

THE ABSENCE OF A COMPREHENSIVE FEDERAL POLICY  
TOWARD INTERNET AND SPORTS WAGERING AND  
A PROPOSAL FOR CHANGE

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I. INTRODUCTION

Sports wagering, although mostly illegal, exists albeit narrowly and proves to be big business in the United States. Currently, the federal law governing sports wagering distinguishes between animal races and human athletic contests. Both events, however, draw eager bettors and raise enormous monetary stakes. The amount wagered by wealthy clientele on horseracing and human athletic contests is truly staggering.

Thoroughbred racing, which involves skilled human jockeys, has become the most popular animal race wager. While bettors wager over \$12 billion each year on the “ponies,” thoroughbred horseracing wagering is on the decline.<sup>1</sup> According to one report: “Wagering on U.S. races was down \$1.35 billion to \$12,319,129,673 in 2009, a percentage drop of 9.9%. Hurt by the overall ailing economy, as well as industry-specific issues, the decline represents the sharpest drop in more than 25 years.”<sup>2</sup> However, one of the few bright spots for horseracing has been the increase in advance deposit wagering. This type of wager allows players to deposit money on account with a track or off-track betting facility and remotely place bets on horses by telephone or Internet. Of the total handle (i.e. amount wagered) in 2009, about 14% was placed online through advance deposit wagering, which is about equal to the amount of wagering that now occurs at the track.<sup>3</sup> The other re-

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1. See Frank Angst, *Another Billion-dollar Decline in Wagering*, THOROUGHBRED TIMES, Jan. 6, 2010, <http://www.thoroughbredtimes.com/national-news/2010/January/06/Wagering-on-US-races-dips-in-December.aspx> (reporting that wagering on horseracing amounted to over \$12,000,000 in 2009).

2. *Id.*

3. See Ray Paulick, *Was Churchill Acquisition A Smart Move? YUBET*, PAULICK REPORT.COM, Nov. 18, 2009, <http://www.paulickreport.com/blog/category/wagering/>.

maining race wagers are placed at other race tracks, off-track betting facilities, and over the Internet.<sup>4</sup>

Sports wagering in the realm of human athletic contests includes both team and individual competitions. Determining the amount wagered on these sporting events is difficult because virtually all wagering is done illegally by bookies, who rarely keep open books or pay taxes. When the National Gambling Impact Study Commission ("NGISC") issued its Final Report in 1999, its estimate of illegal sports gambling ranged as high as \$380 billion annually.<sup>5</sup> The most popular human sport for wagering is professional and college football, estimated annually at \$80-100 billion and \$60-70 billion, respectively.<sup>6</sup> Less than 1% of all sports wagering on human athletic events is done legally. In 2008, the total amount wagered in Nevada at the nation's only legal sports books was \$2.57 billion, up from \$2.27 billion in 1998.<sup>7</sup> For the calendar year 2009, the total net revenue realized by these operations was \$136.4 million, excluding wagering on horseracing.<sup>8</sup> These books won an average of 5.31 percent of each bet placed.

This Article discusses the disparate treatment of these two categories of sporting events under federal law, the contradiction in public policies and why and how implementation of federal law has failed. Furthermore, this Article concludes with a proposal for a new model for dealing with sports wagering, particularly over the Internet.

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4. See Anthony N. Cabot & Eugene Christiansen, *Why the Future of Horseracing is at Risk: The WTO Decision and Senator Kyl*, 9 GAMING L. REV. 201, 201-10 (2005) (describing where horseracing bets are placed).

5. See NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT ch. 2 at 14 (1999) available at <http://govinfo.library.unt.edu/ngisc/index.html> [hereinafter NGISC FINAL REPORT] ("Estimates of the scope of illegal sports betting in the United States range anywhere from \$80 billion to \$380 billion annually, making sports betting the most widespread and popular form of gambling in America.").

6. See Jim McDermott, *All Bets Are Not Off on Superbowl Sunday*, ROLL CALL, Feb. 4, 2010, available at <http://www.rollcall.com/news/42994-1.html> (describing estimate of \$80-\$100 million in NFL wagers annually); see Top Sports for Illegal Wagering, CNBC.COM, <http://www.cnbc.com/id/34312813?slide=4> (last visited April 20, 2010) (noting estimated \$60-\$70 billion annual wagers for college football). The Big Business of Illegal Gambling, CNBC, December 2009, available at <http://www.cnbc.com/id/34039744>.

7. See NEVADA GAMING CONTROL BOARD, GAMING REVENUE REPORT 4 (2008) available at [http://gaming.nv.gov/documents/pdf/1g\\_08dec.pdf](http://gaming.nv.gov/documents/pdf/1g_08dec.pdf) (summarizing gambling revenue for 2008).

8. See NEVADA GAMING CONTROL BOARD, GAMING REVENUE REPORT 4 (2009) available at [http://gaming.nv.gov/documents/pdf/1g\\_09dec.pdf](http://gaming.nv.gov/documents/pdf/1g_09dec.pdf) (summarizing gambling revenue for 2009).

## II. CRIMINAL PROHIBITIONS AGAINST SPORTS WAGERING ARE RARELY ENFORCED

Despite the enormous amount wagered illegally every year, the United States has lapsed into a general approach of non-enforcement of illegal sports wagering laws, both at the state and federal level. Law enforcement efforts to deal with illegal sports wagering have declined dramatically in the past twenty years.<sup>9</sup> In 1960, almost 123,000 arrests were made for illegal gambling.<sup>10</sup> FBI arrest statistics reveal that all gambling arrests in the United States have steadily declined since 1994 and totaled less than 10,000 in 2008.<sup>11</sup> In contrast, the number of illegally wagered dollars has increased dramatically. In 1983, only \$8 billion were wagered on sports in the United States compared to an estimated \$380 billion in 2009.<sup>12</sup>

Many factors have contributed to this decline in arrests. First, law enforcement has reallocated its limited resources to more serious crimes. Second, federal laws and prosecutorial policies have become increasingly confusing and contradictory. Therefore, prosecutors may be less anxious to test the laws in fear of creating bad precedence. Third, the penalties assessed against those who violate betting laws are generally low, and often do not justify the time or expense of law enforcement. Fourth, improvements in technology have made it more difficult to detect and prosecute offenders. Attempting to apprehend and prosecute gambling operators in foreign countries is often a challenge. Fifth, the public does not perceive gambling as a serious crime or even a crime at all: office pools on sporting events, such as the NCAA basketball tournament and the NFL Super Bowl, flourish. Championship games are frequently marked by “friendly” bets between governors.<sup>13</sup> Finally, the

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9. See Robert Dort, *With Police Mostly Sidelined, Sports Bettors Run Up the Score*, OMAHA WORLD-HERALD, Jan. 31, 1999, at 1a, available at 1999 WL 4486468 (explaining decline in law enforcement efforts over past twenty years).

10. See Dan McGraw, *The National Bet*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50 (noting gambling arrests in 1960).

11. See NATIONAL CENTER FOR JUVENILE JUSTICE, EASY ACCESS TO FBI ARREST STATISTICS: 1994-2007, available at <http://ojjdp.ncjrs.gov/ojstatbb/ezaucr/> (providing easy access to arrest statistics). The actual figures for 1994 were 18,500 gambling arrests. See *id.* The number reached 21,000 in 1996, but has decreased to 12,200 by 2007. See *id.* In contrast, there were almost 2 million arrests for drug abuse violations in 2007. See *id.* In 2008, the FBI estimated that there were 9,811 gambling arrests in the United States. See Table 29 – Crime in the United States, FBI.COM, [http://www.fbi.gov/ucr/cius2008/data/table\\_29.html](http://www.fbi.gov/ucr/cius2008/data/table_29.html) (last visited Feb. 26, 2010).

12. See FBI.COM, *supra* note 11.

13. See Victoria Advocate, *Jindal Sends Saints Flag to Indiana Governor*, VICTORIAADVOCATE.COM, Feb. 11, 2010 available at <http://www.victoriaadvocate.com>.

media has contributed to the public perception of sports gambling as an enjoyable and legal pastime. For example, wagering on fantasy sports is widespread. Additionally, the NGISC claimed, albeit somewhat incredibly, that because point spreads are available in almost every major U.S. newspaper, many people do not know that sports wagering is illegal.<sup>14</sup> The fact that newspapers post point spreads shows that the public enjoys wagering on sporting events. Because most states have laws against sports wagering, law enforcement is placed in the uncomfortable position of enforcing laws that are unpopular with the public.

The media infused public misconception of sports gambling as lawful is a disturbing trend, particularly, because citizens can lose respect for the government if the laws are not popularly supported or enforced.<sup>15</sup> Disrespect for the law due to non-enforcement also may occur where people adopt an attitude that not all laws need to be taken seriously. For example, the attempt to ban alcohol consumption in the United States in the 1920s resulted in a conflict between the society and the law. The government ultimately recognized the futility of the attempt because of strong commercial demand.<sup>16</sup> This resulted, however, in the first widespread incident where the public openly defied the laws. The effect that this has had on law enforcement is untold. Moreover, non-enforcement may lead the public to believe that the police are corrupt. A national study concluded that “citizens are very likely to view non-enforcement of gambling laws as an indication of police corruption.”<sup>17</sup>

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com/news/2010/feb/11/bc-la-super-bowl-governors-bet/ (noting Super Bowl bet between state governors).

14. See NGISC FINAL REPORT, *supra* note 5, at 14 (describing public’s lack of awareness that sports betting is illegal).

15. See PATRICIA HELSING, COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING — THE ISSUES AND POLICY DECISIONS INVOLVED IN THE TREND TOWARD LEGALIZATION — A STATEMENT OF THE CURRENT AND CHRONISM OF BENIGN PROHIBITION app. 1 at 773 (1976), available at <https://dspace.ucalgary.ca/bitstream/1880/41368/2/appendix1.pdf> (explaining why gambling laws must be properly enforced).

16. See William Eadington, *Issues and Trends in World Gaming*, in Symposium, *Gambling in Canada: Golden Goose or Trojan Horse?* (British Columbia: Simon Fraser University, 1989).

17. FLOYD J. FOWLER, THOMAS W. MANGIONE & FREDERICK E. PRATTER, GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES (National Institute of Law Enforcement and Criminal Justice 1978), .

