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Sports Law 2023 - The Latest Case Law, Recent Changes, and Best Practices

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Blank Rome Speakers



Dennis M.P. Ehling
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Dennis focuses on complex commercial and deal litigation and transactions, governance, blockchain and payments, and all aspects of practice in service to the gaming industry. Dennis has significant experience representing clients in the highly regulated gaming industry including both transactional and litigation matters, as well as handling complex confidential investigations and regulatory proceedings. He has particular knowledge in the area of online gaming and wagering, sports wagering and regulation, and eSports, and represents clients in, and counsels clients on the regulatory and business implications of various issues, including New media, markets, and technologies, Licensing, Financing, Mergers and acquisitions, Sweepstakes and promotions, Electronic payment facilities (including traditional and blockchain).

In addition, Dennis advocates on behalf of gaming entrepreneurs and operators in all types of civil litigation, including: Securities disputes, Intellectual property disputes, Antitrust disputes, Contractual disputes, Criminal investigations.

His clients include well-known casino operators, gaming equipment manufacturers, racing and wagering operators, internet operators, Native American gaming interests, payment providers, vendors, investment funds, and other companies that invest in, or provide services to, the gaming or racing industry.

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Michael P. Trainor

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Gaming & Regulatory Compliance

Michael's practice includes representing clients in the highly regulated gaming industry, as well as handling complex licensing matters, confidential investigations, and regulatory proceedings. In particular, he assists clients in the areas of online gaming and sports wagering and regulation. Michael counsel clients on the regulatory and business implications of M&A, market access, financing, internal controls, and other compliance issues. His clients include well-known casino operators, gaming equipment manufacturers, racing and wagering operators, internet operators, vendors, investment funds, and other companies that invest in, or provide services to, the gaming or racing industry.

Financial and Other Consumer Facing Enterprises

Michael's practice also includes a strong emphasis representing a variety of clients including lenders, mortgage servicers, debt buyers, credit card companies, car financing companies and other financial institutions with a wide array of regulatory and compliance issues as well as extensive federal and state litigation matters, including in class actions. He regularly advises clients on issues involving compliance with the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, state unfair and deceptive acts and practices laws, and various other federal and state consumer protection laws and regulations.

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Overview

How Did We Get
Here?

Where Are We
Now?

Latest
Developments in
California &
Florida

OTHER UPDATES

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Sports Betting: How Did We Get Here?

- Professional and Amateur Sports Protection Act (“PASPA”)
 - 28 U.S.C. §§ 3701-3704
- The Wire Act
 - 18 U.S.C. § 1084
- Unlawful Internet Gambling Enforcement Act
 - 31 U.S.C. § 5361-5367

Key Moments in Expansion of Legal Online Gambling

- December 23, 2011 – U.S. Department of Justice Memo (dated September 20, 2011) (“2011 DOJ Memo”) – stated that the Wire Act only applied to *sports wagering*
- 2013 ... Nevada became the first state to legalize intrastate online poker (soon followed by New Jersey and Delaware)
- 2013 ... New Jersey became first state to legalize intrastate online casino wagering
- 2018 ... *Murphy v. NCAA*, 138 S.Ct. 1461 (May 13, 2018) struck down PASPA
- November 2, 2018 – U.S. Department of Justice Memo (“2018 DOJ Memo”) – *reverses* 2011 DOJ Memo
- 2021 ... *New Hampshire Lottery Commission v. Rosen*, 985 F.3rd 38 (1st Cir, January 20, 2021) (“NHLC II”) – sides with 2011 DOJ Memo
- 2022 ... *IGT v. Garland*, 2022 WL 4245579 (D.R.I. Sept. 15, 2022) – confirms NHLC II bars DOJ from enforcing 2018 DOJ Memo

Sports Betting: PASPA - 28 U.S.C. §§ 3701-3704

- Enacted in 1992
- Prohibited the expansion of sports betting in the United States
 - It shall be unlawful for—
 - (1) a governmental 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.
- Only exceptions were “grandfathered” states:
 - Nevada (full sports betting)
 - Delaware (parlay betting, discontinued 1976-2009)
 - Oregon (parlay betting (repealed 2007))
 - Montana (limited state sports pools – no single-game or multi-game wagers)

Sports Betting: The Wire Act – 18 U.S.C. § 1084

- Enacted in 1961
- Key Provisions:
 - (a) 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.
 - (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission 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 such betting is legal**.

