

Placing Bets on ADW Legality: An Inquiry into Off-track Horse Gambling

Thomas Staffieri*

INTRODUCTION

For citizens located in at least thirty states, betting “\$5 to win on the 3 horse” is as simple as logging into a mobile app or website.¹ While several state legislatures allow such horseracing wagers with ease, other states vaguely permit or are silent on the legality of online horseracing wagering, affecting bettors, payment processors, and licensed gambling platforms across the nation.² Reform is necessary to address the legality of interstate horserace wagering and to provide certainty for gamblers and betting platforms. Legislative improvements for online wagering may not only advance the interests of horsemen (e.g. jockeys, owners, trainers), but may also enhance a state’s fiscal standing through tax reform, particularly in the midst of the COVID-19 global pandemic.³

Across the United States, interstate online horseracing wagers are legally accepted by registered wagering platforms.⁴ This gambling activity is legalized by a patchwork of state legislation granting online wagering across state lines.⁵ If a gambling platform is permitted by the specific state legislation and licensed by the state’s respective racing commission, a

* Senior Staff, Ky. J. Equine, Agric., & Nat. Resources L. 2019-2021; B.B.A. University of Notre Dame; J.D./M.B.A. May 2021. University of Kentucky J. David Rosenberg College of Law. I would like to thank my parents, Vic and Kim Staffieri, for their continuous love and support. Special thank you to Laura Holoubek (Partner, Dinsmore & Shohl LLP) for the invaluable advice and guidance throughout writing this piece. Initial inspiration for this Note came from the head-scratching moment when trying (but failing) to place a wager through the Twinspires app (an ADW) while physically located in Dallas, Texas for a horserace in Louisville, Kentucky.

¹ James Chen, *Advance-Deposit Wagering (ADW)*, INVESTOPEDIA, 3–4 (Apr. 11, 2019), <https://www.investopedia.com/terms/a/advance-deposit-wagering.asp> [<https://perma.cc/5W9J-9DQL>].

² Ray Paulick, *A Texas-Sized Hole in the Betting Landscape*, PAULICK REP., 2 (Oct. 1, 2013, 2:28 PM), <https://www.paulickreport.com/news/ray-s-paddock/a-texas-sized-hole-in-the-betting-landscape/> [<https://perma.cc/6EWJ-FE2T>].

³ *Report on the Possible Authorization of Exchange Wagering*, IOWA RACING & GAMING COMM’N, 5, 65–66 (Dec. 1, 2015), <https://www.legis.iowa.gov/docs/publications/DF/710962.pdf> [<https://perma.cc/62Y3-8LHD>].

⁴ *Id.* at 5.

⁵ *Id.*

system known as advance-deposit wagering (“ADW”) is established to enable off-track betting for thoroughbred racing.⁶

ADW allows the individual bettor to deposit funds into an account and place wagers remotely.⁷ The account balance is then used to fund pari-mutuel wagering over the phone or internet, with the winnings deposited back into the individual’s account.⁸ With modern technology enhancing gamblers’ ability to bet “off-track,” an estimated ninety-two percent of all 2019 bets on American horseracing takes place off-track or through online ADW accounts over the internet.⁹ However, the question surrounding the specific language in federal and state legislation permitting ADW across state borders still remains.¹⁰

The interaction of the 1961 Interstate Wire Act (“The Wire Act”), the 1978 Interstate Horseracing Act (“IHA”), the 2006 Unlawful Internet Gaming Enforcement Act (“UIGEA”), and recent Department of Justice (“DOJ”) opinions have left some inconsistencies in what enables ADW processing across state lines to be considered legal under federal law. Moreover, inconsistent treatment under state law further clouds the legality of interstate ADW, resulting in an uncertain interplay of federal regulation and state legislation.

ADW platforms like Churchill Downs’ wholly owned subsidiary, Twinspires.com, are estimated to account for over \$3 billion in annual handle and continue to grow.¹¹ ADW platforms, horsemen, and individual gamblers hope to clarify the dated federal and state legislation while pushing for legislative reform to ensure these profits continue.¹²

Part I of this note will describe the federal regulation surrounding interstate gambling. By tracing the federal legislative history of interstate gambling, a visible disconnect between several federal regulations will highlight how federal

⁶ *Id.* at 26.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ See generally THOROUGHBRED IDEA FOUNDATION, *TIF: Do You Know Where Wagering Dollars Really Go?*, PAULICK REP. (Apr. 17, 2020, 11:08 AM), <https://www.paulickreport.com/news/the-biz/tif-do-you-know-where-wagering-dollars-really-go/> [<https://perma.cc/RUZ8-G5GK>].

¹⁰ *Id.*

¹¹ Memorandum from Alyssa Bethel, Att’y, to the Honorable William P. Coley, II (June 29, 2016) (on file with the Ohio Legis. Serv. Comm’n) http://www.racingohio.net/LSC_Coley.pdf [<https://perma.cc/5N39-4C7J>].

¹² THOROUGHBRED IDEA FOUND., *supra* note 9, at 1.

legislation has lagged behind the technology enabling interstate gambling.¹³ Part II will then analyze the discrepancies in specific state legislation leading to uncertainty surrounding ADW operations. Based on these considerations, Part III will describe a future roadmap on how to clarify federal and state legislation for ADW systems, while also proposing a mandated withdrawal system from the total ADW handle to ensure funds are appropriately distributed to all parties involved in the industry.

I. LEGISLATIVE HISTORY

A. *The Wire Act*

While horseracing is a century-long tradition in American sports, the explicit legality of horserace wagering in the United States, specifically off-track gambling, is much less stable. The popularity of sports gambling spread throughout the United States during different historical periods as technology improved.¹⁴ Because many forms of interstate gambling exist (e.g. poker, sports, lottery, horseracing), states enacted regulation for specific gambling types at different times and through various measures.¹⁵ As a result, nationwide legislation to regulate gambling resembles a “patchwork quilt of various statutes, regulations, and court and administrative decisions with no interconnectedness.”¹⁶

As technology and communication across states innovated, bookmaking began to affect the legitimacy of the gambling industry.¹⁷ For horseracing, the telephone, telegraph, and pari-mutuel tote machine enabled bettors to place wagers without being physically present at the race.¹⁸ As technology advanced, organized crime began to take advantage of this lucrative business through illegal bookmakers, providing a market for

¹³ Joel Turner, *Update the 1978 Interstate Horse Racing Act – Survival of the US Industry Depends Upon It*, THOROUGHBRED RACING COMMENTARY (Feb. 17, 2015), <https://www.thoroughbredracing.com/articles/update-1978-interstate-horse-racing-act-%E2%80%93-survival-us-industry-depends-upon-it/> [https://perma.cc/5NR8-U3LP].