### III. CURRENT FEDERAL POLICIES TOWARD SPORTS WAGERING ARE INCONSISTENT WITH HISTORICAL FEDERAL GAMBLING POLICY

Before politics superseded policy, historic federal policy towards gambling was relatively simple. Rather than preempting the state laws, federal gambling laws were designed to aid states in the enforcement of their gambling laws. For example, under most federal law, a gambling business is illegal only if it violates a state or local law.<sup>18</sup> Specifically, when Congress adopted the Federal Wire Act, it made clear its respect for the rights of individual states to sanction gambling within their borders.<sup>19</sup> But, these historic gambling laws dated to the early 1960s. Presently, the Federal Government's approach towards gambling and sports wagering demonstrates a marked departure from its historical approach. This departure resulted from federal legislative efforts to dictate gambling policy and attempts by the Executive Branch to adopt policies which would give the Department of Justice plenary authority over all Internet gambling.

This change in policy, however, has not resulted in implementation of laws that effectuate clearly articulated policy positions. Instead, the current federal laws and positions are confusing and often ambiguous. Congress is aware of this ambiguity: In passing new laws to address Internet gambling, it has avoided adding language that would determine whether Internet horse race gambling is unlawful. Specifically, the law states "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."<sup>20</sup> In effect, Congress is stating that it is incapable of setting clear policy on federal criminal law. In such circumstances, it is unclear what a citizen is supposed to think about the lawmaking process, and how a person or business would know what is legal.

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18. See *United States v. Yaquinta*, 204 F. Supp. 276 (N.D. W. Va 1962). The "purpose" of the Wire Act "is succinctly stated in Report No. 588 of the Senate Judiciary Committee of the 87th Congress, on July 24, 1961, as "\* \* \* to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities by restricting the use of wire communication facilities." *Id.*

19. See H.R. Rep. No 87-967 (1961) (Congress did not intend to criminalize acts that neither states nor Congress desired to be treated as criminal).

20. See 31 U.S.C. § 5362 (2006).

#### IV. TREATING SPORTS WAGERING DIFFERENT FROM OTHER FORMS OF GAMBLING

Besides the inherent ambiguity in federal gambling laws, inconsistencies in treatment are difficult to justify based on public policy considerations. This is evident when considering sports wagering. When Congress adopted the Wire Act in 1960, both animal races and human athletic contests were treated equally. Federal law simply prohibited transmitting sports wagers of any kind across state lines. This has since changed.

##### A. Wagering On Sporting Events Not Involving Horse Races Is Treated As a National Problem

States' rights to decide their own policy towards gambling were derailed in 1991 when Congress decided that the states could not responsibly determine their own policies toward wagering on human athletic contests. Specifically, Congress was concerned that states were sanctioning gambling activities including lottery-type games whose outcomes were based on actual sporting events. In response to sports organizations' concerns, U.S. Senator Dennis DeConcini (D-Arizona) introduced the Professional and Amateur Sports Protection Act ("PASPA") on February 22, 1991.<sup>21</sup> According to the Senate Judiciary Committee Report, the "bill serves an important public purpose, to stop the spread of State-sponsored sports gambling."<sup>22</sup> Through PASPA, Congress asserted various problems with sports wagering. The first concern addressed was the potential impact on youth. According to U.S. Senator Bill Bradley (D-New Jersey), a former NBA star, "[l]egalized sports betting would teach young people how to gamble."<sup>23</sup> Senator Bradley believed that children attracted to sports would soon associate sports with gambling, rather than with personal achievement or sportsmanship.<sup>24</sup>

Senator Bradley and others were also concerned that the proliferation of sports wagering might harm both the integrity of sports through game-fixing, as well as the fans' perception of that integrity.<sup>25</sup> For example, a player might fix a game by missing an

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21. 137 CONG. REC. S2256-04 (1991).

22. S. REP. NO. 102-248, at 4 (1991), *reprinted* in 1992 U.S.C.C.A.N. 3553.

23. Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act — Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 7 (1992).

24. *Id.*

25. See Donald L. Barlett & James B. Steele, *Throwing The Game: Why Congress Isn't Closing a Loophole That Fosters Gambling on College Sports — and Corrupts Them*,

easy opportunity to score at the end of a game. Even if this did not affect the game's outcome, it could impact the point spread, and, ultimately, help win certain wagers.<sup>26</sup> Fans might then question the player's true motivation behind missing the shot, asking themselves whether the player was rigging the game or just fatigued. Senator Bradley deemed legal, state-sponsored sports wagering to be the most objectionable form of sports wagering because it created the perception that the government approved of wagering on sporting events. As Senator Bradley stated, sports wagering puts the "imprimatur of the state on this activity."<sup>27</sup>

PASPA prohibits states from legalizing schemes or contests where the winner is determined based on the outcome of any professional or amateur sports event or the individual performance of any athlete in those events.<sup>28</sup> PASPA also bans any person from advertising, pursuant to state law or compact, any gambling or wagering scheme based on the outcome of any professional or amateur sports event or the individual performance of any athlete in those events. Because some states had pre-existing sports wagering

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TIME.MAG.COM, Sept. 25, 2000, <http://www.time.com/time/magazine/article/0,9171,55103-1,00.html>.

26. See *What Is A Point Spread or Side Bet*, THE SPREAD.COM, <http://www.thespread.com/sports-betting/what-is-a-point-spread-or-side-bet-point-spread-explained-definition-be.html> (last visited April 21, 2010) (explaining how point spreads work). A point spread is the amount of points that one team is favored over another. See *id.* With a point spread, a gambler who bets on team X may still win his wager so long as team X does not lose by more points than the spread. See *id.*

27. Bradley, *supra* note 23, at 5.

28. 28 U.S.C. § 3702. The heart of PASPA, codified in 28 U.S.C. § 3702, reads:

It shall be unlawful for –

- (1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

*Id.* A governmental entity means any state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Palau, any Native American tribe, any other U.S. territory, and any subdivision of these entities. See § 3701(2). The law creates an unusual anomaly. See *id.* A person violates federal law if he operates a sports book pursuant to state law, but not if he violates state law. See *id.* Moreover, the Act is ambiguous as to whether it is unlawful for a private person to operate a sports book or contest that is not authorized by state law, but does not violate any state law. See *id.* The most obvious example is sports fantasy leagues, which decide results based on the performance of athletes. See *id.* Based on the legislative history, these activities would not appear to violate the Act. See *id.*

laws, exceptions were crafted to allow them to continue.<sup>29</sup> By 1999, however, only Oregon and Nevada had any form of legal sports wagering. The Oregon lottery conducted a game called "Sports Action," based on the outcome of professional football games,<sup>30</sup> and Nevada has almost 200 legal sports books that accept wagers on many categories of amateur and professional sports.<sup>31</sup> In 1999, the NGISC recommended that Nevada, Oregon, Delaware, and Montana lose their exemption for collegiate and amateur sporting events.<sup>32</sup> The NCAA lobbied Congress to pass legislation banning all betting on college and amateur sporting events.<sup>33</sup> Principally, the NCAA argued that several factors make sports wagering on amateur events more problematic than wagering on professional sports. First, it asserted that student athletes are more susceptible to Internet sports wagering because they have greater access to the Internet.<sup>34</sup> Second, amateur athletes are at risk because they are

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29. See 28 U.S.C. § 3704 (noting exceptions to PASPA). Section 3704(1) provides that § 3702 does not apply to: "[A] lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." *Id.* As a result, Oregon, Nevada, Delaware, and Montana are exempt from the federal prohibition against state-sponsored sports wagering. See Dan Caesar, *Sports Books in St. Louis? No Chance, Says a 1992 Law*, ST. LOUIS POST-DISPATCH, July 12, 2001, at 36, available at 2001 WL 447141 (explaining special exception in New Jersey). A special and peculiar exception to the Sports Protection Act was crafted for Atlantic City, New Jersey. See *id.* This exception was peculiar because New Jersey law did not authorize the Atlantic City casinos to offer sports wagering. See *id.* Nevertheless, to retain the exception, New Jersey had to authorize such sports wagering within one year after passage of the Sports Protection Act. See 28 U.S.C. § 3704(a)(3)(A). New Jersey decided not to authorize sports wagering and lost the exemption. See Caesar, *supra*.

30. Oregon Lottery.com, Sports Action, <http://www.oregonlottery.org/sports/> (last visited Mar. 28, 2010).

31. See NEV. GAMING CONTROL BD., GAMING REVENUE REPORT (Jan. 4, 2010); see generally ARNE K. LANG, SPORTS BETTING 101: MAKING SENSE OF THE BOOKIE BUSINESS AND THE BUSINESS OF BEATING THE BOOKIE (1992) (describing the business of gambling). The most popular sports on which bets are wagered include football, basketball, and baseball. See Lang, *supra*. Wagers are also accepted on hockey, golf, auto racing, soccer, and other sports and athletic events. See *id.* The most popular wagers are straight wagers, futures, and parlay cards. Straight wagers are bets on the outcome of an individual game, usually adjusted according to an established "point spread." See *id.* Futures wagers are made on various outcomes of a season so that, for example, a player may bet that his or her favorite team will win the World Series. See *id.* Parlay cards allow players to bet on multiple games at one time; if the players' choices are all correct, they are paid higher odds. See *id.*

32. See NGISC FINAL REPORT, *supra* note 5, ch. 3 at 18.

33. See Tony Batt, *NCAA Works to End to Sports Betting*, LAS VEGAS REV. J., Oct. 11, 1999, at 1D, available at 1999 WL 9295064.

34. See *The Internet Gambling Prohibition Act of 1999: Hearing Before the S. Subcomm. on Tech. Terrorism and Gov't Info. of the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Bill Saum, Director of Gambling Activities, NCAA).

attracted to the aggressiveness and control that also characterize problem gambling.<sup>35</sup> Finally, because amateur athletes are unpaid, they are more prone to wager on the games in which they participate, and thus, undermine the integrity of the sporting contest.<sup>36</sup> Congress has not accepted either of these arguments, and, therefore, has not passed the recommended legislation.