Sports Betting: Unlawful Internet Gambling Enforcement Act - 31 U.S.C. § 5361-5367

- Enacted in 2006 (Title VIII to the SAFE Port Act regulating port security)
- No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—
 - (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
 - (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
 - (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
 - (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person

31 U.S.C. § 5363

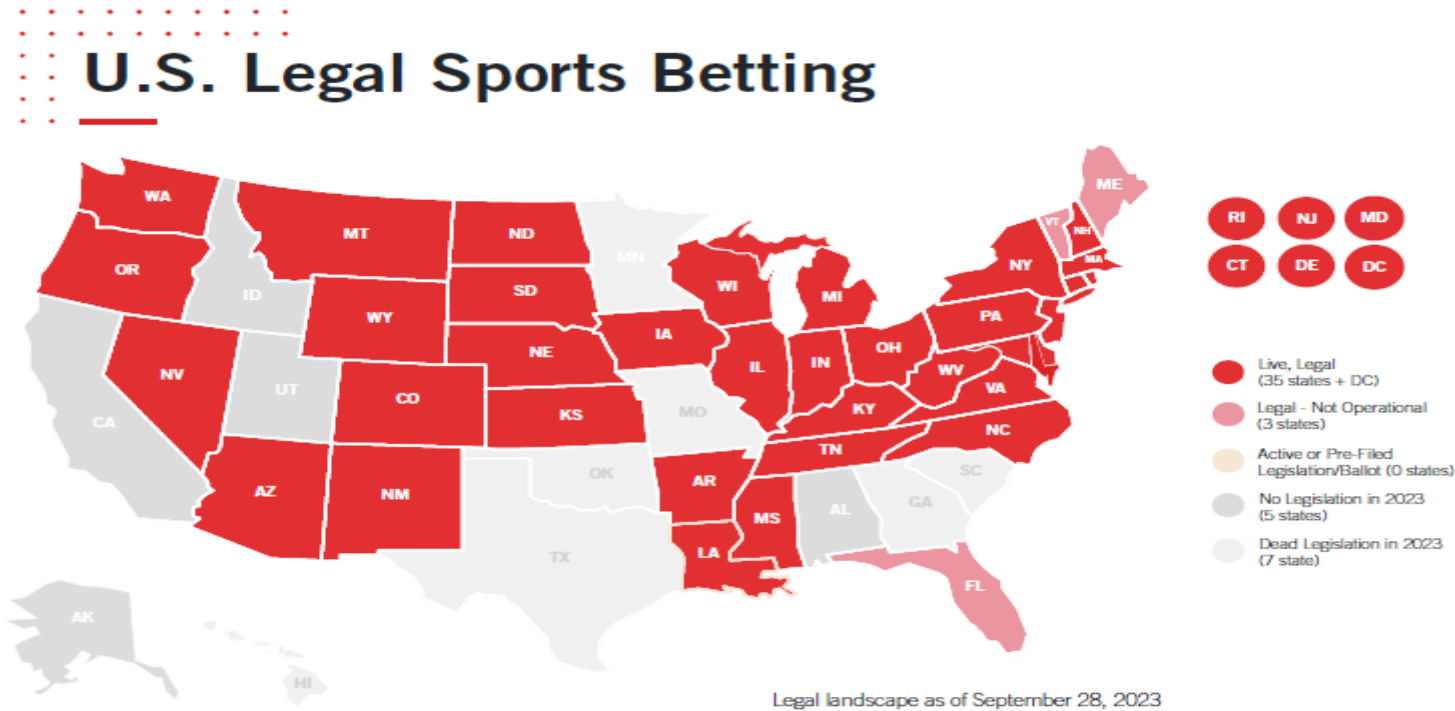
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Sports Betting: UIGEA (cont.)

