the operation of a gambling game only with procurement of a state gaming license); OHIO REV. CODE ANN. § 2915.02(D)(1)(a)-(e) (West, Westlaw through 2015 Files 1 to 6 of the 131st GA (2015-2016)) (permitting certain types of "games of chance").
7. Cf. Blackburn v. Ippolito, 156 So.2d 550, 554 (Fla. 1963) (holding that weekly visits to a supermarket to punch a card to be entered into a contest to win prizes constituted consideration); Knox Indus. Corp. v. State ex rel. Scanland, 258 P.2d 910, 913 (Okla. 1953) ("[T]hings other than money can constitute sufficient consideration . . ."); Cudd v. Aschenbrenner, 377 P.2d 150 (Or. 1962) (en banc) (holding that the element of consideration requires more than mere incidental in-
prize. Very few states, most notably Nevada, have passed specific statutes permitting sports wagering.

See Restatement (Second) of Contracts § 71 (1981) (“To constitute consideration, a performance or a return promise must be bargained for . . . . The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.”); Anthony N. Cabot & Louis V. Csoka, Games People Play: Is it Time for a New Legal Approach to Prize Games?, 4 Nev. L. J. 197, 216 (“Most courts follow the rule that ‘consideration,’ like a ‘prize,’ must be something of intrinsic value, such as money.”) [hereinafter CABOT & CSOKA, Games People Play].

8. Cf. MDS Inv., L.L.C. v. State, 65 P.3d 197, 203 (Idaho 2003) (describing chance as “risk—the chance of losing all or part of the consideration paid.”); Stevens v. Cincinnati Times-Star Co., 73 N.E. 1058, 1060 (Ohio 1905) (“Chance is something that befalls; the result of unknown or uncertain forces or conditions.”); People ex rel. Ellison v. Lavin, 179 N.Y. 164, 168 (N.Y. 1904) (holding the element of chance to be determinative of the issue of whether the defendant had advertised an illegal lottery); People v. Cohen, 289 N.Y.S. 397, 399 (Misc. 1d 1936) (citing 38 C.J.S. Gaming §2 (2015)) (“Game of chance refers to a game determined entirely or in part by lot or mere luck . . . ; a game in which hazard entirely predominates.”) (internal quotation marks omitted); see Marc Edelman, A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime, 3 Harv. J. Sports & Ent. L. 1, 28 (2012) (“Courts have found that the element of chance requires that a game’s result be driven not by judgment, practice, skill or adroitness, but rather by factors entirely outside of the participant’s control.”) (internal quotation marks omitted) (citing State v. Gupton, 30 N.C. 271, 273-74 (N.C. 1848); Chance Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/chance (last visited Aug. 5, 2015) (defining “chance” as “something that happens unpredictably without discernible human intention or observable cause.”).

9. See, e.g., United States v. DiCristina, 886 F. Supp. 2d 164, 200-03 (E.D. N.Y. 2012) rev’d 726 F.3d 92 (2d Cir. 2013) (acknowledging that the definition of gambling varies according to whether dictionary definitions, the common law, or statutory language is being considered); see also The Illegal Gambling Business Act, 18 U.S.C. § 1955(b)(4) (2012) [hereinafter IGBA] for an example of a statutory definition of gambling: “[G]ambling includes but is not limited to . . . bookmaking, . . . conducting lotteries, lottery, bolita or numbers games, or selling chances therein.” See generally D. A. Norris, What are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill, 135 A.L.R. 104 (1941) (discussing the elements of gambling: consideration, chance, and prize); cf. State v. 26 Gaming Machs., 145 S.W.3d 368, 374-75 (Ark. 2004) (noting that an intangible prize does not qualify as a reward for purposes of gambling law); Midwestern Enter., Inc. v. Stenehjem, 625 N.W.2d 234, 237 (N.D. 2001) (“The three elements of gambling are generally recognized as consideration, prize, and chance); State ex rel. Schillberg v. Safeway Stores, Inc., 450 P.2d 949 (Wash. 1969) (“The elements [of gambling], of course, are consideration, prize, and chance”).