More recently, several states have been exploring the possibility of legal sports wagering. Delaware took the step of authorizing single-game wagering. This was quickly challenged by the National Football League. A recent federal appellate court decision determined that Delaware was limited to only sports wagering that existed at the time of the enactment of PASPA. As Delaware only permitted parlay card wagering on professional football, the court held that PASPA limited it to such activity.<sup>37</sup> Delaware is not, however, the only challenge to PASPA. Given the current economic downturn, many states are seeking new ways to raise revenue, without raising taxes. A New Jersey legislator recently filed a lawsuit in March 2009 seeking to overturn PASPA, arguing the federal law is unconstitutional because it treats four states differently than the other states. Other states, including Iowa, Missouri, and Rhode Island, also are sending a message to Congress that they would like the ban lifted.

#### B. Horseracing Is Treated Differently Under The Law

Although horseracing is excluded from the PASPA prohibition, Congress has decided to intervene in this sport in a much different way. Specifically, it has decided to control the economics of the sport to assure that a portion of all interstate wagers are shared between all stakeholders in the sport. Congress saw this as a method to promote the stability of horseracing and off-track betting (“OTB”) in the United States.<sup>38</sup>

Congress envisioned an interstate pari-mutuel scheme to ensure that states would “cooperate with one another in the accept-

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35. See Steve Brisendine, *NCAA Backs College Gambling Ban*, AP ONLINE, June 19, 1999, available at 1999 WL 17815684 (statement of Bill Saum, Director of Gambling Activities, NCAA). This statement found support in the NGISC FINAL REPORT, *supra* note 5, ch. 3 at 10.

36. See NGISC FINAL REPORT, *supra* note 5, ch. 3 at 10.

37. PASPA may be subject to constitutional challenge because of the treatment of the various states is not uniform under the Commerce Clause of the United States Constitution. See Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005).

38. See 15 U.S.C. § 3001(3)(b) (2001).

ance of legal interstate wagering.”<sup>39</sup> To this end, the original version of the Interstate Horseracing Act (“IHA”) prescribed rules for “interstate off-track wagering,” which Congress defined as a “legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another state.”<sup>40</sup>

The IHA now governs the relationship between the OTB operators, licensed Internet and interactive television horse race betting services, the tracks, the horse owners and trainers, and the state racing commissions concerning interstate wagers.<sup>41</sup> All other aspects of horseracing, such as licensing and policing, are left to the discretion of the various state racing or gaming commissions.<sup>42</sup>

Before an OTB operator can accept an interstate off-track wager, “consent” must be obtained from three parties: (1) the track, the (2) racing commission in the state where the track is located, and (3) the racing commission in the state where the OTB operator is located.

The use of the word “consent” should not mask the true intent of the Act. Consent comes with a price, either in the form of an agreement to provide wire information or a simulcast, or to conduct pari-mutuel wagering.<sup>43</sup> As a practical matter, the OTB operator will negotiate a contract with the track to conduct wagering on the track’s races. This usually involves provisions for the merging of pari-mutuel pools and the receipt by the OTB operator of the race simulcast and instantaneous transmission of all tote (i.e., wagering) and other track information.

The IHA has met its original intent of assuring that the tracks receive a fair share of interstate wagers on races conducted at its track. The respective rights of the OTB operator and the track are well defined under the IHA. Once forced to the bargaining table, both parties have relatively equal bargaining power because both need the other to maximize profits. The Act also seeks to assure

39. 15 U.S.C. § 3001(2) (2001).

40. P.L. 95-515 (1978).

41. See 15 U.S.C. §§ 3001-07 (2000).

42. See, e.g., *Atlantic City Racing Ass’n v. Attorney General*, 189 N.J. Super. 549, 461 A.2d 178 (1983) (holding that IHA did not preempt state law that prohibited interstate pari-mutuel wagering).

43. The IHA does not, however, regulate wire information, disseminators or simulcasts. See *Kentucky Div., Horsemen’s Benev. & Protective Ass’n, Inc. v. Turfway Park Racing Ass’n, Inc.*, 20 F.3d 1406, 1412 n.10 (Ky. 1994) (“We reject the appellee’s claim that Congress was implicitly regulating the simulcasting of horse races by regulating interstate off-track wagering because interstate off-track wagering may occur without simulcasting, and simulcasting may occur without interstate off-track wagering.”).

that horsemen receive fair shares of interstate wagers by including their consent as a “condition precedent” to the agreements.

What is striking between the PASPA and IHA is that both Acts address sporting events with highly skilled athletes, but their treatment is a dichotomy. In the case of horseracing, Congress shows no concern for the impact of wagering on the integrity of the sport. Instead, Congress’ concern is to assure that the various stakeholders in the sport are fairly compensated when persons accept wagers on their events. No proof exists that horseracing is any more tainted with scandal than other sports. The only difference is that the lobbyists for the powerful professional sports leagues want a ban on sports wagering that does not involve horses and the lobbyists for the powerful horseracing industry want wagering on their sport.

#### V. THE HISTORICAL GAMBLING LAWS

The future of sports wagering, under IHA, PASPA and the more recent Unlawful Internet Gambling Enforcement Act (“UIGEA”), must be considered in light of historical gambling laws. Three historic federal gambling laws apply to Internet wagers. These are the Wire Act, the Illegal Gambling Business Act, the Travel Act, and the Unlawful Internet Gambling Enforcement Act. The proper application of these Acts requires consideration of both human athletic contests and horseracing and whether these activities are occurring in intrastate (wholly within a state), interstate (between two states), foreign commerce (between a state and a foreign country) or entirely outside the United States.

#### VI. THE WIRE ACT

The Wire Act, perhaps the most discussed law, includes the major provision of Section 1084(a)), which provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>44</sup>

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44. 18 U.S.C. § 1084(a) (2001).

The Wire Act, in its entirety, reads poorly and in parts, the Act is nearly incomprehensible. For example, subsection (a) is a single sentence containing ninety-four words. In addition, the difference between a “bet” and a “wager” is never explained and there is confusion among clauses and definitions. The third subclause does not make sense alone, so some wonder whether, despite commas, there are only two subclauses. There is debate on whether the words “on any sporting event or contest” area meant only to apply to the first sub-clause or the other clauses as well. If the words were only meant for the first sub-clause, why would Congress limit the illegality of transmitting actual wagers only to sporting events? What is the difference between a sporting event and a sporting contest? Or, was sporting meant to modify both event and contest? Why wasn’t the phrase “in interstate or foreign commerce” used to modify the second and third sub-clauses? Many commentators and courts have engaged in serious debate as to these and other questions regarding this Act, but the real truth is that its intent was probably obscured by its horrific drafting.

Aside from its poor construction, a few things can be derived from this Act. In the context of sports wagering, it clearly applies to persons in the business of accepting house-banked wagers on sporting events. These individuals are generally referred to as bookies. Under the Wire Act, no person or entity has ever been successfully prosecuted under the Wire Act unless he/it was: (i) in the business of accepting or laying off bets from customers on a regular basis<sup>45</sup>

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45. See, e.g., *United States v. Reeder*, 614 F.2d 1179 (8th Cir. 1980); *United States v. Truchinski*, 393 F.2d 627 (8th Cir. 1968), cert. denied, 89 S.Ct. 104. The case of *United States v. Baborian*, 528 F. Supp. 324 (D.C.R.I. 1981) is instructive. In that case, the Court engaged in a lengthy analysis of the legislative history of Section 1084 to determine whether a large scale, sophisticated, bettor was “engaged in the business of betting or wagering.” *Id.* The evidence at trial established that the defendant was a frequent, high-volume gambler with indications that he also “laid off” bets, but no direct evidence existed that he accepted bets from others. See *id.* The court noted that: “When such a [gambling] business exists is not easy to determine. There are no sharp contours and the general term such as ‘business,’ and the present state of the law is indeed amorphous. The legislative history does not help solve the problem at hand.” *Id.* The court noted that a person who “lays off” bets may not himself be accepting bets but rather seeking to minimize losses. *Id.* After a detailed examination of the legislative history, the Court stated:

This last quote [citing legislative history] does indicate that the business of gambling is a bookmaking operation involved in the acceptance of bets and laying off of bets. I conclude after considering all of the foregoing legislative history, that Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets and not mere betting. The provocative question is whether this is still the proper definition when the bettor wagers substantial sums and displays the sophistication of an expert in his knowledge of odds making. I conclude the statute

or (ii) engaged in knowingly providing betting or wagering information to bookmakers or others engaged in illegal gaming activity.<sup>46</sup> Consistent with this interpretation, in *United States v. Southard*,<sup>47</sup> the United States Court of Appeals for the First Circuit affirmed a jury instruction that a “mere bettor” is not engaged in the business of wagering “regardless of the amount wagered.”<sup>48</sup>

The 2002 Jay Cohen case established the applicability of the Wire Act to Internet sports wagering in foreign commerce.<sup>49</sup> Cohen operated an offshore betting company based in Antigua. Patrons would establish and fund accounts with the company typically through wire transfers. The company would only place bets “based from” accounts in Antigua. However, the company would take telephone calls and Internet communications from the United States patrons where they would relay information on which bets the company should place using funds from their accounts. The court ad-

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simply does not cover such a situation. I find that Congress never intended to include a social bettor within the prohibition of the statute and that Congress did not contemplate prohibiting the activities of mere bettors, even where, as with Mr. Baborian, they bet large sums of money with a great deal of sophistication. Indeed, I do not see how the statute could be read otherwise. The government’s interpretation of the statute would make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered. I submit that these factors are not determinative of what constitutes a business.

*Id.* at 327-329. The court distinguished cases where individuals who lay off bets were found guilty of violating §1084 by noting that those individuals either directly accepted bets or worked closely with individuals who accepted bets illegally. Indeed, the Court noted that Baborian’s co-defendant Lauro, who accepted bets from Baborian, was involved in the business of betting or wagering. *See Id.* at 331-332.

46. *See, e.g.*, *United States v. Scarvo*, 593 F.2d 837 (8th Cir. 1979).