¹⁴ I. Nelson Rose, *Gambling and the Law®: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, at 1162–63 (2007).

¹⁵ *Id.* at 1177.

¹⁶ *Id.* at 1164.

¹⁷ *Id.* at 1163–64.

¹⁸ *Id.*

horseracing gambling across the nation.¹⁹ Organized crime's fraudulent practices and the discrepancies in state legislation led Congress to pass the Wire Act in 1961.²⁰

The Wire Act specifically prohibited the interstate transmission of bets or wagers from individuals or entities "engaged in the business of betting."²¹ The wire transmission of information assisting in placing bets or wagers "on any sporting event or contest, or for the transmission of a wire communication that 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" was specifically prohibited.²² The Wire Act continues to be valid law under current legislation, but its implications on the horseracing industry remain unsettled, specifically as the usage of ADW is on the rise.

B. The Interstate Horseracing Act

Due to the murky interpretation of the Wire Act, many horseman began to lobby the federal government for the clarification of the Wire Act's applicability to horseracing.²³ As a result, Congress enacted the Interstate Horseracing Act ("IHA") in 1978.²⁴ The IHA specifically addressed the state's ability to determine what forms of gambling could take place within their borders and enabled racetracks to simulcast races to other off-track locations for wagering.²⁵ This enabled the use of wire transmissions to conduct pari-mutuel wagering across state lines, so long as the individual states, racetracks, and horseracing commissions permitted such conduct.²⁶

In 2000, an IHA amendment specifically addressed the internet's role in horseracing gambling across state lines.²⁷ The amendment expressly allowed for ADW (i.e. the ability to deposit

¹⁹ *Id.* at 1166.

²⁰ Rose, *supra* note 14, at 1164–66.

²¹ 18 U.S.C.S. § 1084 (LexisNexis 1961).

²² *Id.*

²³ See Joel Turner, *New Racing Economics Show Inadequacies of 1978 Interstate Horse Racing Act*, THOROUGHBRED RACING COMMENTARY (Feb. 16, 2015), <https://www.thoroughbredracing.com/articles/new-racing-economics-show-inadequacies-1978-interstate-horse-racing-act/> [<https://perma.cc/9C72-HX46>].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Rose, *supra* note 14, at 1171.

funds into an individual betting account by computer or mobile device; then use these funds to place wagers in advance), so long as the bet was legal in both the state where the patron was located and the state where the bet was placed.²⁸ Groundbreaking for ADW platforms, the IHA seemingly authorized the use of wires to legally conduct pari-mutuel wagering across state lines.²⁹

In theory, the IHA was passed to provide a legal framework for orderly business operations for interstate horseracing gambling consistent with public policy concerns.³⁰ Under the IHA, ADW platforms were required to receive consent from 1) the host racing association; 2) the racing commission with jurisdiction over the host track; and 3) the racing commission of the state where the off-track wager was placed to conduct interstate wagering.³¹ While the 2000 amendment expanded the ability to place horseracing wagers using the internet and cellular phone data, the act stressed how such gambling is only permitted if lawful in each of the States involved.³² No state is required to allow interstate horseracing wagers, but every state is granted the option to allow for such wagering.³³

Since the IHA was amended in 2000, more than 30 states have permitted interstate wagering on horseracing via the internet or telephone.³⁴ To enable ADW platforms to receive bets from individuals who are not physically located at the track, many legislatures have amended their pari-mutuel wagering statutes to create the legal fiction that an individual placing an ADW is located at the track where the deposit is supposedly held.³⁵ Part II of this note will describe a more in-depth comparison of how states vary on their treatment of ADW platform's legality. Based on the 2000 Amendment of the IHA, ADW platforms can now operate based on the combination of

²⁸ Chen, *supra* note 1; Rose, *supra* note 14, at 1171.

²⁹ Turner, *supra* note 23; 15 U.S.C.S. § 3002 (LexisNexis 1978).

³⁰ Rose, *supra* note 14, at 1186.

³¹ 15 U.S.C.S. § 3004 (LexisNexis 1978); *see also* Turner, *supra* note 13.

³² *Unlawful Internet Gambling Enforcement Act of 2006 – Factsheet*, STOP PREDATORY GAMBLING, <http://stoppredatorygambling.org/wp-content/uploads/2012/12/UIGEA-2006-Fact-Sheet.pdf> [https://perma.cc/MJ3K-X299] (last viewed Nov. 7, 2020).

³³ *Id.*

³⁴ I. Nelson Rose, *Betting on New Jersey*, GAMBLING AND THE LAW (June 26, 2017), <http://www.gamblingandthelaw.com/column/betting-on-new-jersey> [https://perma.cc/CDA3-M6AA]; *See STATES WITH LEGAL HORSE BETTING, States that Have Banned Online Horse Betting*, [https://perma.cc/6E6Z-ADE6].

³⁵ *Id.*

federal law and individual state laws permitting licensed racing associations to operate pari-mutuel wagering.³⁶

C. The Unlawful Internet Gambling Enforcement Act

Further clouding the ability to gamble on horseracing across state lines, Congress enacted the Unlawful Internet Gambling Enforcement Act (“UIGEA”) in 2006.³⁷ The UIGEA was passed as part of the SAFE Port Act to specifically target payment processors and financial institutions from the transmission of money from bettors to operators for “unlawful internet gambling,” prohibiting the ability to:

Place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wagers is initiated, received, or otherwise made.³⁸

By specifically targeting businesses who knowingly accept money for illegal gambling, the UIGEA appeared to significantly affect the horseracing industry.³⁹ However, Congress later attempted to clarify the UIGEA’s effect on the horseracing industry and address the tension between the IHA and the Department of Justice at the time, stating, “It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law.”⁴⁰

This “sense of Congress” to not adjust the status quo of gambling in the horseracing industry thus begs the question of how interstate horseracing wagering interacts with specific state laws in conjunction with the IHA and the Wire Act.⁴¹ Congress did not intend for the UIGEA to be used against transactions that

³⁶ 15 U.S.C.S. § 3002(3).