11. See PASPA, 28 U.S.C. § 3704 for an explanation about how the states that implemented a sports wagering scheme during the period of September 1, 1989 and October 2, 1991, before the passage of PASPA, are exempt from § 3702. See Nev. Rev. Stat. Ann. tit. 41 § 465.094(1)(5) (permitting sports wagering of certain licensed persons and sports pools); Del. Code Ann. tit. 29, § 4825 (West, Westlaw through 80 Laws 2015, ch. 38); Am. Gaming Assoc., http://www.americangaming.org/government-affairs/key-issues/past-issues/sports-betting (last visited Aug. 5, 2015) (“PASPA bans betting on sporting events except in those states where such betting was legal at the time the law was approved, or in any state that legalized sports betting...
Although not free from doubt, the more likely conclusion is that fantasy contests constitute gambling under both federal and state law. They are a wager on a sporting event. Under federal law, the Wire Act prohibits transmitting information involving wagering on any sporting event, except in states where such bets are legal. PASPA precludes bets on the performance of professional athletes or the games they play, unless such betting activity was legal in a state at the time of passage. Thus, if indeed fantasy contests are in fact wagering contests, then both principal federal statutes appear to prohibit fantasy games, unless specifically permitted under state law. Yet state law provides little relief. In general, fantasy games are prohibited under state law because gambling is prohibited under state law. A fantasy contest involves the classic elements of consideration, chance, and prize. Fantasy game operators and investors are under the constant risk of federal or state prosecution. “Black Friday,” which shut down the comparatively smaller market for internet poker, might one day be regarded as a dress rehearsal.

Those who defend the legality of fantasy sports cite two principal arguments, neither of which is entirely compelling. First, the Unlawful Internet Gambling Enforcement Act (“UIGEA”) prohibits certain financial intermediaries within a year of that date. Four states—Nevada, Oregon, Delaware and Montana—qualify for this exemption.


from facilitating transactions involving unlawful Internet gambling. What constitutes unlawful Internet gambling is not defined by the statute; instead, UIGEA refers to other applicable, aforementioned federal and state laws. But UIGEA contains several “carve-outs,” exemptions to the otherwise breathtaking sweep of its language. These carve-outs are notable: stock and commodities trading, insurance, banking, and fantasy sports. As a matter of legality, the specific exemption for fantasy sports only allows financial intermediaries to facilitate transactions involving fantasy games. The exemption does not make fantasy sports legal; indeed, the exemption does not speak to the legality issue at all. Nonetheless, the fact that the federal financial intermediary statute specifically permits funding of fantasy sports activities has been understood by many to constitute an implicit endorsement of their legality.

14. The Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5363 (2012) [hereinafter UIGEA] (“No person . . . may accept . . . credit, . . . an electronic fund transfer, . . . any check, draft, or similar instrument . . . or the proceeds of any form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.”); see, e.g., Kraig P. Grahmann, Betting on Prohibition: The Federal Government’s Approach to Internet Gambling, 7 NW. J. TECH. & INTELL. PROP. 161, 161 (2009) (“The UIGEA bans acceptance of any financial instrument used for unlawful Internet gambling.”); James L. Johnston & Josh J. Gordon, Daily Fantasy Sports presents Opportunities and Risks to Companies, 27 NO. 1 INTELL. PROP. & TECH. L. J. 19, 19 (2015) (“[UIGEA], among other things, prohibited financial transactions that supported unlawful online gambling.”).

15. See id. § 5362(1)(E)(i-iv) (The term ‘bet or wager’ . . . does not include . . . any activity governed by the securities law . . . of the Securities Exchange Act of 1934 . . . ”).

16. See id. § 5362(1)(E)(i-vi) (The term ‘bet or wager’ . . . does not include . . . any contract for insurance.”).

17. See id. § 5362(1)(E)(i-vii) (The term ‘bet or wager’ . . . does not include . . . any deposit or other transaction with an insured depository institution.”).

18. See id. § 5362(1)(E)(ix)(I)-(III) (“The term ‘bet or wager’ . . . does not include . . . participation in any fantasy or simulation sports game . . . ”).

19. Anthony N. Cabot & Louis V. Csoka, Fantasy Sports: One Form of Mainstream Wagering in the United States, 40 J. MARSHALL L. REV. 1195, 1201 (2007) (“The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA.”).