47. 700 F.2d 1 (1st Cir. 1983),

48. The jury instruction provided the following:

Now, an individual engages in the business of betting or wagering if he regularly performs a function which is an integral part of such business. The individual need not be exclusively engaged in the business, nor must he share in the profits or losses of the business. He may be an agent or an employee for another person’s business, but the function he performs must provide a regular and essential contribution to that business. If an individual performs only occasional or non-essential services or is a mere bettor, regardless of the amount wagered, or customer, he cannot properly be said to engage in the business.

*Id.* at 21-22. (Emphasis added.)

49. *See, e.g.*, *U.S. v. Cohen*, 260 F.3d 68 (2d Cir.). Jay Cohen, a U.S. citizen, was convicted under the Wire Act (18 U.S.C. § 1084(a) (2001)) and a related New York State Statute for his ownership and involvement in the World Sports Exchange (“WSEX”). *See id.* WSEX is an Antiguan company doing business in Antigua, licensed in Antigua and Barbuda, that takes sports bets from anywhere in the world. *See id.* Although Mr. Cohen has been sentenced, the WSEX site is still online and apparently taking U.S. bets. *See id.*

dressed the issue of whether the Wire Act applies when a sports book, which is licensed in a foreign jurisdiction, takes wager information from a U.S. patron by use of the Internet. Cohen maintained that the Wire Act should not apply because his business was licensed in Antigua and all wagers were taken, recorded, and processed in Antigua. The court, on appeal from his conviction, held that the wagers take place both in the state where the bettor resides and where the servers or service provider resides; therefore, the bets took place in part in the U.S.<sup>50</sup> Since the bets took place in the U.S., the Wire Act applied and his conviction for violating the Wire Act was upheld. The district court held that taking bets from the U.S. in Antigua was the transmission in interstate commerce of wagers and therefore the Wire Act was applicable and Cohen was properly charged. Cohen's conviction was upheld on appeal, and all arguments regarding the inapplicability of the Wire Act to such circumstances were rejected.

The court, in Cohen, did not establish that all Internet sports wagering was unlawful. The Wire Act would not appear to apply to purely intrastate wagering as by its own terms; it only applies to interstate or foreign commerce. In fact, intrastate telephone sports wagering is and has been operational in Nevada for many years.

The Department of Justice ("DOJ"), in an effort to assert plenary jurisdiction over all Internet wagering, regardless of whether permitted under state law, has taken a broader definition of interstate commerce to include an Internet transmission that originates and ends in the same state but where the routing of the message crosses state line.<sup>51</sup> This position is contrary to the very reason that

50. *Id.*

51. In testimony before the Congress, a DOJ representative noted: [The pending bills also permit] "intrastate" wagering over the Internet without examining the actual routing of the transmission to determine if the wagering is "intrastate" versus "interstate." Under current law, the actual routing of the transmission is of great importance in deciding if the transmission is in interstate commerce. The department is concerned that these two proposals would weaken existing law.

Letter from Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, Department of Justice (April 5, 2006). This position was repeated in a letter to the U.S. Virgin Islands Casino Control Commission, which was considering implementation of Internet gambling. The letter noted:

While several federal statutes are applicable in Internet gambling, the principal statutes are sections 1084 and 1952 of Title 18, "... [We] believe that the acceptance of wagers by gambling businesses located either outside of the Virgin Islands or within the Virgin Islands (but where the transmission is routed outside of the Virgin Islands) would itself violate federal law.

Letter from U.S. Attorney David M. Nissman to Eileen R. Peterson, Chair of the U.S. Virgin Islands Casino Control Commission (Jan. 2, 2004). The DOJ has some

Congress adopted the Wire Act, which was to assist the states in enforcement of their own state policy toward gambling. This was even acknowledged by the Justice Department. In testimony before Congress, a DOJ representative stated:

That being said, 18 U.S.C. 1084 — the Wire Communications Act — currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest. This law was originally enacted to assist the states and territories in enforcing their laws and to suppress organized crime involvement with gambling.<sup>52</sup>

About the only type of Internet sports wagering that the Federal Government agrees is lawful is wagering that occurs wholly outside the United States. This should not be confused with “foreign commerce” that under the Wire Act means commerce between a state or U.S. territory and a foreign country. Accordingly, the Wire Act does not prohibit a United States company or individual from operating a sports wagering site outside the United States that does not accept players physically located in the United States. In the comments to the recently enacted regulations implementing the Unlawful Internet Gambling Enforcement Act, the Treasury Department and the Federal Reserve Board noted that “[t]ransactions that are wholly outside the United States (i.e., when all parties and financial transaction providers to the transaction are outside the United States) would not violate [federal and state gambling] laws.”<sup>53</sup>

A major question regarding the Wire Act is whether its general prohibition applies to Internet horse race wagering, which unques-

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support for its position in the context of illegal activity occurring over telephone lines. See *United States v Kammersell*, 196 F.3d 1137 (10th Cir. 1999), *cert denied* 530 U.S. 1231 (2000) (Use of telephone — make threats in interstate despite originating and concluding in same state), *Yaquinta v. United States*, 204 F. Supp. 276 (N.D. W.Va 1962) (establishing that illegal horse race betting, originating and ending in West Virginia, violates Wire Act because routing through Ohio constitutes interstate commerce); Mark Hichar, *The Wire Act Should Not Be Used to Prohibit Internet Gambling Carried Out Under the UIGEA Intrastate Wagering Exception*, 13 GAMING L. REV. & ECON. 106 (2009), at 13(2): 106-114 (noting that several problems exist in applying Wire Act to purely intrastate activities).

52. Kevin V. Di Gregory, Deputy Assistant Attorney General Criminal Division, Statement at the Subcommittee On Crime Committee On The Judiciary, U.S. House of Representatives, Concerning Gambling On The Internet (June 24, 1998).

53. Comments to Final Rule implementing the Unlawful Internet Gambling Enforcement Act, page 21.

tionably is a sport. At the time of its adoption, the answer was that it did. Today, although the Wire Act has not been amended, the answer is that the Act probably does not apply to Internet horseracing which is legal in both the sending and receiving states. How this came to be requires an understanding of a tortured legislative path.

Before the passage of legislation in 2000, which specifically addressed Internet wagering on horses, several racetrack and OTB facilities conducted account wagering, including the New York Racing Association (NYRA) and the six New York OTB corporations, which are quasi-government agencies. A second section of the Wire Act, often referred to as the safe harbor provision, provides an exception to the general prohibition against interstate off-track pari-mutuel wagering by allowing for "the transmission in interstate or foreign commerce . . . of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which betting is legal."<sup>54</sup> The horse race industry took the position that when a person in one state uses the telephone to transmit the bet that he wants to place that this is information only because the actual bet takes place at the track.<sup>55</sup> They maintained that when a patron called to place a wager, the patron was merely providing instructions to the operator to place a wager on his or her behalf with the track and the actual placing of the bet or wager did not occur until the track accepted the wager. They maintained that this betting instruction was simply information assisting in the placing of the bet, not the bet itself.

This argument, however, was rejected in a case involving Jay Cohen who was operating a licensed sports book in Antigua called World Sports Exchange (WSE).<sup>56</sup> A distinction, however, between

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54. Section 1084(b). This exemption only applies to the transmission of "information assisting in the placing of bets," not to the transmission of (1) bets or wagers or (2) wire communications entitling the recipient to money or credit as a result of bets or wagers. The exemption is further narrowed by its requirement that the betting at issue be legal in both jurisdictions in which the transmission occurs. *Id.*

55. See Heidi J. Seebauer, *The Interstate Horseracing Act of 1978: An Evaluation*, 12 CONN. L. REV. 883 (1980) (evaluating Interstate Horseracing Act of 1978).

56. See Cohen, 260 F.3d at 68. The Second Circuit Court of Appeals held, in Cohen, that:

Cohen appeals the district court's instructions to the jury regarding what constitutes a bet per se. Cohen argues that under WSE's account-wagering system, the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from cus-

the Cohen facts and the position of the horseracing interests is the

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tomers accounts located in Antigua. He argues that this fact was precluded by the district court's instructions. We find no error in those instructions.

Judge Griesa repeatedly charged the jury as follows:

If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1089. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee in an internet mechanism located on the premises in the foreign country.

Jury instructions are not improper simply because they resemble the conduct alleged to have occurred in a given case; nor were they improper in this case. It was the Government's burden in this case to prove that someone in New York signaled an offer to place a particular bet and that someone at WSE signaled an acceptance of that offer. The jury concluded that the Government had carried that burden.

Most of the cases that Cohen cites in support of the proposition that WSE did not transmit any bets involved problems pertaining either to proof of the acceptance of transmitted bets, *see* *United States v. Truesdale*, 152 F.3d 443 (5th Cir. 1998), *McOusten v. 9teinmetz*, 58 A. 876 (N.H. 1904), *Lescallett v. Commonwealth*, 17 S.E. 546 (Va. 1893), or to proof of the locus of a betting business for taxation purposes, *see* *Saratoga Harness Racing, Inc. v. City of Saratoga Springs*, 55 A.D.2d 295 (App. Div. 1976). No such problems existed in this case. This case was never about taxation, and there can be no dispute regarding WSE's acceptance of customers' bet requests. For example, a March 18, 1998 conversation between Spencer Hanson, a WSE employee, and a New York-based undercover FBI agent occurred as follows:

Agent: Can I place a bet right now?

Hanson: You can place a bet right now.

Agent: Alright, can you give me the line on the um, Penn State/ Georgia Tech game, it's the NIT [T]hird Round game tonight.

Hanson: Its [sic] Georgia Tech minus 711, total is 147.

Agent: Georgia [T]ech minus 71,1, umm I wanna take Georgia Tech. Can I take 'em for 50?

Hanson: Sure.

WSE could only book the bets that its customers requested and authorized it to book. By making those requests and having them accepted, WSE's customers were placing bets. So long as the customers' accounts were in good standing, WSE accepted those bets as a matter of course.

Moreover, the issue is immaterial in light of the fact that betting is illegal in New York. Section 1084(a) prohibits the transmission of information assisting in the placing of bets as well as the transmission of bets themselves. This issue, therefore, pertains only to the applicability of § 1084(b)'s safe-harbor provision. As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here even if WSE had only ever transmitted betting information.

*Id.*

IHA, which the horseracing interests allege was Congressional recognition of the legality of Interstate account wagering.