³⁷ 31 U.S.C.S. § 5363.

³⁸ 31 U.S.C.S. § 5362(10)(A).

³⁹ I. Nelson Rose, *Game on for Internet Gambling with Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 665 (Dec. 2012).

⁴⁰ 31 U.S.C.S. § 5362(10)(D)(iii).

⁴¹ 31 U.S.C.S. § 5362(10)(D)(iii); STOP PREDATORY GAMBLING, *supra* note 32.

are authorized under the IHA, but the lack of specificity further clouds what language specifically grants the legality of an interstate, online horseracing wager under the Wire Act.⁴²

Because the UIGEA specifically targeted financial institutions by forcing banks to monitor online gambling and the receipt of illicit gambling funds, many payment processors were reluctant to accept online gambling as a legitimate form of payment for fear of criminal and civil prosecution.⁴³ Under the UIGEA, financial institutions were required to block any money transfers to gambling businesses who engage in unlawful internet gambling.⁴⁴ Financial institutions such as Chase Bank and American Express began to monitor transactions via licensed ADW platforms with a specific merchant category code (“MCC”).⁴⁵ The 7802 Code is uniquely defined to identify horse racing transactions, as opposed to the more general 7995 code for any gambling transaction.⁴⁶ By identifying and allowing individual ADW transactions through this unique MCC, financial institutions are hopeful to encourage more customers to utilize banking services when gambling legally.⁴⁷

Despite developing a unique MCC Code, financial institutions remain fearful of the UIGEA’s threat to prosecute the processing of an illegal gambling transaction.⁴⁸ This is particularly the case because of the ambiguity of the UIGEA’s “sense of Congress” language and its uncertain interaction with the IHA and the Wire Act.⁴⁹ The murky interaction between the two federal laws has left financial institutions with a state of apprehension, weighing the revenue upside of accepting pari-mutuel transactions across state lines against the legal risk of specific state legislation, the Wire Act, or the UIGEA.⁵⁰

⁴² STOP PREDATORY GAMBLING, *supra* note 32.

⁴³ John Egan, *Chase Cardholders Can Charge Advance Horse-racing Bets*, CREDITCARDS.COM (Mar. 22, 2018), <https://www.creditcards.com/credit-card-news/chase-credit-cards-horse-race-betting.php> [<https://perma.cc/F2E3-RFS6>].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Egan, *supra* note 43.

⁵⁰ Ray Paulick, *Waldrop: Online Betting on Horse Racing Still Legal Despite Justice Department Reversal on Wire Act*, PAULICK REP. (Jan. 8, 2020, 9:55 PM), <https://www.paulickreport.com/news/ray-s-paddock/waldrop-online-betting-on-horse-racing-still-legal-despite-justice-department-reversal-on-wire-act/> [<http://perma.cc/C5CY-B75E>].

D. Department of Justice Opinions

The final piece to this rather complex web of legislative history involves the Department of Justice’s (“DOJ”) clarification of the outdated 1961 Wire Act addressing online, telephone, and satellite transfer of information across state lines in regard to the sale of lottery tickets online.⁵¹ In 2009, Illinois and New York State lottery commissions challenged the DOJ after enacting laws to enable virtual lottery tickets to be electronically delivered to computers or mobile phones.⁵² Illinois and New York specifically asked the DOJ whether the Wire Act and the UIGEA prohibited the transmission of lottery data from “in-state ticket sales to out-of-state transaction processors.”⁵³

The 2011 DOJ opinion clarified that the provisions of the Wire Act only applied to transmissions of wire communications related to “sporting events or contests.”⁵⁴ Thus, the transfer of information from a lottery ticket purchaser to out-of-state servers fell outside the purview of the Wire Act.⁵⁵ Interestingly, the DOJ declined to address the underlying conflict with the UIGEA, stating “we have not found it necessary to address the Wire Act’s interaction with UIGEA, or to analyze the UIGEA in any other respect.”⁵⁶

As a result, state lotteries created out-of-state servers for multi-jurisdictional games to transmit an individual player’s information.⁵⁷ Lotteries began to create “super” data centers across state lines allowing for ticket sales and instant winners to be validated.⁵⁸ Because the state lotteries were considered non-sports wagers, the state lotteries, internet gambling operators,

⁵¹ *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processor to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 8, §I-1 (2011); see also *N.H. Lottery Comm’n v. Rosen*, No. 19-1835, 2021 U.S. APP. LEXIS 1526, at *46 (1st Cir. Jan. 20, 2021) (clarifying that the Wire Act applies only to interstate wire communication related to sporting events or contests, not statewide lottery systems).

⁵² *Id.* at § I-1.

⁵³ *Id.*

⁵⁴ Transmission of wagering information; penalties, Pub. L. No. 103-322, § 18 U.S.C.S. § 1084(a), 256-57 (1994).

⁵⁵ *N.H. Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132, 153 (D.N.H. 2019).

⁵⁶ *Id.* at §I-1.

⁵⁷ Mark Hichar & Erica Okenberg, *The New Hampshire Lottery Sues to Restore the DoJ’s 2011 Opinion that the Wire Act Applies Only to Sports Betting*, PUBLIC GAMING INTERNATIONAL, Mar-Apr 2019, at 64, 65.

⁵⁸ *Id.* at 64.

and payment processors operated under the assumption that the interstate transfer of wired information could not be prosecuted under the Wire Act.⁵⁹

In an unprecedented reversal of the 2011 DOJ opinion, the DOJ opined in 2018 that the Wire Act applied to all forms of internet gambling, as opposed to solely sports gambling.⁶⁰ The 2018 opinion was immediately controversial to state lotteries and online poker companies operating under the 2011 analysis of the Wire Act.⁶¹ Based on a narrow grammatical analysis, the 2018 DOJ opinion applied the Wire Act to all types of internet gambling, as opposed to solely sports gambling.⁶² Under this interpretation, state lottery's interstate transmission of information to out-of-state processors would be deemed illegal under the Wire Act.⁶³

As a result, the New Hampshire Lottery Commission filed suit in the U.S. District Court of New Hampshire to set aside the DOJ's 2018 interpretation.⁶⁴ New Hampshire specifically found the 2018 Opinion to be incongruous with the legislative history and Congressional intent of the Wire Act.⁶⁵ Instead, "limiting the entire section [§ 1084(a)] to sports gambling renders the statute coherent and makes the 2011 Opinion the better reading of the text," and the DOJ's support for interstate lottery ticket purchases further clouded the interpretation of the Wire Act.⁶⁶ In 2021, the 1st Circuit Court of Appeals agreed with this limited interpretation of the Wire Act when directly addressing the conflicting DOJ opinions.⁶⁷

In a direct challenge to the uncertainty suggested by the DOJ opinions, the New Hampshire Lottery Commission challenged the applicability of §1084 to state lottery wagering

⁵⁹ *Id.* at 65.