The second principal argument in favor of the legality of fantasy sports refers to state law. Citing the “chance” element derived from the common law definition of gambling, and to the numerous state court decisions that adhere to it, this argument holds that fantasy sports, in which success appears to involve an apparent measure of skill, do not fall within the common definition of gambling. The conception of “chance” to which most state courts appear to adhere, however, does not comport with the expansive notion of chance that

21. See 15 U.S.C. § 3001(a)(1) (2012), which explains that each state has “primary responsibility” when determining which activities constitute gambling within that state. See, e.g., Haskell v. Time, Inc., 857 F. Supp. 1392, 1404 (E.D. Cal. 1994) (quoting Finster v. Keller, 96 Cal. Rptr. 241, 246 (Cal. Ct. App. 1971) (“In considering whether a game requires skill, the court looks to whether the players exercise some control over the outcome”) (quotation marks omitted); Mendelsohn v. BidCactus, LLC, No. 3:11-CV-1500, 2012 WL 1059702 (Conn. 2012) (explaining that chance must predominate over skill to be considered illegal gambling); National Football League v. Governor of State of Del., 435 F. Supp. 1372, 1384 (Del. 1977) (“[A] ‘lottery’ should be interpreted to encompass not only games of pure chance but also games in which chance is the dominant determining factor.”); People v. Mitchell, 444 N.E.2d 1153, 1155, 1157 (Ill. App. Ct. 1983) (holding that bridge and poker are games of chance); Las Vegas, Hacienda, Inc. v. Gibson, 359 P.2d 85, 29 (Nev. 1961) (“The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element”) (holding that golfing a hole-in-one is based primarily on skill, regardless of whether chance is involved); Humphrey v. Viacom, No. 06-2768, 2007 WL 1797648, at *11 (D. N.J. 2007) (holding fantasy sports as games of skill and not games of chance); People ex rel. Ellison v. Lavin, 179 N.Y. 164, 168 (N.Y. 1904) (holding the element of chance as being determinative of the issue of whether the defendant had advertised an illegal lottery); People v. Stiffel, 308 N.Y.S.2d 64, 64 (Misc.2d 1969) (holding that a game of billiards is not a game of chance and is therefore legal); People v. Turner, 165 Misc.2d 222, 223-24 (Misc. 2d 1995) (“Games of chance range from those that require no skill, such as a lottery, to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards.”); State v. Gupton, 30 N.C. 271, 273-74 (1848) (holding the game of ten pins as not a game of chance, but a game of skill and therefore legal); Commonwealth v. Laniewski, 173 Pa.Super. 245, 217 (Pa. 1953) (“The question here involved is the interpretation of the word ‘chance’) (concluding that football betting pools and other similar betting schemes based on sporting events qualify as games of chance, and are therefore illegal).

22. See cases cited supra, note 21; see generally BOWSELL, supra note 13, at 1257 (arguing that fantasy sports are a game of skill and therefore legal); see also HOLLIMAN, supra note 20 at 79 (citing Magee, supra note 20, at C17) (explaining that the National Football League agrees that fantasy sports are a game of skill and thus not illegal sports wagering) (“Fantasy sports . . . involve elements of both skill and chance, but the skill elements are dominant”).

23. State courts generally employ one of two guides to determine whether chance or skill is present: (1) The Pure Chance Doctrine, in which a scheme is illegal where the person’s judgment plays no part in winning a prize, and (2) the Dominant Factor Doctrine, which is used in the majority of states. The Dominant Factor Doctrine was defined in Morrow v. State, 511 P.2d 127, 129 (Alaska 1973) and laid out four qualifications for when a scheme is dominated by skill: (1) Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment; (2) participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill; and (3) skill or the competitors efforts must sufficiently govern the results—skill must control the final result, not just one part of the larger scheme. As explained in Morrow, “[U]nder New York law a ‘contest of chance’ encompasses games in which the skill of the contestants may play a role, so long as the outcome depends in a material degree on chance”) (citing United States v. Gotti, 459 F.3d 296, 342 (2d Cir. 2006)). See also United States v. DiCristina, 886 F. Supp. 164 (E.D.N.Y.), rev’d 726 F.3d 92 (2d Cir. 2013), which originally held poker to be a game requiring sophisticated skill. The court
these proponents have in mind. State courts generally take a broader, more commonsensical approach to defining “chance,” with an eye toward precluding gambling in the traditional sense.\(^{24}\) Certain varieties of fantasy contests have the appearance of gambling games. State courts will respond accordingly.