The debate over whether the Wire Act applied to interstate account wagering conducted by a state or a state licensed entity was initially purely academic, as no prosecution was ever brought. The question was no longer academic, however, when a DOJ representative appeared at a 1999 Congressional hearing that was debating a controversial bill to extend the Wire Act to Internet gambling. The representative stated the DOJ's position that the multi-billion dollar OTB horseracing industry was illegal. Obviously, the horseracing industry disagreed. As a direct result of that controversy, the horseracing interests solicited the help of Kentucky Senator McConnell, a Republican, to "fix" the law. The protectors of the sport, the Kings of horseracing are not prone to partisan politics. The solution was to avoid the controversy with the Wire Act that was attendant with the Internet Gambling Prohibition Act and to seek clarification through an amendment to The Interstate Horseracing Act of 1978. The amendment was buried in a massive appropriations bill that passed in 2000. It clarified that pari-mutuel wagering may be placed, via telephone or other electronic media (including the Internet), and accepted by an off-track betting system where such wagers are lawful in each state involved.<sup>57</sup> The new definition of "inter-state off-track wager" is as follows:

"[I]nterstate off-track wager" means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools.<sup>58</sup>

The only relevant place in the IHA where the definition is used is in Section 3003, which provides "No person may accept an interstate off-track wager except as provided in this chapter." While this is hardly an unambiguous pronouncement of the legality of accepting an "interstate off-track wager," the legislative intent was clear. During Congressional debate, Representative Harold Rogers (R-Kentucky), then Chairman of the Appropriation Subcommittee on Commerce, Justice, and State, stated the IHA amendment (in

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57. See 15 U.S.C. §§ 3001-07 (2000).

58. See 15 U.S.C. § 3002 (2000).

H.R. 4777) was specifically intended to “clarif[y] that the Interstate Horseracing Act permits the continued merging of any wagering pools and wagering activities conducted between individuals and state-licensed and regulated off-track betting systems, whether such wagers are conducted in person, via telephone, or other electronic media.”<sup>59</sup> An electronic media communication would undoubtedly include the Internet.

Yet in spite of the 2000 amendment, the United States Department of Justice continues to take the position that the existing prohibitions under the Federal Wire Wager Act were not affected.<sup>60</sup> The DOJ made this assertion as recently as May 2006 in another Congressional hearing on the prospect of prohibiting Internet gaming. In that hearing, a DOJ official stated:

The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horseracing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes. H.R. 4777, however, would change current law and amend Section 1084 to permit the interstate transmission of bets and wagers on horse races. H.R. 4777 also permits “intrastate” wagering over the Internet without examining the actual routing of the transmission to determine if the wagering is “intrastate” versus “inter-

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59. Considering recognized rules of statutory construction, the Department of Justice continued position on account wagering does not make sense. There is a presumption that Congress is aware of existing law when it passes legislation. *See South Dakota v. Yankton*, 522 U.S. 329, 351, 118 S. Ct. 789, 802 (1998). There is also that presumption when it amends an existing statute. *See In re Dobbins*, 258 Cal. App. 2d 262, 270, 65 Cal. Rptr. 704, 709 (Cal. 1968). Case law has determined that if two statutes conflict, the statute that was most recently enacted controls. *See Marschall v. City of Carson*, 86 Nev. 107, 115, 464 P.2d 494, 500 (1970). In this case, the IHA amendment was enacted after the Wire Act and therefore controls. *See Marschall*, 86 Nev. at 107. To be sure Representative Rogers’s comments evince that the very purpose of amending the IHA was to clarify that account wagering is legal and not within the purview of the Wire Act. *See id.*

60. Conference Report on H.R. 4942, District of Columbia Appropriations Act, 2001, 146 Cong. Rec. H11265-02, at H11271 (2000). Despite what was an unequivocal pronouncement that account wagering was legal pursuant to this amendment, the Department of Justice still would not concede the legality of account wagering. In a press statement signing the IHA amendment into law, President Clinton commented that the Department of Justice continued its position on account wagering. *See Press Statement by President William J. Clinton, Signing H.R. 4942 into law* (Dec. 27, 2000), *available at* 2000 WL 31157618.

state.” Under current law, the actual routing of the transmission is of great importance in deciding if the transmission is in interstate commerce. The Department is concerned that these two proposals would weaken existing law

...

We also are concerned that this bill would permit interstate wagering by the horse racing industry. Under H.R. 4777, other industries could only conduct intrastate wagering. As expressed earlier, it is the Department’s view that the Interstate Horseracing Act did not change Section 1084. H.R. 4777, however, expressly permits interstate wagering on horse racing. The Department questions why, under the provisions of H.R. 4777, one industry will be able to accept interstate wagers while other industries that are also regulated by the states cannot.<sup>61</sup>

The position that the IHA amendment does not permit any account wagering, however, is questionable. Under recognized rules of statutory construction, the Department of Justice’s continued position on account wagering has some substantial weaknesses. A presumption exists that Congress is aware of existing law when it passes legislation,<sup>62</sup> and when it amends an existing statute.<sup>63</sup> As a result, if two statutes conflict the statute most recently enacted legislation controls.<sup>64</sup> In this case, the IHA amendment was enacted after the Wire Act and therefore, IHA controls. Representative Rogers’s comments evince that the very purpose of amending the IHA was to clarify that account wagering is legal and not within the purview of the Wire Act. Therefore, a fair reading of existing federal statutes is that IHA specifically permits pari-mutuel wagering on horse races in those instances outlined above, and the Wire Act would not indirectly prohibit the same activities.

Another unfortunate aspect of the 2000 Amendment is that it is inconsistent with the Wire Act. First, the Wire Act exemption applies to any type of bet, not simply pari-mutuel bets. Second, the Wire Act exemption extended to information assisting in the plac-

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61. *Concerning H.R. 4777, The “Internet Gambling Prohibition Act,” Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong. (2006)* (statement by Bruce G. Ohr, Chief Org. Crime and Racketeering Sec., U.S. Dept. of Justice).

62. *See South Dakota v. Yankton*, 522 U.S. 329, 351 (1998).

63. *See In re Dobbins*, 258 Cal. App. 2d 262, 270, 65 Cal. Rptr. 704, 709 (Cal. 1968).

64. *See Marschall v. City of Carson*, 464 P.2d 494, 500 (1970).

ing of a bet “from a State or *foreign* country where betting on that sporting event or contest is legal into a State or *foreign* country in which betting is legal,” while the 2000 Amendment only referred to wagers “transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State.”

#### VII. A WTO DECISION SEIZED UPON THIS POOR DRAFTING

In 2005, a World Trade Organization decision between the United States and Antigua over trade obligations related to Internet gambling generated significant publicity.<sup>65</sup> In short, the WTO case was brought by Antigua based on commitments made by the United States under the General Agreement on Trade in Services (GATS). This agreement sets out multilateral rules governing international trade in services. The scope of what constitutes a service was intended to be very broad. As part of GATS, the WTO members made certain commitments reading the cross-border supply of services. In particular, the United States agreed that with regard to “recreational services,” it would follow two principles: market access and national treatment. Market access means that it will open its markets to recreational services offered from another member country and will not impose trade restraints such as numerical limits. National treatment means that the United States agreed that it would not treat another member country less favorably than it treats its own suppliers of a like service.

An exception to market access and national treatment is measures that are adopted to protect the “public morals.” According to the WTO Secretariat, “[m]easures to curb obscenity or to prohibit Internet gambling might well be justified on these grounds.”<sup>66</sup> But, what justifies the exception is pretty much uncharted territory in trade law.<sup>67</sup>

Against this backdrop, the WTO Appellate Body issued a final ruling on April 9, 2005. Some findings are not debated. First, the United States’ commitment regarding recreational services included gambling services. Second, certain U.S. laws including the

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65. Footnotes 66 to 72 and the accompanying text originally appeared in an article I co-authored in 2005. See Anthony N. Cabot and Eugene Christiansen, *Why the Future of Horseracing is at Risk: The WTO Decision and Senator Kyl*, 9 GAMBLING L. REV. 201, 206-08 (Jun. 2005).

66. WTO Secretariat, *The Work Programme on Electronic Commerce* (Nov. 16, 1998).

67. Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 694 (1998).

Wire Act, the Travel Act and the Illegal Gambling Business Act violate GATS because they have the effect of placing numerical limits on the number of services suppliers and operators and the quantity of services output.

What the parties disagreed on is the very convoluted discussion of the Public Morals exception. Here, the United States must show that the prohibitions are necessary to protect the public morals and that any reasonable regulatory alternative to prohibition put forth by Antigua would not work. This was not fully played out in this case because the Appellate Body found that Antigua failed to put forth any regulatory alternatives.

The Appellate Body did, however, find that the United States failed to disprove Antigua's claim that the Interstate Horse Racing Act discriminated between foreign and domestic suppliers.<sup>68</sup> The decision stated:

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68. A portion of the text of that decision includes:

We now turn to the United States' Article 11 claim relating to the chapeau. The Panel examined the scope of application of the Interstate Horseracing Act ("IHA"). Before the Panel, Antigua relied on the text of the IHA, which provides that "[a]n interstate off-track wager may be accepted by an off-track betting system" where consent is obtained from certain organizations. Antigua referred the Panel in particular to the definition given in the statute of "interstate off-track wager":

[T]he term . . . 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools. (emphasis added)

Thus, according to Antigua, the IHA, on its face, authorizes domestic service suppliers, but not foreign service suppliers, to offer remote betting services in relation to certain horse races. To this extent, in Antigua's view, the IHA "exempts" domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA.

The United States disagreed, claiming that the IHA — a civil statute — cannot "repeal" the Wire Act, the Travel Act, or the IGBA—which are criminal statutes — by implication, that is, merely by virtue of the IHA's adoption subsequent to that of the Wire Act, the Travel Act, and the IGBA. Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done explicitly, which was not the case with the IHA.

. . .  
 In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue.

. . .  
 In sum, we find that none of the challenges under Article 11 of the DSU relating to the chapeau of Article XIV of the GATS has succeeded.