⁶⁰ Benjamin William Perry & Alex McFall, *Gambling on a DOJ Enforcement Action: State of the Wire Act*, BRADLEY ARANT BOULT CUMMINGS, LLP (Aug. 1, 2019), <https://www.financialservicesperspectives.com/2019/08/gambling-on-a-doj-enforcement-action-state-of-the-wire-act/> [<https://perma.cc/7SY-Y-SFM2>].

⁶¹ *See generally id.*

⁶² *Id.* at ¶ 3.

⁶³ *Id.*

⁶⁴ *Id.*; N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132, 153 (D.N.H. 2019).

⁶⁵ Perry, *supra* note 60, at ¶ 3.

⁶⁶ *Id.* at 152–53.

⁶⁷ *See* N.H. Lottery Comm'n v. Rosen, No. 19-1835, 2021 U.S. App. Lexis 1526 (1st Cir. Jan. 20, 2021).

using wire transmission.⁶⁸ Based on the “unharmonious oddities” of the broad interpretation of §1084 suggested by 2018 DOJ opinion, the 1st Circuit ruled that the Wire Act is limited to bets or wagers on sporting events or contests.⁶⁹ While the 1st Circuit opinion focused on state lottery operators, the narrow interpretation of the Wire Act is favorable for the gaming industry as a whole.⁷⁰ Many experts are hopeful that the 1st Circuit opinion will be the first of many favorable rulings for the gambling industry this year, particularly since the ADW platforms could represent a source of tax revenue in the midst of the COVID-19 economic hardships.⁷¹

While the DOJ’s conflicting opinions primarily affect state lotteries and non-sport gambling across state lines, the uncertainty surrounding the application of the Wire Act remains.⁷² If the Wire Act applies to the transfer of all wired information associated with sports wagering, does this impact ADW across state lines? While ADW platforms clearly operate under this assumption, the 2000 IHA amendment, permitted through the “sense of Congress” in the UIGEA, is still vague on the legality of the interaction.⁷³ Further, because the IHA only permits ADW when the bet is legal in both the state where the bettor is located and the state where the bet was placed, discrepancies in state laws leave financial institutions and ADW platforms weary of prosecution under the Wire Act.⁷⁴

II. ADW LEGALITY BASED ON VARIOUS STATE LEGISLATION

Despite the clouded interaction of federal legislation permitting the interstate transmission of horse gambling information, states are granted the regulatory power to permit or prohibit ADW from out-of-state or off-track gambling websites

⁶⁸ *Id.*; 18 U.S.C.S. § 1084(a).

⁶⁹ *N.H. Lottery Comm’n*, 2021 U.S. App. Lexis 1526, at *5, *34.

⁷⁰ Sarah Slone Reeves ET AL., *A Win for Online Gaming: Federal Court Rejects DOJ’s Broad View of Wire Act*, STOLL KEENON OGDEN, PLLC (Jan. 29, 2021), <https://www.skofirm.com/publications/a-win-for-online-gaming-federal-court-rejects-doj-s-broad-view-of-wire-act/> [<https://perma.cc/M824-5MNE>].

⁷¹ *Id.*

⁷² *See generally id.*

⁷³ Egan, *supra* note 43.

⁷⁴ Turner, *supra* note 23; 15 U.S.C.S. § 3002; Paulick, *supra* note 50.

through the 2000 IHA Amendment.⁷⁵ The regulatory power of each individual state to legalize horse gambling within their borders is not disputed based on the language in 15 U.S.C.S. § 3001.⁷⁶ Despite the blanket authority to permit or prohibit such gambling, a cross-state analysis of specific state statutes displays a spectrum of legislation that either grants, forbids, or is silent on the ability to wager through ADW platforms. This gray area indicates the need to clarify the legality of ADW for gamblers, payment processors, and ADW platforms.

A. Strictly Prohibitive: Texas Legislation

Texas is a prime example of a state which historically rejects off-track gambling, as made evident in the 2019 Texas Racing Act, passed as a recodification of the original 1986 Texas Racing Act.⁷⁷ By explicitly stating “wagering may be conducted only by a racetrack association within the racetrack’s enclosure,” the 2019 Texas Act prevents ADW platforms from operating within the state, and prohibits gamblers from placing wagers on other simulcast races off-track.⁷⁸ Furthermore, the Act prohibits accepting wagers by phone or Internet conducted inside or outside of the state from a person in the state.⁷⁹ Specifically noting “*only a person inside* an enclosure where both live and simulcast race meetings are authorized” may wager.⁸⁰ The Legislature explicitly stated its intent to prohibit telephone or online wagering by citizens inside or outside the state unless authorized under the original Texas Racing Act.⁸¹

As a result, Texas residents are required to bet in-person, and ADW platforms are prohibited from providing services to Texas residents.⁸² Churchill Downs challenged the Texas legislation, claiming discrimination under the dormant commerce

⁷⁵ 15 U.S.C.S. § 3002.

⁷⁶ 15 U.S.C.S. § 3001.

⁷⁷ See TEX. OCC. CODE ANN. § 2021-35 (West 2020) (noting that the 2019 Texas Racing Act is intended as a codification of the original 1986 Texas Racing Act with no intention to change the substantive law); TEX. REV. CIV. STAT. ANN. art. 179e, §§11.01-05 (West 2020).

⁷⁸ TEX. OCC. CODE ANN. §2021-35 (West 2020).

⁷⁹ *Id.*

⁸⁰ *Id.* (emphasis added).

⁸¹ Paulick, *supra* note 2.