- **Intrastate transactions.**— The term “unlawful Internet gambling” does not include placing, receiving, or otherwise transmitting a bet or wager where—
 - (i) the bet or wager is initiated and received or otherwise made exclusively within a single State;
 - (ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—
 - (I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and
 - (II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State’s law or regulations; and
 - (iii) the bet or wager does not violate any provision of—
 - (I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);
 - (II) chapter 178 of title 28 (commonly known as the “Professional and Amateur Sports Protection Act”);
 - (III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or
 - (IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)

31 U.S.C. § 5362(10)
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Sports Betting the United States – Where Are We Now?



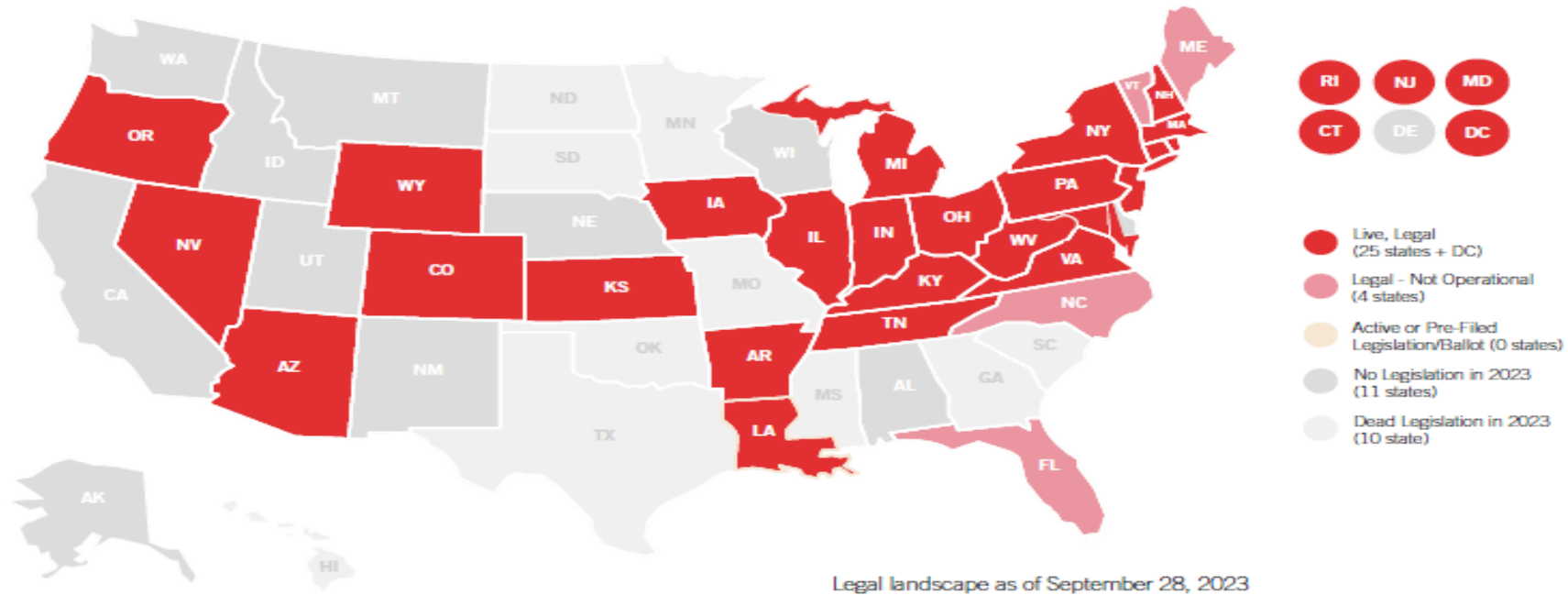
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Sports Betting the United States: Mobile