(O)ur conclusion . . . relates solely to the possibility that the IHA exempts only domestic suppliers of remote betting services for horse racing from the prohibitions of the Wire Act, the Travel Act, and the IGBA,

So, while others argue the implications of the WTO ruling on Internet casinos and poker, no one disagrees that a problem existed with regard to horseracing. Here is what Acting USTR Peter Allegeier from the Office of the United States Trade Representative said in its press release shortly after the ruling:

By reversing key aspects of a deeply flawed panel report, the Appellate Body has affirmed that WTO Members can protect the public from organized crime and other dangers associated with Internet gambling,” said in a prepared statement.

This is also a victory for the federal and state law enforcement officers and regulators who protect the public from illegal gambling and its associated risks of money laundering and organized crime.

U.S. restrictions on Internet gambling can be maintained

. . . .

This report essentially says that if we clarify U.S. internet gambling restrictions in certain ways, we’ll be fine.

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. . .

We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign and domestic suppliers of remote gambling services, notwithstanding the IHA — which, according to the Panel, “does appear, on its face, to permit” domestic service suppliers to supply remote betting services for horseracing. In other words, the United States did not establish that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.

Therefore, we modify the Panel’s conclusion in paragraph 7.2(d) of the Panel Report. We find, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horseracing. For this reason alone, we find that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

[The United States] “needs to clarify one narrow issue concerning internet gambling on horse racing [and that it will be] exploring possible avenues for addressing this finding. USTR will not ask Congress to weaken U.S. restrictions on internet gambling.”<sup>69</sup>

A United States Trade Spokesman, Rich Mills, put it another way: “We need to clarify one narrow issue, which is Internet gambling and horseracing. . . . It doesn’t necessarily mean loosening restrictions. It could also mean tightening them.”<sup>70</sup>

#### VIII. REGARDLESS OF YOUR VIEWS TOWARD GAMBLING, THE WIRE ACT IS A TERRIBLE LAW

The general consensus on the interpretation of the Wire Act is that it is narrowly constructed to only apply to bookies and does not apply to casual bettors. Moreover, there is no dispute that the Act does not apply to business conducted outside the United States which does not accept bets from or otherwise communicate with persons within the United States. Aside from that and indicative of any rational attempt to decipher this abomination of the English language, virtually every other interpretation of the Wire Act is disputed. First, the Fifth Circuit Court of Appeals has ruled that the Wire Act does not apply to any wagers other than sports. The Department of Justice and one district court disagree. Second, some states have implemented intrastate Internet or telephone wagering presumably because the Wire Act applies to interstate and foreign commerce. The Department of Justice disagrees. Third, the Ninth Circuit and a district court have held that the Wire Act does not apply to wagers lawfully made under state law. The Department of Justice disagrees. Fourth, as will be discussed in the next section, the horseracing industry maintains that the Wire Act does not apply to pari-mutuel account wagering between states where it is legal. The Department of Justice, of course, disagrees. Finally, these inconsistencies have created trade disputes with other countries resulting both in trade sanctions and the United States having to attempt to withdraw trade obligations at considerable expense.

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69. Press Release, Office of the United States Trade Representative, U.S. Internet Gambling Restrictions Can Stand as U.S. Wins Key Issues in WTO Dispute (April 7, 2005).

70. Declan McCullagh, *WTO slams U.S. Net-Gambling Ban*, CNET NEWS.COM, Apr. 7, 2005, available at [http://news.cnet.com/WTO-slams-U.S.-Net-gambling-ban/2100-1030\\_3-5658636.html](http://news.cnet.com/WTO-slams-U.S.-Net-gambling-ban/2100-1030_3-5658636.html) (emphasis added).

## IX. ILLEGAL GAMBLING BUSINESSES ACT AND TRAVEL ACT

The Illegal Gambling Businesses Act (“IGBA”) and the Travel Act (“TA”) are not plagued by the same problems as the Wire Act because both were more clearly written and interpreted as being consistent with legislative intent. Both Acts can potentially apply to Internet sports wagering. But, both require a finding of a violation of a state law as a predicate to a violation of federal law.

The Travel Act prohibits any person from using any facility in interstate or foreign commerce, with the intent to promote, manage, establish, carry on or facilitate unlawful activity.<sup>71</sup> Unlawful activity is defined as “any business enterprise involving gambling” in violation of state or federal laws.<sup>72</sup> Therefore a defendant using a facility in interstate or foreign commerce for an activity deemed to be in violation of state gambling laws could be simultaneously deemed to violate the Travel Act.

The Illegal Gambling Business Act is similar. It prohibits any person from conducting, financing, managing, supervising, directing, or owning an illegal gambling business.<sup>73</sup> An illegal gambling business is defined as an operation that violates state law, involves five or more persons, and either is in substantially continuous operation for more than 30 days or has a gross revenue of more than \$2,000 in any single day.<sup>74</sup> Under the Illegal Gambling Business Act, anyone who participates in a gambling business other than a mere bettor may be subject to criminal liability under federal law.<sup>75</sup>

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71. See 18 U.S.C. § 1952 (1994).

72. *Id.* With respect to the federal law violation, because there are no common law crimes under United States law, the prosecution of the offender would have to be based on a then existing federal statute. See *id.*

73. See *id.*

74. See *id.*

75. See *id.* (prohibiting any person from conducting, financing, managing, supervising, directing, owning or operating illegal gambling business); see also *United States v. Hunter*, 478 F.2d 1019, 1022 (7th Cir. 1973) (finding that Section 1955 reaches both high level bosses and street level employees but subsequently, distinguishing on different grounds); *United States v. Becker*, 461 F.2d 230, 232 (2d Cir. 1972) (vacating and remanding on other grounds); *United States v. Ceraso*, 467 F.2d 653 (3d Cir. 1972). The issue is often what constitutes “managing,” or “conducting” an illegal gambling business. See, e.g., *United States v. Rowland*, 592 F.2d 327, 328-29 (6th Cir. 1979) (holding that for purposes of conducting illegal gambling business, participation and not financial interest must be proven). “The pleasure of participation and association in a gambling enterprise . . . is sufficient . . . [for a conviction under Section 1955].” *Id.* at 329 (emphasis added); See, e.g., *Sanabria v. United States*, 437 U.S. 54, 70 (1978) (concluding that “conduct” can be any degree of participation in illegal gambling business except participation as customer). Most circuits have adopted a simple test: a person “conducts” a gambling business if he or she performs any function that is “necessary or helpful in”

More importantly, simply being a patron is not facilitating the gambling establishment under the IGBA. The Fifth Circuit's holding in *Rewis v. United States*<sup>76</sup>, noted that patronage by interstate gamblers of a gambling establishment was not facilitating such gambling establishment such that the gamblers themselves could be charged with a violation of the Travel Act, and noted that the United States Supreme Court expressly approved the position taken on this issue by the Fifth Circuit.

Unlike the Wire Act, the Travel Act and the Illegal Gambling Business Act do not create substantial debate over their application because in practice they remain consistent with the underlying federal policy to assist the states in enforcement of state gambling laws. By specifically requiring a predicate state law violation, any doubt is removed as to the ability of the state to set its own gambling policies. The Acts, however, are duplicitous. They do not seek to prohibit different activities but simply provide two paths to prosecute the same activity.

#### X. PATRIOT ACT

Although not specifically a gambling law, The Federal Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly known as the USA Patriot Act ("Patriot Act"), is an existing law that has direct relevance to Internet wagering. One section of the Patriot Act prohibits certain money transmitting businesses. This prohibition includes companies that transmit funds that are known to have been derived from a criminal offense or are intended to be used to be used to promote or support unlawful activity. The term "money transmitting" includes transferring funds on behalf of the

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the illegal business. Several cases have noted that the term conduct, as used in the IGBA, is meant to apply generally to persons who participate in the day to day ownership, management or conduct of the illegal gambling business, and includes actions by both high level bosses as well as street level employees. See, e.g., *United States v. Merrell*, 701 F.2d 53, 55 (6th Cir. 1983) (subsequently, distinguished on different grounds). Under this analysis, virtually all, if not all, employees can be indicted. See *id.* (a janitor that cleaned and straightened up a gambling room "conducted" the gambling operation); see also *United States v. Bennett*, 563 F.2d 879, 883-84 (8th Cir. 1977) (a cocktail waitress in an illegal casino could be deemed a participant). However, the Ninth Circuit's ruling regarding what constitutes participation in a business would seem to indicate that general service providers would not count as one of the five participants in an illegal gambling business. Likewise the Tenth Circuit found, in *United States v. Boss*, 671 F.2d 396 (10th Cir. 1982), that mere ownership of a building in which illegal activity is operated by lessee cannot be held to be ownership of a gambling business, without further proof of actual financial connections and participation in the gambling business.

76. *Rewis v. United States*, 418 F. 2d 1218 (5th Cir. 1969).

public by any and all means including transfers within the U.S. or to locations abroad.

While originally intended to provide tools to go after terrorist organizations, the broad scope of the Patriot Act probably applies to any online gambling payment solution provider that knowingly assists in the transmission of funds from a U.S. player to an unlawful gambling site. This provision would appear to directly apply to the business facilitating payments between customers and online gaming market merchants.

In fact, this provision has already been applied to Internet gambling payment processing. In 2002, the U.S. Attorney's office in Missouri alleged that PayPal had provided services between October 2001 and July 2002 to offshore sites in violation of this law and the Wire Act. By allowing its users to transfer moneys by the PayPal e-wallet to off-shore gaming sites and from the gambling sites back to the users, PayPal allegedly violated the provision in the Patriot Act that prohibits "the transmission of funds that are known to been derived from a criminal offense or are intended to be used to promote or support unlawful activity."<sup>77</sup> The U.S. Attorney's office requested eBay, the parent company of PayPal, to repay nine months of the gambling-related earnings in settlement, as well as interest. In early 2003, eBay settled for \$10 million, which represented what both parties agreed were forfeitable revenue that PayPal obtained from processing the gambling transactions. Penalties for violating this provision of the Patriot Act can be substantial, including fines and up to 5 years in prison. This, however, is not the only federal law that poses concern.