Despite the dubious arguments favoring the legality of fantasy sports, this paper will argue that they should be lawful as a normative matter. The exceptions to UIGEA are telling and informative. The Congress has often permitted the creation of what are essentially gambling markets in order to promote particular social ends.\(^{25}\) Fantasy games promote a desirable social end. Specifically, they deepen our understanding of athletic games, of the proper definition of athletic skill, and of the limits of human performance. They are useful, and they are fun. They should not be proscribed by federal or state law.

considered the defense’s expert’s statistical data depicting the top ten best and worst poker players’ consistency and discussion of techniques such as “bluffing”, “raising”, and “folding”, which requires “honed skills”. On appeal, the Appellate Court held poker to be illegal under IGBA’s statutory language, “including but not limited to”, and because the appellee’s poker business fell directly in the realm of the statutory provisions because the business: (1) operates in violation of the law of the state in which the business is conducted; (2) is conducted by five people or more; and (3) is either in operation for more than thirty days or earns more than $2,000 in one day. The Appellate Court refused to engage in a skill or chance analysis of poker; therefore, it is arguable that poker remains to be considered a game of skill although it retains an element of chance, i.e., the Dominant Factor Test is employed. See, e.g., Las Vegas, 359 P.2d at 29 (illustrating the usage of the Dominant Factor Test).

24. See State v. One Hundred and Fifty-Eight Gaming Devices, 499 A.2d 940 (Md. 1985) (holding that the element of chance is present in a device offering a monetary or merchandise reward to a successful player and thus constitutes illegal gambling); Laniewski, 173 Pa.Super. at 217 (concluding that football betting pools and other similar betting schemes based on sporting events qualify as games of chance, and are therefore illegal); Ward v. West Oil Co. 387 S.C. 268, 278 (S.C. 2010) (holding that pull-tab game machines have the element of chance, which constitutes illegal gambling); Sun Light Prepaid Phonecard Co. v. State, 600 S.E.2d 61, 64 (S.C. 2004) (holding that phone card dispenser rolls present the element of chance and thus constitute illegal gambling); Geoffrey T. Hancock, Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law, 31 T. JEFFERSON L. REV. 317, 320 (2009) (“[T]he adoption of the UIGEA . . . illustrates that there is a trend toward increased regulation of online activities, even when the activity may not fit the traditional definition of gambling.”) (internal quotation marks omitted); see also, e.g., Mitchell, 444 N.E.2d at 1157 (holding that bridge and poker are games of chance).

II. FANTASY SPORTS AS SPORTS BETTING

Courts generally construe the elements of a wager, specifically consideration, chance, and prize, expansively. Most judicial decisions defining a wager arose from disputes involving “lotteries.” The lottery cases have been numerous because many state constitutions contain provisions banning lotteries. “Consideration” requires merely that the participant give “something of value” beyond the mere effort of registering for the contest. The element of “chance” has received the most judicial and scholarly attention, and has been stretched broadly, even where the outcome of the contest was determined merely by the independent decisions of opponents to cease participation. “Prize” can include winnings as meaningless as pinball replays, although some decisions have limited “prize” to items that are tangible and have an independent value in the marketplace.

The fact that fantasy sports is specifically exempted from the UIGEA statute is highly suggestive that the Congress contemplated that fantasy sports do constitute sports wagers in the first place. The statute prohibits funding of games involving a “bet” or “wager,” defined as “staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.” Two of the elements are clearly satisfied: ordinary fantasy play requires consideration, assuming participants must purchase the opportunity to join the league; the substantial payoffs for league victors constitutes “prize.”

Proponents of the view that fantasy sports do not constitute a bet, implying that the UIGEA carve-out is mere surplusage, argue that the “chance” element