⁸² *Id.*

clause.⁸³ Texas' prohibition of online, off-track gambling, however, was upheld.⁸⁴ The Appellate Court's ruling further affirmed the state's ability to forbid its citizens from using ADW platforms as described in the 2000 IHA Amendment.⁸⁵

B. Enabling Operations: Oregon Legislation

Conversely, several states have adopted a bright line rule permitting ADW platforms to operate within the state.⁸⁶ Because of these favorable conditions, many ADW platforms select to be licensed in such states that clearly enable ADW platforms to legally operate.⁸⁷ Oregon, for example, explicitly grants the Oregon Racing Commission to "authorize and license multi-jurisdictional simulcasting and interactive wagering totalizator hubs to conduct simulcast broadcasting of and mutual wagering on animal races."⁸⁸

If licensed by the Oregon Racing Commission, ADW operators are granted the ability to provide services to both Oregon residents and out of state residents residing in states enabling such gambling.⁸⁹ For example, Churchill Downs' ADW platform (Twinspires.com) is licensed in Oregon likely because of the state's explicit language permitting gambling operations.⁹⁰ Other states similarly permit the operation of ADW platforms which enable citizens from roughly thirty states to gamble across state lines using popular ADW sites like Twinspires.com.⁹¹

C. Gray Area: Delaware, Ohio, and (Formerly) Kentucky Legislation

While ADW platforms provide services to citizens in roughly thirty states, not every state's legislation resembles the concrete language specified in Texas's prohibitive legislation or

⁸³ Churchill Downs Inc. v. Trout, 589 F. App'x 233 (5th Cir. 2014).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, OR. REV. STAT. ANN. § 462.725.

⁸⁷ *See, e.g.*, OR. REV. STAT. ANN. § 462.725.

⁸⁸ OR. REV. STAT. ANN. § 462.725.

⁸⁹ *Id.*

⁹⁰ *See generally id.*

⁹¹ Rose, *supra* note 39.

Oregon's enabling statutes.⁹² Even though some ADW platforms continue to operate in such states, the specific legal protection enabling services is sometimes based on an assumption in state legislations.⁹³ The uncertainty of unspecified legislation leaves individual gamblers, ADW operators, and payment processors in a state of apprehension.⁹⁴

i. Delaware legislation

Currently, the explicit language regarding the legality of off-track gambling in Delaware's legislation and Delaware's Constitution are contingent on a legal fiction. Nonetheless, ADW platforms continue to provide services within Delaware.⁹⁵ The specific language of Delaware's legislation authorizes pari-mutuel wagering, so long as the gambler is "within the enclosure" of a licensed horse racing operator.⁹⁶ Moreover, the Delaware Constitution prohibits all gambling, unless "within the enclosure of any racetrack licensed under the laws of the State to receive and accept wagers or bets on electronically televised simulcasts of horse races."⁹⁷

Despite the "within the enclosure" requirement, ADW has yet to be challenged by the Delaware court system, and Delaware citizens continue to gamble through ADW platforms.⁹⁸ It is clear a gambler placing an off-track bet through an ADW platform is not physically "within the enclosure" of the host-track.⁹⁹ Yet, the legal fiction of this online wagering system is seemingly permitted under the status quo.¹⁰⁰ Despite the popularity of ADW, there is no direct mention of ADW in Delaware's legislation or Delaware's constitution.¹⁰¹ The apparent disconnect between the dated legislation and modern form of internet gambling should

⁹² *See id.*

⁹³ Egan, *supra* note 43.

⁹⁴ *Id.*

⁹⁵ Rose, *supra* note 39; *See also* TWINSPIRES.COM, *Frequently Asked Questions* <https://www.twinspires.com/generalfaq> [<https://perma.cc/WT4D-X4ZD>] (last viewed Oct. 22, 2019).

⁹⁶ DEL. CODE ANN. tit 3 § 10161 (West 2020).

⁹⁷ DEL. CON. art. 2 § 17

⁹⁸ DELAWARE ONLINE BETTING, *Delaware Horse Racing Betting* [<https://perma.cc/M45V-EUZZ>].

⁹⁹ *See generally id.*

¹⁰⁰ *See generally id.*

¹⁰¹ *See generally id.*

act as an impetus for states like Delaware to provide a clear stance on the legality of ADW.

ii. Ohio legislation

Ohio's legislation is also unconvincing when defining the ability for ADW platforms to operate within the state.¹⁰² Ohio's specific language grants pari-mutuel wagering for live racing and simulcast racing by licensed permit holders. Nonetheless, the legislation is silent on exactly what permits ADW platforms to provide services within Ohio.¹⁰³ As a result, Ohio gamblers utilize ADW through ADW platforms, yet have no tangible legal protection to support their actions.¹⁰⁴ Ohio's Attorney General recently requested clarity on the statute, claiming the statute is "confusing to read...[and] does not specifically allow or prohibit the wager on horse races through ADW companies."¹⁰⁵ Considering an estimated \$100 million per year of ADW comes from Ohio residents, the non-existent regulations are a growing concern for Ohio gamblers, ADW processors, and even the Ohio Attorney General.¹⁰⁶

Additionally, specific regulation of ADW through a legislative amendment may also introduce a standardized state tax on ADW wagers.¹⁰⁷ This tax would provide an additional source of revenue and incentivize states to regulate and monitor ADW processing within states that have vague legislation in this area.¹⁰⁸ Part III of this Note addresses a more in-depth proposal for specific language and a withdrawal system that could be implemented to update vague state legislation and capitalize on this potential source for state revenue.

¹⁰² OHIO REV. CODE ANN. § 2769.08 (West 2020).