U.S. Sports Betting: Mobile



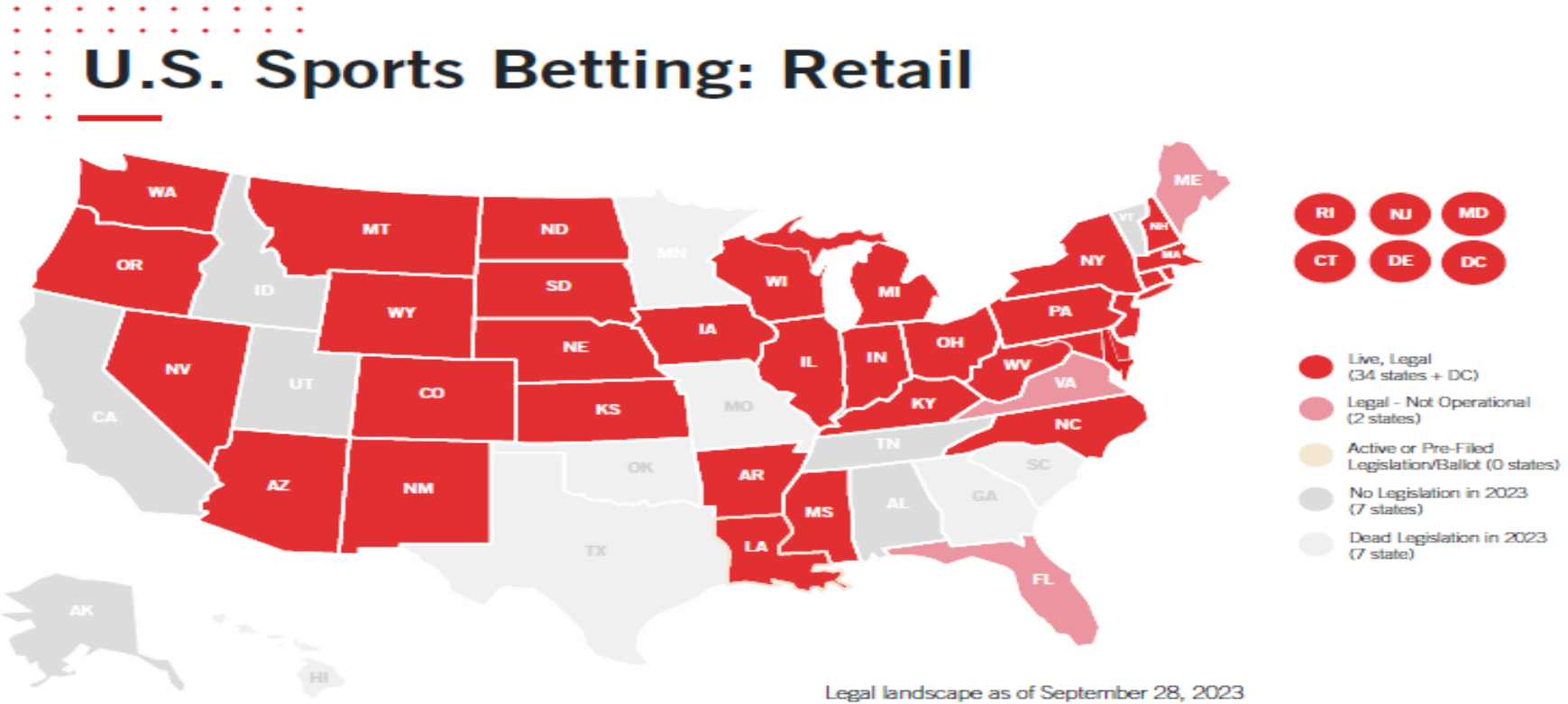
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Sports Betting the United States: Retail



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Complex Reality of Online Gambling in the U.S.

- State x State Legislation and Regulation
- Commercial Realities:
 - Multiple licenses
 - Multiple approvals (*e.g.* multiple UIGEA payment provider approvals)
 - Multiple contracting partners
 - Multiple hardware/software iterations
 - Efforts to squeeze efficiencies – close to the line
 - Operators must use only vendors licensed in each state (*e.g.* data sources, KYC vendors)

Complex Reality of Online Gambling in the U.S. – State x State

- Competing Interests:
 - Sign-ups (online vs in-person)
 - Mobile-only licensees? Casino (retail)-only licensees? Casino-controlled licenses?
 - Tribes and sports teams
- Licensing and Taxation:
 - Licenses, Fees, Taxation
 - Who Must Be Licensed?
 - License Process

Critical States – California – Florida - Texas

- What's happening in other large potential markets:
 - California
 - Florida
 - Texas

The Latest In California – Prop 26 and 27 & Next Steps

- Prop 26 – Would have allowed legalized sports betting at tribal casinos and the state’s four horse tracks. This was supported by a coalition of tribes.
- Prop 27 – Would have allowed online and mobile sports betting. This was supported by operators.
- Hundreds of Millions Spent combined on both initiatives.
- They failed...WHY???