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26. See supra notes 7-9 and accompanying text.
27. See e.g., ALA. CONST. art. IV, § 65 (“The legislature shall have no power to authorize lotteries . . . .”); see also UTAH CONST. art. VI, § 28 (“The legislature shall not authorize any game of chance, lottery, or gift enterprise . . . .”).
28. See Glick v. MTV Networks, 796 F. Supp. 743 (S.D.N.Y. 1992) (holding consideration not present because the use of the paid telephone system was a mere convenience to participants, who could have pursued a cost-free entry sweepstakes made available by the promoter); Knox Indus. Corp. v. State ex rel. Scanland, 258 P.2d 910, 913 (Okla. 1953) (“[T]hings other than money can constitute sufficient consideration . . . .”); Cabot & Csoka, supra note 7, at 216 (“Most courts follow the rule that ‘consideration,’ like a ‘prize,’ must be something of intrinsic value, such as money.”).
29. See Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185, 185-87 (N.Y. Civ. Ct. 1980) (explaining that in a contest to determine the “King of the Infants, . . . [t]he chance was in purchasing and voting more coupons than others . . . .”); thus, winning was determined by opponents ceasing participation).
30. See Cabot & Csoka, supra note 7, at 216 (“Most courts follow the rule that ‘consideration,’ like a ‘prize,’ must be something of intrinsic value, such as money.”); State v. 26 Gaming Machs., 145 S.W.3d 368, 374-75 ( Ark. 2004) (noting that an intangible prize does not qualify as a reward for purposes of gambling law); McKee v. Foster, 347 P.2d 585 (Or. 1959) (holding that a “prize must be tangible in nature and have a value in the marketplace”).
does not obtain. Sustained success at any contest that involves repeated trials requires a significant component of skill. The common “fantasy league” that involved a season’s-long series of games requires research and judgment for optimal success. Certain fantasy products offer “same-day” or “single-game” contests; at one fixed point along a spectrum, these contests increase the significance of luck at the expense of skill. They move closer to single-game “side bets” or “straight bets” that are the principal object of the federal prohibitions on sports betting. Requiring bettors to win multiple single-game contests over the course of a season, on the other hand, increases the importance of skill-factors in determining the outcome. Those jurisdictions that have adopted the most pro-gambling test for chance, specifically the “predominance” test that permits contests where skill is the dominant component of winning, could look benignly on the season-long fantasy tournament.

Nonetheless, the more likely outcome is that fantasy contests will fail even under the more generous legal standards, even with regard to fantasy leagues involving season-long tournaments. A season-long fantasy contest consists of a series of individual contests, each one of which has all the components of luck as does a single-game bet. Indeed, the fantasy bet may involve even more luck than the single-game side bet: unlike predictions of overall team strength endemic in side bets, the fantasy bet hinges on predictions of both team and individual play. Fantasy points derive from scoring plays, in the main. To score in an athletic game, the team must be in advantageous positions against its opponent. The successful bettor must assess team advantages. The fantasy player must also assess and predict individual play. Fantasy play asks not only which

32. See cases cited supra note 8; see, e.g., Boswell, supra note 13, at 1270 (arguing that skill, not chance, is the dominant factor in selecting and managing a winning fantasy sports team).


34. See, e.g., Ehrman, supra note 20, at 80-114 (discussing the growth of daily fantasy sports organizations, such as FanDuel); see also Purdum, supra note 33.


36. See, e.g., Purdum, supra note 33.

37. Also referred to as “The Dominant Factor Test”, this predominance test prevails in the majority of states. See sources cited supra note 23 and accompanying text; see also Boswell, supra note 13, at 1264 (“The states that follow the predominance test, however, greatly outnumber the states that adhere to the strict anti-gambling approach.”).

38. See generally SAM HENDRICKS, FANTASY FOOTBALL GUIDEBOOK: YOUR COMPREHENSIVE GUIDE TO PLAYING FANTASY FOOTBALL 1-371 (2010) (teaching the basic operations of playing fantasy sports as well as detailed concepts such as scoring, forming a league, draft rules, and strategies).

39. See id. at 143 (discussing the importance of using historical data such as performance and ranking averages from several years in order to make a prediction of the statistics that a player or team will produce in the upcoming year when playing fantasy sports).
team will likely have the upper hand in the sports game, but how that upper hand will result in a score. In other words, the fantasy bet demands that the bettor determine both which team is likely to prevail, but also how that prevailing team will capitalize on its dominance, and in what manner of scoring play. The fantasy bet involves a lot of luck. Its multiple points of assessment and prediction look more like a highly risky multi-game parlay wager than it does a classic side bets against a point spread. If the side bet in sports involves a degree of “chance” that exceeds the legal limit, then a fortiori the fantasy bet does as well.