¹⁰³ *Id.*

¹⁰⁴ Legality of Horse Race Betting Services, Op. Oh. Att'y Gen. (2017) [<https://perma.cc/M4YC-BZF7>].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Legality of Horse Race Betting Services, Op. Oh. Att'y Gen. (2017) [<https://perma.cc/M4YC-BZF7>]; Rose, *supra* note 34.

iii. Kentucky legislation

Historically, Kentucky was quite similar to Delaware and Ohio in that explicit permission for ADW was not supported by legislation.¹⁰⁹ Kentucky legislation vests regulatory power to the Kentucky Racing Commission for rules and regulations of the horse racing industry, which now has provided reasonable guidance on ADW; however, this was not always the case.¹¹⁰ In 1982, Kentucky's Attorney General filed an opinion in reference to KRS 230.361(1), stating:

Pari-mutuel wagering may be conducted only by a licensed racing association holding a race, and only on that association's "licensed premises" or "within the enclosure" where the race is being held.¹¹¹

Conversely, the state legislation adjusted its approach to the location-specific requirement in a 1988 legislative session, by authorizing telephone account wagering and interstate simulcasting of races.¹¹² Specifically, a 1992 amendment to KRS 230.279 eliminated the "within the track enclosure" requirement, stating:

A track may engage in telephone account wagering, if all moneys used to place telephone account wagers are on deposit in an amount sufficient to cover the wagers at the track where the account is opened.¹¹³

While the 1982 Attorney General Opinion cited the "within the enclosure" requirement, the Attorney General clarified in 2004 that KRS 230.361(1) should not be construed as prohibiting activities permitted by this section.¹¹⁴ Therefore, account wagering via telephone or the internet are currently

¹⁰⁹ KY. REV. STAT. ANN. § 230.260 (West 2020).

¹¹⁰ KY. REV. STAT. ANN. § 230.260 (West 2020).

¹¹¹ Legality of Horse Race Betting Service 04 Op. Ky. Att'y Gen. 005 (2004).

¹¹² Legality of Horse Race Betting Service 04 Op. Ky. Att'y Gen. 005 (2004).

¹¹³ KY. REV. STAT. ANN. §230.379 (West 2020).

¹¹⁴ Legality of Horse Race Betting Service 04 Op. Ky. Att'y Gen. 005 (2004).

permitted in Kentucky.¹¹⁵ Kentucky, unlike Ohio, specifically addressed the “legal fiction” of enabling an ADW to operate “within the enclosure” by adjusting their legislation accordingly.¹¹⁶ However, in states where legislation is silent or vague on ADW (like in Ohio and Delaware), the legal fiction that an ADW bet takes place within the enclosure will continue to be assumed.¹¹⁷

D. Modification Adding Clarity: Indiana and Minnesota Legislation

While some states have yet to introduce effective amendments to their pari-mutuel racing legislation, several states such as Indiana and Minnesota) have recently updated their legislation to account for the growing usage of ADW.¹¹⁸ Indiana’s former governor Mike Pence vetoed Indiana’s first attempt to legalize ADW in 2015.¹¹⁹ However, Indiana shifted its stance in favor of ADW in 2017 by updating legislation with concrete provisions and specific requirements for ADW platforms to operate.¹²⁰ ADW platforms operating in Indiana are subject to conditions including written contracts with local racetracks, application fees, age verification, and recordkeeping as required by the Indiana Horse Racing Commission.¹²¹ Specific withholdings are described, including an ADW fee equal to sixty percent of the net source market fee in the legislation.¹²²

Furthermore, the added legislation also defines specific tax provisions for ADW platforms to withhold from the total handle.¹²³ Such provisions include a 2.5 percent tax on “total amount of money wagered on simulcasts at satellite facilities,

¹¹⁵ *Id.*

¹¹⁶ *See generally id.*

¹¹⁷ *See generally* OHIO REV. CODE ANN. § 2769.08 (West 2020); *see generally* DEL. CODE ANN. tit. 3, § 10161 (West 2020).

¹¹⁸ IND. CODE § 41-31-7.5-9; MINN. STAT. ANN. § 240.131 (West 2020).

¹¹⁹ *Indiana Horse Racing Betting*, INDIANABETTING.com, <https://www.indianabetting.com/racing/> [<https://perma.cc/UGV7-GLB9>] (last viewed Nov. 7, 2020).

¹²⁰ *See id.*

¹²¹ *Id.*; IND. CODE ANN. § 4-31-7.5-9 (2018).

¹²² *See* IND. CODE ANN. § 4-31-7.5-18(A-B) (2017) (defining “net source market fee” as the difference between the amount of the source market fee received by a permit holder from a licensed SPMO (Secondary Pari-mutuel Organization) minus the amount of expenses incurred by the permit holder under this chapter).

¹²³ IND. CODE ANN. § 4-31-9-1.5 (2016).

regardless of whether those simulcasts originate from Indiana or another state.”¹²⁴ The updated legislation enables the gambling funds from those simulcasts to be incorporated back into the state through a tax provision.¹²⁵

Minnesota similarly updated its legislation to support and improve the horseracing industry through increased regulation of wagers processed through ADW platforms.¹²⁶ Like Indiana, Minnesota’s legislation explicitly authorizes ADW platforms to provide services within the state.¹²⁷ However, each ADW operator is subject to an established contract with licensed racetracks, a plan of operation verified by the Minnesota Racing Commission, and source market fees to be paid to the commission.¹²⁸ Additionally, Minnesota requires a regulatory fee equal to 1.0 percent of all amounts wagered by Minnesota residents with the authorized ADW provider, and a breeders’ fund fee equal to 0.25 percent of all amounts wagered by Minnesota residents with the authorized ADW provider.¹²⁹

The increased regulation not only benefits the individual gambler by granting explicit access to off-track gambling, but it also allows the state and the industry to share in the increased amount of money wagered through withdrawals and tax revenues.¹³⁰ The Minnesota Racing Commission and the individual horse owners are able to participate in the increased handle associated with ADW through this withdrawal structure.¹³¹ Explicit terms in Minnesota’s legislation effectively redistribute the total ADW handle throughout the state, ensuring the state and industry partially benefit from a higher handle through their respective fees.¹³²

Indiana and Minnesota’s legislative updates provide an effective model for other states to implement to take advantage of ADW platform’s popularity.¹³³ By mandating a specific withdrawal system from the total ADW handle, other states can

¹²⁴ IND. CODE ANN. § 4-31-9-3 (2016).

¹²⁵ *See generally* IND. CODE ANN. § 4-31-9-3 (2016).

¹²⁶ *See* MINN. STAT. ANN. § 240.15 (West 2019).

¹²⁷ MINN. STAT. ANN. § 240.131 (West 2019).

¹²⁸ MINN. STAT. ANN. § 240.131 (West 2019).

¹²⁹ MINN. STAT. ANN. § 240.131 (West 2019).

¹³⁰ MINN. STAT. ANN. § 240.131 (West 2019).

¹³¹ MINN. STAT. ANN. § 240.131 (West 2019).