The Latest in Florida – West Flagler Associates, Ltd., et al. v. Haaland et al.

- Background –
 - Following *Murphy* decision, a referendum passed to amend the state Constitution to ensure that a subsequent referendum would be required to authorize any form of casino gambling in the sunshine state.
 - The amendment does not apply to “the conduct of casino gambling on tribal lands” per IGRA compacts.
 - 2021 – Florida Governor executed an IGRA compact with Seminole Tribe of Florida to allow the Tribe the right to offer online sports betting so long as the best are received by servers located on Tribal lands.
 - Secretary of Interior did not take formal action to approve or disapprove the Compact, thus deeming it “approved.”

West Flagler Continued

- Suit was filed challenging the legality of the Secretary's approval arguing that Compact was not authorized by IGRA, that the Compact violated UIGEA and Equal Protection.
- D.C. Circuit reversed the District Court's ruling that the approval was not authorized by IGRA.
- October 6, 2023 – West Flagler files Application for Stay of D.C. Circuit's Mandate Pending Petition for Cert with SCOTUS
- October 12, 2023 – SCOTUS granted brief stay pending further ruling by SCOTUS.
- October 18, 2023 – Department of Interior has until 5 pm ET to respond.

Offshoots of Sport Betting

- Exclusivity Deals Between Operators and Leagues
 - Some evidence of scaling back – Initial Spend to Obtain Market Share
 - Ex – DraftKings in February 2023 announced it will continue to scale back partnerships with leagues and teams.
 - However, physical locations are also popular with sports books and advertising deals in several stadiums/event locations.
- Naming Rights Deals Between Teams and Operators
- Stadium/Team “market access”
- Premier League – All Gambling Companies will be removed as sponsors on jerseys by end of 2025-2026 season
 - Will U.S. Follow?
- NIL

State of the States – Fantasy Sports

- UIGEA Carve Out ... The term ‘bet or wager’ ... does **not** include ...
 - participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:
 - (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
 - (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
 - (III) No winning outcome is based—
 - (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
 - (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

31 U.S.C. § 5362(1)(E)(ix)

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State of the States – Fantasy Sports (cont.)

- Broadly available
 - 24 states + DC have formally legalized online daily fantasy sports:
 - Alabama, Arizona, Arkansas, Colorado, Delaware, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia + Washington DC
 - DFS is commonly available in another 21 states:
 - Alaska, **California**, Florida, Georgia, Illinois, Kentucky, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin, Wyoming

Growing Conflict – Where to Draw the Line on Fantasy

- “Prop” Fantasy – What does it involve?
 - Certain companies, such as UnderDog and PrizePicks, offer pick’em-style fantasy games
 - Concept is to choose a series of prediction items (e.g. such as an over/under of completions by quarterbacks NFL games) for a chance to win a predetermined prize.
 - The contest does not depend on how other players perform

“Prop” Fantasy - Continued

- Certain States maintain that player props constitute sports betting while other are taking a closer look at the offerings:
 - Ohio
 - Maryland
 - Wyoming
 - Maine
 - Michigan
 - Massachusetts
 - New York
 - Florida
 - Colorado
- Why Is this Important?
 - If “Prop” Fantasy is not considered Sports Wagering, then license hurdles are typically less.
 - States that permit DFS do not permit sports wagering (i.e., California).

“Sweepstakes” Sports

- Business across the U.S. (e.g. Pulsz , Chumba) offer players online opportunities to play “for fun” games along with entries to “sweepstakes” drawings
 - “For fun” games with “virtual currencies” (e.g. “gold coins”) to win nothing but more such coins
 - Simultaneous “sweepstakes” drawings where customers spend “sweepstakes coins” for chance to win real money prizes
 - Simulated casino games
- Fliff, Inc. – sports games

Q&A

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