III. THE UIGEA FANTASY CARVE-OUT

The UIGEA statute prohibits certain financial intermediaries from conducting transactions that have the effect of facilitating unlawful Internet gambling. It has seven exemptions or “carve-outs.” Exempted from the ambit of unlawful gaming are certain areas of commerce: (1) securities investments governed by the Securities Exchange Act of 1934; (2) commodities trades under the Commodity Exchange Act; (3) insurance contracts; (4) banking deposits; (5) fantasy sports; (6) gaming under the Indian Gaming Regulatory Act; and (7) gaming governed by the Interstate Horseracing Act.

Two observations are apparent from this list. The first is the fantasy sports exemption appears anomalous. Each of the other exempted transactions is subject to substantial statutory, regulatory, and judicial oversight. Each of the other exemptions involves matters of significant and perduring federal concern, namely the integrity of the capital investment markets and the security of the banking and insurance industries. The latter two exemptions, for tribal gaming

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40. Cf. Purdum, supra note 33 (explaining the level of precision and complexities involved in picking the winning team).


44. Id. § 5362(1)(E)(i)-(ix).

45. Id. § 5362(1)(E)(i).

46. Id. § 5362(1)(E)(ii)-(iv).

47. Id. § 5362(1)(E)(vi).

48. Id. § 5362(1)(E)(vii).


52. See sources cited supra notes 44-49.

53. See, e.g., Horseracing Act, §§ 3001-07 (regulating the horseracing industry); Indian Gaming Act, §§ 2701-21 (governing the operation and regulation of gaming by Indian tribes); Securities Exchanges, 15 U.S.C. §§ 78a-78pp (2012) (governing the trading of securities in the United States).
and pari-mutuel horseracing, represent significant federal commitments that find their roots back to the founding era of the nation, and address matters of substantial federal interest.\textsuperscript{54} It is not an overstatement to say that the list of UIGEA exemptions comprises the pantheon of federal economic interest and regulation. In contrast is the infant industry in fantasy sports,\textsuperscript{55} itself merely a tiny, specialized and “hobbyist” portion of the giant sports betting market. Its inclusion on the pantheon list of exemptions seems inexplicable.

The second observation stems from the first. The curious inclusion of fantasy sports, this tiny industry filled with hobbyists, presumably generated for the Congress a significant problem of statutory construction. Note that the statutory language creating the other exemptions is comparatively brief: the text of the UIGEA statute creates an exemption simply by reference to other federal statutes or parts of statutes.\textsuperscript{56} With respect to fantasy sports, however, the Congress had to write on a blank slate. Prior to UIGEA, fantasy sports was not defined by federal or state law in any form. Indeed, few would have thought that fantasy sports would ever be an object of federal attention. In order to create an exemption for fantasy sports betting, the Congress first had to define an industry. Its effort was clumsy, perhaps inevitably so given the difficulty of separating fantasy bets from ordinary side bets or contracts of “insurance” on sports results. Its hasty creation\textsuperscript{57} has turned a mere hobbyist’s pastime into a multi-billion


\textsuperscript{56} See UIGEA, 31 U.S.C. § 5362(1)(E)(i)-(ix) (2006); see supra notes 50, 51 and accompanying text.

industry, as opportunists have exploited the statute’s ambiguous language and dared federal prosecutors to indict them for activity that, although not specifically legalized, appears to fit plausibly within the exception’s opaque language. Fantasy sports has become the vehicle for the gambling industry to inch closer to offering to the American public that most coveted and lucrative wagering opportunity in the entire gambling industry: the single-game side bet.

IV. IN FAVOR OF FANTASY SPORTS

Although apparently anomalous, the inclusion of fantasy sports among the exalted pantheon of UIGEA exemptions may be suggestive of a deeper truth, both about fantasy sports and about sports wagering more generally. Horse racing provides a window to this “theory of the UIGEA exemptions.” Some states have never permitted gambling of any kind, including bets on horse races. Yet during the long periods in the nation’s history where gambling in all its forms was generally prohibited, pari-mutuel bets on horse races have been specifically permitted by statute or even constitutional amendment. This toleration and tacit


59. See Goeller, supra note 20, at 18 (“[P]rosecutors have not pursued any fantasy sports businesses or participants for violating gambling laws, likely because . . . consumer demand for fantasy sports leagues creates political pressure for legalization.”) (internal quotation marks omitted).