¹³² MINN. STAT. ANN. § 240.131 (West 2019).

¹³³ *See generally* IND. CODE ANN. § 4-31-9-1.5 (2016); *see generally* MINN. STAT. ANN. § 240.131 (West 2019).

improve their fiscal policy in an area that is generally untaxed. States not requiring such a regulated tax, yet allow for out-of-state ADW platforms to transmit wagers, are simply missing out on the opportunity to receive additional state revenue associated with off-track gambling.

III. PROPOSAL TO CLARIFY ADW LEGALITY

While off-track gambling through ADW accounts for roughly ninety percent of all horseracing wagers throughout the United States, the specific federal and state legislation that legally support ADW platforms is unclear.¹³⁴ To remedy the inconsistencies throughout legislation for ADW, both the federal government and individual states should consider implementing more explicit language to discern whether citizens have the ability to gamble across state lines through ADW platforms. Specifically, an IHA amendment to reiterate the legality of ADW (despite the conflicting phrasing of the UIGEA) will clarify the legality of off-track betting, given individual state approval.

To ensure the legality of such interstate gambling, individual states must also explicitly discern whether or not to prohibit ADW within the state. A concrete amendment to state legislation will help eliminate the gray area, or legal fiction, that ADW platforms and individual gamblers are operating “within the enclosure” of the host track. Moreover, specific legislation containing withdrawals based on the total ADW handle will hopefully benefit the individual states and industry as a whole. Finally, to encourage cooperation among horsemen, state legislatures should consider administering an official allocation of the total ADW handle to be distributed back to the horsemen themselves. This additional withdrawal will help calm horsemen’s growing concern that ADW operators are retaining a higher proportion of the takeout rate associated with horseracing’s pari-mutuel structure.¹³⁵

¹³⁴ Egan, *supra* note 43.

¹³⁵ See *Takeout 201 – Rebating*, THOROUGHBRED IDEA FOUND. (Mar. 8, 2019), <https://racingthinktank.com/blog/takeout-201-rebating> [<https://perma.cc/Z8KR-PK3C>].

A. Federal Clarification

Current federal legislation pertaining to interstate horseracing gambling and ADW platforms (as described in Part II of this Note) represents a mixed bag of gambling statutes enacted as technology has improved, and online gambling has increased in popularity.¹³⁶ The interplay between the Wire Act, the 2000 IHA Amendment, and the UIGEA appears to legally grant “interstate off-track 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.”¹³⁷ However, the conflicting language in the UIGEA “prohibiting unlawful internet gambling” leaves businesses and ADW platforms liable for knowingly accepting money from illegal gambling.¹³⁸

Despite Congress’s stance prohibiting illegal gambling, the question remains whether ADW platforms operating in states with vague legislation constitutes unlawful internet gambling that would subject ADW platforms and financial institutions to prosecution. An amendment to the IHA will encourage states to update their own legislation and remove the uncertainty of liability for ADW platforms. While it is not the “sense of Congress” for the UIGEA to impact the legality of off-track horseracing gambling, definitive language should be added to the IHA addressing the prevalence of ADW across state lines.¹³⁹ The amendment should remove liability from ADW platforms and financial institutions for their involvement in ADW processing if operating in a state who does not explicitly prohibit ADW in its legislation.

Although the right to prohibit or enable ADW is reserved for individual states by the IHA, Congress should shield ADW platforms from liability if operating in a state who has yet to determine a firm stance on the operation of such gambling.¹⁴⁰ This added language is likely congruent with the intentions of Congress in the initial 2000 IHA amendment, which permitted

¹³⁶ See generally 15 U.S.C.A. § 3002 (2000).

¹³⁷ 15 U.S.C.A. § 3002 (2000).

¹³⁸ *Unlawful Internet Gambling Act of 2006 Overview*, FDIC.GOV, <https://www.fdic.gov/news/financial-institution-letters/2010/fil10035a.pdf> [<https://perma.cc/8CWS-VKX2>] (last viewed Oct. 6, 2020).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

interstate off-track wagering with state approval.¹⁴¹ The IHA amendment will hopefully incentivize states to take a firm stance on whether ADW is prohibited or permitted.

An IHA amendment will also help clarify the DOJ's conflicting opinions on the legality of the interstate transmission of gambling information (specifically relating to horseracing) as described in the Wire Act.¹⁴² Even though the 1st Circuit narrowed the application of the Wire Act to sporting events and contests, uncertainty remains surrounding the Wire Act's application to ADW platforms from state to state.¹⁴³ By explicitly granting the ability to create out of state servers and super-data hubs to operate ADW platforms, an IHA amendment will help clear a relatively murky area of the law and will formalize the apparent exception to the Wire Act which enables ADW platforms to transfer information associated with horseracing wagering across state lines.

The following proposed amendment would be included in 15 U.S.C.S. §3001:

(c) It is the policy of Congress hereby establishes and permits the legal transmission of horseracing gambling information relating to interstate, off-track Advance-Deposit Wagering ("ADW") platforms. Notwithstanding, States retain the reserved right to prohibit such action as a matter of public policy. The following conditions apply:

(i) Each respective State retains the ability and primary responsibility to permit or prohibit respective forms of gambling within their borders,

(ii) Each respective State retains the right to permit or prohibit registered ADW platforms from operating within each respective state

(ii) Registered ADW platforms and Financial Institutions shall not be subject to the damages described in 15 U.S.C.S. § 3005

¹⁴¹ *Id.*

¹⁴² Perry, *supra* note 60; 18 U.S.C.S. § 1084(a).

¹⁴³ Perry, *supra* note 60; *N.H. Lottery Comm'n*, 2021 U.S. App. Lexis 1526, at *5.

in the event that an individual State Legislature fails to explicitly permit or prohibit the usage of off-track, simulcast horseracing gambling through registered ADW platforms.