In January 2007, Neteller founders Stephen Lawrence and John Lefebvre were arrested.<sup>78</sup> Both men were subsequently charged with a money laundering conspiracy in accordance with Section 1956 (a) (2) (A) of Title 18 of the United States Code which specifically addresses anyone who "transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds . . . with the intent to promote the carrying on of specified unlawful activity."<sup>79</sup> The unlawful activities specified in the Complaints were the operation of illegal gambling businesses in

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77. See Todd R. Weiss, *PayPal Cited for Patriot Act Violation*, COMPUTERWORLD, Apr. 1, 2003, available at [http://www.pcworld.com/article/110103/paypal\\_cited\\_for\\_patriot\\_act\\_violation.html](http://www.pcworld.com/article/110103/paypal_cited_for_patriot_act_violation.html).

78. See Paritosh Bansal, *NETeller Founder Pleads Guilty In Gambling Case*, REUTERS.COM, Jun. 29, 2007, available at <http://www.reuters.com/article/idUSN2938127420070630>.

79. 18 U.S.C § 1956(a)(2)(A).

violation of U.S. Code Title 18 Section 1955 and the illegal transmission of wagers and gambling information and violation of U.S. Code Title 18 Section 1084.

Subsequently, the Neteller entity entered into a non-prosecution agreement with the government. Pursuant to the agreement, Neteller consented to the filing with the United States District Court for the Southern District of New York of a criminal information charging Neteller with participating in a conspiracy in violation of certain United States laws. Specifically, the felony information charged that Neteller participated in a conspiracy, in violation of Title 18, Section 371 of the United States Code.<sup>80</sup> Title 18 Section 371 of the United States Code provides the following:

(i) use the wires to transmit in interstate and foreign commerce bets and wagers on behalf of persons engaged in the business of betting and wagering, in violation of Title 18, United States Code, Section 1084; (ii) conduct illegal gambling businesses, in violation of Title 18, United States Code, Section 1955; (iii) conduct international monetary transactions for purposes of promoting illegal gambling, in violation of Title 18, United States Code, Section 1956(a)(2)(A); and (iv) conduct an unlicensed money transmitting business, in violation of Title 18, United States Code, Section 1960.<sup>81</sup>

## XII. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

The fourth major law that impacts Internet gambling is the Unlawful Internet Gambling Enforcement Act ("UIGEA").<sup>82</sup> Its passage may have changed the legal landscape for Internet sports wagering. The heart of UIGEA is Sections 5363 and 5364, which respectively contain the criminal prohibitions and the financial regulation provisions that make up the heart of the bill.

Understanding UIGEA requires understanding of the politics and players beyond the bill. Some efforts were evident, while others were clandestine. UIGEA was a culmination of eight years of effort from Senator Jon Kyl (R-Arizona). Senator Kyl is generally

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80. *See id.*

81. 18 U.S.C. § 371. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." *Id.*

82. 31 U.S.C. §§ 5361 - 6367.

associated with the evangelical movement in the Republican Party. To give an indication of the power of this lobby, when Congress commissioned the National Gambling Impact Study Commission, four of nine commissioners were evangelicals including the President of Regent College and James Dobson himself. The evangelical movement espouses a theocracy based on their vision of a Christian nation. The basic political philosophy of the movement is categorized under an umbrella: family values. Gambling, which is a historical vice, fails under the wrath of family values. Therefore, no surprise exists that efforts to ban Internet gambling emanates from Senator Kyl and the evangelical movement.

Historically, however, Senator Kyl ran into problems with passage. Principal opposition came from the horseracing industry, state-run lotteries, and traditional casinos. Each has strong lobbies in DC and wants exemptions to any prohibition.

The 2006 Congressional session had two competing bills introduced both by conservative Republican Congressman: James Leach (R-Iowa) (who worked with Kyl) introduced a criminal prohibition while Bob Goodlatte (R-Virginia) offered what was primarily a financial services bill. Both made it through the House, but a protracted fight bogged both pieces of legislation in the Senate.

Coming into the last few months of Congress, a new player, Senator Bill Frist then Senate majority leader, came onto the scene. Frist took up the cause with the fervor of an evangelical minister. Frist's motivation was simple; he wanted to be President. The issue had two benefits. Point #7 of the evangelical movement's top ten "family values" issues, as espoused by its House Leadership, targeted Internet gambling along with the usual suspects: Anti-gay Marriage Amendment, Unborn Child Pain Awareness Act, Human Cloning Prohibition Act, and the Pledge Protection Act. The second benefit to Frist was that supporting Leach, who was from Iowa, could help a presidential campaign where Iowa was so important.

The less likely ally of the evangelical movement was the National Football League. Professional sports had a strong interest in joining the battle — to protect the legality of fantasy sports. Two motivations were evident. The first was preserving increasing revenues that the sports leagues were charging to Internet sites that were operating fantasy sports wagering.<sup>83</sup> The future of fantasy

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83. At the time that the NFL was acting to preserve its licensing revenues, a case was being decided that jeopardizes the leagues ability to charge fees to fantasy leagues to use player statistics. In a decision from August of 2006, a federal district court held that fantasy operators do not need to pay licensing fees to the sports leagues to use the statistics of players in that league. C.B.C. Distribution and Mar-

sports would have been placed in jeopardy if Congress passed Internet gaming legislation that could have been read to prohibit fantasy sports. The second was to maintain the increased viewership by those that played fantasy sports.

Not surprisingly, the NFL played a major role in the passage of UIGEA. According to a New York Post article:

the National Football League used a big bucks lobbyist to ram through Internet gambling-curbing legislation in the final minutes of the legislative session, sources revealed. But opponents of the bill charge that the NFL broke the rules when it fast-tracked legislation that never even got a vote in the Senate - a trick play that provided a big exemption for fantasy football. The NFL runs its own fantasy football site, and gets royalties from others.<sup>84</sup>

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keting, Inc. v. Major League Baseball Advanced Media, L.P., 443 F.Supp.2d 1077 (E.D.Mo. 2006). This was a significant decision because the licensing fees gave the sports leagues a direct interest in the success of the major fantasy leagues. *See id.*

Two major issues in the case involved a legal doctrine called “right of publicity” and whether the players’ names and statistics are copyrightable. The right of publicity is described in Section 46 of the Restatement (Third) of Unfair Competition (2005), Appropriation of the Commercial Value of a Person’s Identity: The Right of Publicity. This Restatement provision states that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . .” *See id.* The court reasoned, in part, that:

[u]nlike cases where the commercial advantage element of the right of publicity has been found, there is nothing about CBC’s fantasy games which suggests that any Major League baseball player is associated with CBC’s games or that any player endorses or sponsors the games in any way. The use of names and playing records of Major League baseball players in CBC’s games, moreover, is not intended to attract customers away from any other fantasy game provider because all fantasy game providers necessarily use names and playing records. Indeed, there is no evidence to create a triable issue as to whether CBC intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with CBC’s fantasy games any more than the players are associated with a newspaper boxscore.

*Id.* The court concluded:

that the undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC’s fantasy games and that CBC has not violated the players’ claimed right of publicity. The court further finds, alternatively, that even if the players have a claimed right of publicity, the First Amendment takes precedence over such a right. The court further finds that the undisputed facts establish that the names and playing records of Major League baseball players as used in CBC’s fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players’ claimed right of publicity.

*Id.*

84. Geoff Earle, *NFL Makes Fantasy Pass*, NEW YORK POST, October 10, 2006.

The same New York Post article went on to say:

[l]ast month, right before lawmakers left town to campaign, the league was struggling for a way to overcome opposition to clearing the gambling bill. The league decided to try to tack the gambling bill onto final defense legislation that couldn't be amended. . . . NFL Chairman Roger Goodell and past chairman Paul Tagliabue wrote Senate Armed Services Committee Chairman John Warner (R-Va.) that the bill was an "achievement" he could be proud of, but that couldn't get through the Senate by regular means."<sup>85</sup>

The letter was referring to an attempt by Senator Bill Frist to have the legislation attached to the Defense Appropriations bill then being considered by a joint committee of the Senate and House in the closing days before the 2006 fall adjournment. Senator Bill Warner (R-Virginia) rejected this attempt in a September 25th letter to Senator Frist that read, in part: "My strong objection is based on the following precedents: Section 102 of S.2349, The Legislative Transparency and Accountability Act of 2006 which passed the Senate on May 23, 2006 clearly expresses the views of the Senate that out-of-scope provisions are not to be included in conference reports."<sup>86</sup>

Undeterred by this rejection, Senator Frist turned to another joint committee, this one considering the Port Safety Act. Unlike Senator Warner, none of the members of the committee objected to the inclusion of the amendment. Once attached, the full legislation went before Congress without the ability of its members to vote against the amendment without voting against the entire bill. The trick worked and the bill passed. Though Frist's presidential campaign failed, this bill is an important part of his legacy.

The bill has two distinct provisions, largely because it consisted of a last minute merger of two different bills. The first provision of Section 5363 is criminal and is both relatively straight forward and unnecessary. This provision provides that no person or corporation engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling, virtually any type of payment including credit, the proceeds of credit, credit card payments, electronic fund

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85. *Id.*

86. Memorandum for Senator Bill Frist, from Senator John Warner, September 25, 2006.

transfers or the proceeds there from, checks, drafts or similar instruments, or the proceeds from any other financial transaction as specified by the Treasury Secretary and the Federal Reserve by regulation. Penalties can include fines and imprisonment for up to five years. The reason that this is unnecessary and has not been controversial is that a person engaged in the business of accepting illegal bets is already violating federal law. The person is merely violating another statute.

Like the previously described Travel Act and Illegal Gambling Business Act, UIGEA only applies to unlawful gambling, which is defined as a bet or wager that is unlawful under any applicable state law in the state in which the bet or wager is initiated, received, or otherwise made.

The standards appear identical to the existing law under the Travel Act and the Illegal Gambling Business Act where federal prosecutors need to show a violation of state law to be a violation of federal law. The words of UIGEA, however, could be read more favorable to the prosecution, which need only prove that the bet or wager is unlawful under state law. For example, some states make it unlawful for persons to play poker for money. These statutes would not directly assess liability on a poker site because they are not players. The bets, however, are unlawful under state law. Therefore, an Internet gambling site may be charged under UIGEA for accepting the financial transfer, even if it does not directly violate the state law.