60. Hawaii and Utah are currently the only states without any form of gambling. See HAW. REV. STAT §§ 712-1223 (West, Westlaw current through Act 196 of the 2015 Regular Session) (prohibiting gambling in Hawaii); UTAH CODE ANN. § 76-10-1102 (West, Westlaw current through 2015 General Session) (prohibiting gambling in Utah); See also Nancy Todd Tyner, The Odd Couple: How Have Hawaii and Utah Staved Off Casinos – and Will They Ever Join the Game?, CASINO J. (2001), http://www.nancytodd.com/articles/Will_Hawaii_and_Utah_Join_The_Game_Nov2001.pdf (discussing Ohio’s and Hawaii’s prohibition on pari-mutuel horseracing).

61. For example, twelve states banned lotteries between 1833 and 1840, and by the time of the Civil War in 1861, all legal lotteries were prohibited. THOMPSON, supra note 54 at xi. (describing the chronology of gambling events throughout history). For further discussion on America’s gambling history and prohibition, see DAVID GOLDFIELD, ENCYCLOPEDIA OF AMERICAN URBAN HISTORY, 289-90 (2007) (explaining the history of American gambling) (“For much of American history, . . . gambling has been illegal . . . Gambling has been legalized sporadically, and usually briefly, from colonial times . . . .”).

62. See, e.g., IND. CONST. art. 1, § 23 (permitting pari-mutuel gambling in Indiana); KY. CONST. § 226 (permitting pari-mutuel horseracing in Kentucky); OHIO CONST. art. XV, § 6 (permitting pari-mutuel horseracing in Ohio); IND. CODE ANN. §§ 4-31-1-1 to 4-31-13-9 (West, Westlaw current with all 2015 Regular Session of the 119th General Assembly legislation) (permitting pari-mutuel horseracing in Indiana); KY. REV. STAT. ANN. § 230.361 (West, Westlaw current through the end of the 2015 regular session) (regulating pari-mutuel horseracing in Kentucky); OHIO REV. CODE ANN. § 3769.08 (West, Westlaw current through 2015 Files 1 to 10,
encouragement of horse betting grew from an appreciation of the importance of the horse stock to the national economy during its formative stages. Betting on horses improved the breeding of horses. Bets on horses generated large financial pools with huge payouts to winning horse owners, either through a bet on the horse or through the “stakes” skimmed from the betting pool. Stakes races gave owners a financial incentive to improve their skill at horse breeding. The nation benefited from this industry through the overall improvement of the American stock, a substantial matter given the historical importance of the horse to the agrarian economy. Legalized wagering, in effect, created a means by which the federal legislature could direct large sums of money toward a matter of significant public concern, without any actual expenditure of public funds.

Horseracing’s legality suggests that American legislatures have implicitly appreciated the unique usefulness of betting markets in solving large, social problems. The other pantheon exemptions in UIGEA evidence a similar motive. The financial problem of funding a growing national economy was solved by the creation of a capital market. The market pools numerous bets on company valuations, enhancing opportunities for development and expansion. The stock market’s quick settlements create liquidity, allowing bettors to find counterparties for their wagers and take their winnings. Similarly, the pervasive economic problem of wild price fluctuations in the food supply was solved by the


64. Cf. Jane Allin, Horse Racing: Breeding by the Numbers, INT’L FUND FOR HORSES, http://www.horsetrack.org/resources/Horse_Racing_Breeding_by_the_Numbers.pdf (last visited Aug. 5, 2015) (explaining the drastic increase in thoroughbred horse breeding due to the horse racing industry); JANET VORWALD DOHNER, THE ENCYCLOPEDIA OF HISTORIC AND ENDANGERED LIVESTOCK AND POULTRY BREEDS 313 (2001) (“Racing was an important incentive to scientific horse breeding, and as a side effect, it improved the quality of horses used for pleasure activities.”).

65. See RICKY TAYLOR, PROFITABLE BETTING SYSTEMS FOR HORSE RACING (2008) to learn more about various horse race betting systems.

66. See id.; see also sources cited supra notes 63-64.

67. See TAYLOR, supra note 65.

68. See id.

and 12 to 24 of the 131st GA (2015-2016) (permitting and regulating pari-mutuel horseracing in Ohio).
creation of a betting market for futures in commodities.69 This betting scheme allows farmers, processors, and others in the grocery supply chain to lock in predictable returns despite price fluctuations that depend on the weather and uncertain consumer demand.70 Speculators who serve as counterparties to the bets supply the needed liquidity and improve the price. Finally, state and federal legislatures solved the huge social problem of premature death, with its potentially devastating impact on family life, and other financially calamitous events by allowing wage-earners to place bets on their lifespan or other calamity with regulated insurance companies.71

In short, massive and seemingly intractable social problems were solved by legislation creating gambling markets. Gambling improves the horse stock,72 allows for private capital formation,73 stabilizes the nation’s food supply,74 and


72. See sources cited supra note 63-64 and accompanying text.

73. See sources cited supra note 69 and accompanying text.
insures citizens against financial devastation. It also allows for some repayment of historical debts to Native American inhabitants. And today, federal legislation impliedly allows for American hobbyists to play a version of a “rotisserie” board game that tracks the statistics of certain athletes playing popular sports. Why should the federal Congress have decided to include this comparatively obscure hobby game in its pantheon list of successful gambling ventures? If we assume that American professional and college sports constitute an object worth Congress’ attention, then creating a gambling market on sports might reduce or eliminate some socially significant problems. The increased financial rewards of sports to athletes, franchises, and leagues have improved sports: more young athletes seek specialized instruction and other assistance to increase their opportunities, and the outsized salaries likely induce multi-skilled young

74. See sources cited supra note 70 and accompanying text.
75. See, e.g., JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1988) (describing the forced relocation of Native Americans following the Indian Removal Act of 1830); MARK STEWART, THE INDIAN REMOVAL ACT: FORCED RELOCATION (1960); Indian Removal Act, LIBRARY OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/Indian.html (discussing the passage of The Indian Removal Act during President Jackson’s tenure, which resulted in forcible relocation and approximately 4,000 Native American deaths).
76. The unique history of fantasy sports can be traced back to the 1950s to a man named Bill Gamson, a psychology professor at Harvard University and the University of Michigan, who created a game he dubbed “The Baseball Seminar”, whereby participants paid a ten-dollar entry fee to “draft” a team of baseball players. See Edelman, supra note 8 at 7-8. Years later, one of Gamson’s participants, Robert Sklar, introduced the same game to a group of friends at the New York restaurant, La Rotisserie Francaise, where Gameson’s original game and playing rules were updated and amended, creating the original “Rotisserie League”. Id. Much like how fantasy sports is played today, the participants of the Rotisserie League earned points based on his or her selected players’ real-life performances in various statistical categories. Id. at 7. See ANDREW C. BILLINGS & BRODY J. RUIHLEY, THE FANTASY SPORT INDUSTRY: GAMES WITHIN GAMES 13 (2014) (describing the beginnings of the Rotisserie league).
78. See generally TUDOR O. BOMPA, TOTAL TRAINING FOR YOUNG CHAMPIONS (2000); see also WILLIAM J. KRAEMER & STEVEN J. FLECK, STRENGTH TRAINING FOR YOUNG ATHLETES (2005) (describing physical and psychological development techniques to increase athletic performance); Avery D. Faigenbaum et al., Youth Resistance Training: Updated Position Statement Paper from the National Strength and Conditioning Association, 23 J. STRENGTH & CONDITIONING RESEARCH
people to focus on the most popular games. The huge financial pools that would be generated by legalized sports betting, of which fantasy is a part, would multiply these incentives. A pool of money focused on improving sports performance could generate greater funding for high schools and colleges, higher salaries for participants, and larger returns for investors and owners. Greater returns would improve the study and understanding of the games, and expensive analytical studies of game play would lead to improved game play. Betting pools that enhanced the financial rewards of victory might also help solve the ubiquitous problem of selfish play: player salaries based on winning rather than individual contracts would better align personal incentives with team needs. Franchises that did award lengthy, expensive contracts to injury-prone athletes could hedge the risk of the contract by taking the opposite “short” position in a highly liquid betting market filled with available counterparties.

The Congress may have made a mistake in including fantasy sports in its pantheon of UIGEA exceptions. On the other hand, this odd exemption could signal a more interesting and significant venture. Throughout American history, legislatures have created gambling markets repeatedly80 to stimulate private investments to fund solutions to large public problems. Gambling markets create a large pool of private money that the Congress, through careful regulation, can in effect direct toward useful purposes.81 A betting pool in sports would potentially solve certain problems and enhance production. The UIGEA exemption for fantasy sports appears a first step in that direction.