Section 5364 has been more controversial. First, serious question exists as to whether 5364 was even needed. The Department of Justice was doing just fine under the Patriot Act. Second, serious doubt still exists as to whether the intended regulatory scheme is even workable. Under UIGEA, two agencies, the Federal Reserve Board and the Department of the Treasury, had a nine-month period (until July 2007) in which to enact regulations that would require any financial transaction provider, i.e. credit card companies, banks, or stored value providers (like PayPal) to identify, code and block restricted transactions. Restricted transactions are those transactions where a gambling business accepts funds directly or indirectly from a player in connection with unlawful Internet gambling, i.e. unlawful under state law.

The agencies had four tasks in crafting the regulations. The first was to identify types of policies and procedures that would be reasonable to identify and block restricted transaction. The second was to allow financial transaction providers ("FTPs") to choose al-

ternative methods of blocking restricted transactions. The third was to exempt certain restricted transactions of FTPs from a regulation if the agencies found it is not reasonably practical to identify and block such transactions. Finally, the agencies were tasked to ensure that lawful Internet gambling, such as intrastate casino and lottery wagers and interstate horse race wagers, was not blocked.

When the regulation finally came out in January 2009, the agencies did not seek to directly implement the Congressional mandates. They determined that attempting to identify and block most restricted transactions was not feasible. The agencies justified not following the UIGEA mandates that individual transactions be identified, coded and blocked because the Automated Clearing House (ACH), check cashing and other systems do not enable the exempt participants to reasonably identify and block restricted transactions. In its place, the agencies substituted a different scheme that focuses on participants not transactions. This scheme focuses on the FTP that has the relationship with the gambling business, or is the United States FTP that deals directly or indirectly with the foreign FTP that has the customer relationship with the gambling business. These are the only FTPs not exempted from the regulations. For example, in the check collection system, the non-exempt participant is the depository bank — more specifically the first U.S. institution to which a check is transferred whether from the gambling business itself or a foreign bank or correspondent. This scheme puts the burden on the first U.S. entity in the money chain coming from outside the United States.

The regulation requires the non-exempt entities to conduct due diligence and know their customer to assure that it is not involved in restricted transactions. The result is that banks that work with foreign banks must pressure the foreign banks to police their own customers, and that non-exempt entities that deal directly with gambling sites must know their own customer. An unknown factor is how the non-exempt FTP will distinguish legal and illegal transactions for the purpose of determining what is a restricted transaction. This is often a nuanced determination that imposes a great burden on the non-exempt entity.

To help elevate this burden, the regulations provided two different methods to determine if the customer was lawfully engaged in gambling transactions. For a non-exempt financial institution to provide financial services to a commercial customer engaging in such Internet business, the commercial customer must provide the financial institution with either a copy of a government-issued or

tribe-issued license authorizing such activity or, if the customer does not have such a license, a “reasoned legal opinion” that demonstrates the commercial customer’s Internet gambling business does not involve restricted gambling transactions. Under the regulation, a “reasoned legal opinion” means “a written expression of professional judgment by a State-licensed attorney that addresses the facts of a particular client’s business and the legality of the client’s provision of its services to relevant customers in the relevant jurisdictions under applicable federal and state law, and, in the case of intra-tribal transactions, applicable tribal ordinances, tribal resolutions, and Tribal-State compacts.” Issuing a reasoned legal opinion requires an attorney to fulfill these requirements of the regulation while complying with the legal profession’s guidelines and standards for ethics and legal opinions.

The notion of identifying, coding and blocking specific transactions envisioned to apply to all financial transactions was imposed only on the credit card industry, which already has a system of identifying, coding and blocking merchant transactions for gambling transactions. Likewise, the agencies did not address the mandate of establishing procedures to assure that legal gambling transactions are not blocked. These regulations, that were suppose to go into effect on December 1, 2009, have been postponed and mandatory compliance with the regulations of UIGEA was delayed until June 1, 2010.

### XIII. REASONABLE ALTERNATIVES

Regardless of one’s position on gambling, most would agree that federal gambling law is an inappropriate approach. But, reasonable alternatives exist.

First, the Wire Act, PASPA and UIGEA should be repealed. Specifically, the Wire Act is comprehensible only to authors, who have long been deceased and UIGEA adds nothing to the law and has only created cost and confusion.

Second, Congress should implement one of several approaches. The first, most obvious approach, is to set gambling policy at the federal level in a meaningful, consistent and cohesive way. Currently, federal gambling policy is dictated by politics, not policy. For example, fantasy sports are exempted from the UIGEA without serious discussion primarily because the NFL wanted the exemption. UIGEA passed without transparency or debate because a powerful Kentucky Senator was playing to home state industry. The DOJ was correct in questioning why horseracing “will be able to

accept interstate wagers while other industries that are also regulated by the states cannot.” Trying to resolve contradictions in existing laws aside, this approach also would require a real review of gambling including nuanced decisions regarding various forms of gambling. Should all Internet games be illegal? What about chess tournaments? If skill games should be excluded, what should be the minimum skill required and how do you measure it? Do the skills acquired through mastering poker justify its legality versus games of pure chance? Should state lotteries be prohibited because they experience disproportionate play by lower economic classes? Is Congress willing to kill the horse race industry by taking away off track betting? The list is long.

After that, the question remains whether the Federal Government really wants to devote the resources and burden financial institutions to effectively implement prohibition. Certainly Senator Bradley’s arguments for passage of PASPA are no less relevant today than they were in 1991. What is different, however, is the expanded popularity of illegal wagering, the diminution of prosecutions for that illegal activity and the media proliferation of wagering information like the daily line that has been central to sports. Even if Congress wanted to return to a policy of rigid enforcement, the issue lingers over whether it would work. Does the Internet effectively make enforcement of gambling laws impractical, particularly in light of the reality that the United States’ closest allies are more likely to sue in the world trade courts than help it shut down foreign based gambling operators? If necessary, is the Federal Government willing to make it illegal for a casual bettor to place a wager and is it willing to violate the sanctity of its citizen’s homes to make arrests?

Finally, Congress must put aside politics that create paralysis like simply being asked to resolve statutory interpretation conflicts between the horseracing industry and the DOJ. It would also need to stand up to powerful special interests that resulted in exceptions for betting on the outcome of players performance but which make it a felony to accept bets on the outcome of the same game in which the player is a participant.

The second most obvious approach for federal gambling policy to return to its historic roots is to use existing laws, like the Illegal Gambling Business Act, the Travel Act and the Patriot Act, to truly assist the states in enforcing state law. This eliminates the debate as to the legality of the various forms of gambling under federal law and return historical rights to the states to determine their gam-

bling policies. It would legitimize the entire horse race wagering industry and permit states to conduct online lotteries, casino games and poker.

But, the existing laws are insufficient in an interactive world. Federal law does assure the fairness of the distribution of wagering revenue except as it relates to horseracing. Sports and sports wagering are married. Athletes and teams are necessary for wagering to exist. Therefore, compensation for wagering on these athletes or teams should accrue to the athletes and teams. Moreover, some of these revenues can be dedicated to improve the integrity of the sports and minimize harmful impacts of the already pervasive wagering in our society.

A modest proposal is that states shall have the right to sponsor, operate, advertise, promote, license, or authorize sports wagering on the following conditions:

- (a) Before a state licensed or operated sports book or pool can accept a sports wager, the party accepting such wager must obtain consent from:
  - (i) The league representing the owners of or colleges for the teams playing in the sporting event or contest (or in the event of single athlete sports with the athletes themselves), and
  - (ii) The gaming regulatory authority in the state where the sports book or pool is located.
- (b) As a condition of granting such consent, the league may charge a fee not to exceed a reasonable amount, such as one percent (1%) of each wager.
- (c) In the case of professional team sports, the league must obtain the consent and have a revenue sharing agreement in place with the association representing the athletes.
- (d) A league may refuse consent for any reason.
- (e) A set portion of all fees collected must be dedicated to an enforcement program that protects the integrity of the sport against any influences including gambling, performance enhancing drugs or other unwanted influences.
- (f) A set portion of all fees collected shall be used placed into a federally administered fund to provide supplemental health and life insurance to amateur and professional athletes that have suffered sports related injuries.

- (g) Any person accepting wagers must report the wagering activity to the association or league in real time so as to provide the association or league to analyze wagering patterns that might indicate problems.
- (h) A state licensed or operated sports book or pool can only accept intrastate wagers that are made either in person or through communication technologies that verify that the point of sending and receiving the wager are in the authorized state.
- (i) A state licensed or operated sports book or pool must implement technologies or procedures approved by the state to assure that minors are not permitted to wager.
- (j) A person accepting wagers inconsistent with this law shall be guilty of a federal crime.

This proposal offers many positive effects as a result. Sports associations and leagues can make their own decisions as to whether to permit wagering on their sporting events. If a sports association or league decided to permit it, they would benefit from the wagering. This is modeled after the IHA, which created revenue sharing that has saved the industry. Without revenues from off-track betting, probably 80% of all revenues would have been lost. Profit sharing from sports wagers can then be used to support programs that better regulate the integrity of the sport. For example, if the NCAA received 1% of all wagers made on college football, it would receive about \$600 million each year. If it devoted 10% of this amount to policing college football, it would have a powerful arsenal of \$60 million annually to assure that the sport is free of gambling, drugs, academic cheating and player payoffs. A 1% fee is probably reasonable as licensed Nevada sports books retain on average about 5% of all wagers, so a 1% fee would equate to a 20% tax on net revenues.

States can return to set their own gambling policies without fear of Federal government intervention. Likewise, the state could set up patron dispute resolution mechanisms, assure the honesty of advertising and prevent abuse collection tactics. For example, a state could make gambling debts uncollectable, but if made collectable would be enforced only through legal processes.

Licensed operators can be vetted prior to licensing and subject to strict regulation and audits. Licensed operators would be able to provide the type of information needed to help police the integrity

of the games themselves. This would be in contrast to illegal bookmakers. Licensed operators also would pay taxes and provide employee benefits.

Federal prosecutors can then devote their limited resources to assisting states that need help in enforcing their laws. With far less illegal gambling and better resources through increased information and taxation, the percentage of persons engaged in illegal gambling and who are prosecuted can return to a reasonable number. Organized crime would be deprived of revenues that can be used to finance other illegal activities. With less money going to organized crime, general crime rates might decrease.