The proposed amendment to 15 U.S.C.S. §3001 resolves the apparent gray area that the Wire Act, the IHA, and the UIGEA have created. With concrete language explicitly addressing ADW and reserving the state's ability to prohibit interstate, off-track gambling, the §3001 amendment solidifies the "sense of Congress" into concrete language. Further, the proposed amendment will hopefully spur states to update their own legislation to specifically address and regulate the usage of ADW platforms within their borders.¹⁴⁴

B. Updating State Legislation

As discussed in Part II, state legislation varies greatly in the treatment of off-track gambling. Because states retain the primary responsibility to determine what forms of gambling are permitted within their borders, the complete prohibition of ADW is a power reserved for states.¹⁴⁵ Conversely, states maintain the ability to permit ADW platforms to operate within the state.¹⁴⁶ However, the specific legislation for individual states (e.g. Delaware, Ohio) is vague or even silent on its treatment of ADW.¹⁴⁷ The Federal clarification suggested in Part III, Section A will hopefully incentivize states to update their own legislation to explicitly permit or prohibit off-track gambling through registered ADW platforms.

States who have yet to establish a definitive approach to regulate ADW should look to implement similar legislation as Indiana and Minnesota, whose respective legislation explicitly permits the usage of ADW

¹⁴⁴ 31 U.S.C.S. § 5362.

¹⁴⁵ 15 U.S.C.S. § 3001; TEX. REV. CIV. STAT. ANN. art. 179e, §§ 11.01, 11.011, 11.04, 11.05.

¹⁴⁶ See generally 15 U.S.C.S. § 3001; TEX. REV. CIV. STAT. ANN. art. 179e, §§ 11.01, 11.011, 11.04, 11.05.

¹⁴⁷ 3 Del. C. § 10161; IND. CODE ANN. § 4-31-7.5-9 (2020); MINN. STAT. ANN. § 240.131 (West 2020).

in concrete language.¹⁴⁸ Moreover, requirements to become a licensed ADW platform are included in the legislation, as well as conditions to ensure coordination with each state's respective Racing Commission.¹⁴⁹ Most importantly, Indiana and Minnesota have a series of withdrawals and taxing schemes to ensure the state and the horsemen (e.g. jockeys, owners, trainers) share in the increased usage of ADW.¹⁵⁰ By enforcing a regulatory fee on all amounts wagered through ADW, a breeders' fund fee of the total ADW handle, and a standardized state tax on all wagers on simulcast at satellite facilities, states can effectively participate in the increased handle wagered through ADWs across the state.¹⁵¹

Updated state legislation will also validate the legal fiction that ADW platforms are somehow operating "within the enclosure" as several states require. By modifying the language of state legislation to outright permit or prohibit ADW, states may resolve the inherent assumption that a gambler is somehow "within the enclosure" of a licensed horse racing operator.¹⁵² As the trend for ADW and off-track gambling continues to rise, states will hopefully be encouraged to update their current legislation to potentially benefit through withdrawals based on the total ADW handle.¹⁵³ Tax revenue generated through ADW platforms could be a valuable source of income for state and local governments, particularly since COVID-19 restrictions have limited in-person attendance and individual gamblers rely on ADW platforms to place wagers.

C. State Legislation to Mandate Takeout Rate in Favor of Horsemen

As described previously, the exact payout structure and calculation of ADW handles varies across the nation

¹⁴⁸ IND. CODE ANN. § 4-31-7.5-9; MINN. STAT. ANN. § 240.131.

¹⁴⁹ IND. CODE ANN. § 4-31-7.5-9; MINN. STAT. ANN. § 240.131.

¹⁵⁰ IND. CODE ANN. § 4-31-7.5-9; MINN. STAT. ANN. § 240.131.

¹⁵¹ IND. CODE ANN. § 4-31-7.5-9; IND. CODE ANN. § 4-31-9-3 (2020); MINN. STAT. ANN. § 240.131 (West 2020).

¹⁵² 3 Del. C. § 10161.

¹⁵³ Bethel, *supra* note 11.

depending on state legislation and specific contracts between ADW platforms and host-tracks. With the popularity of online wagers through ADW increases, the ADW platform additionally benefits from a favorable payout structure (commonly referred to as the “takeout rate”) that a traditional host-track is unable to recover.¹⁵⁴ The pari-mutuel betting scheme specifically favors ADW platforms due to the adjustment in takeout rates and margins associated with on-track and off-track gambling.¹⁵⁵

i. Takeout rates and payout structure

For each horseracing wager, an associated “takeout rate” is deducted from each wager.¹⁵⁶ The takeout rate (generally about twenty percent) represents the cut of the total handle that the racetrack and horsemen (e.g. jockeys, owners, trainers) are able to receive.¹⁵⁷ In other words, this takeout represents the amount of money retained by the racetrack to “put on the show.”¹⁵⁸ Generally half the takeout goes to the racetrack to help fund operations, pay staff, and maintain the grounds while the horsemen receive the other half; however, these amounts vary by state and track operator.¹⁵⁹ While this seems like an appropriate payout structure for both the track and horsemen to benefit from higher handles, the payout structure is disproportionate when wagers are placed off-track through ADW platform.¹⁶⁰

When an online wager is placed through an ADW platform, the allocation of the twenty percent takeout rate varies significantly.¹⁶¹ The owners of the ADW platforms will usually have to pay an operating fee to the host-track represented by roughly five percent of the wager.¹⁶² The host-track is then forced to split the five percent among the appropriate horsemen for each

¹⁵⁴ *Takeout 101*, THOROUGHBRED IDEA FOUND. (Jan. 29, 2019), <https://racingthinktank.com/blog/takeout-101> [<https://perma.cc/2WQ2-NLAL>].

¹⁵⁵ *Takeout 201 – Rebating*, *supra* note 135.

¹⁵⁶ *Takeout 101*, *supra* note 154.

¹⁵⁷ *Takeout 201 – Rebating*, *supra* note 135.

¹⁵⁸ *Takeout 101*, *supra* note 154.

¹⁵⁹ Turner, *supra* note 13; *Takeout 201 – Rebating*, *supra* note 135.

¹⁶⁰ *Takeout 201 – Rebating*, *supra* note 135.

¹⁶¹ *Id.*

¹⁶² *Id.*

respective race.¹⁶³ This operating fee is based on the individual contracts between ADW platforms and host racetracks.¹⁶⁴ Host racetracks welcome ADW platforms as a way to improve handle and popularity among the sport.¹⁶⁵ Yet, the cut of the handle received by the host racetrack and horsemen is significantly reduced when wagers are placed through ADW platforms.¹⁶⁶

Since bets placed through ADW platforms avoid the overhead costs associated with operating a racetrack, the ADW benefits from higher margins compared to host racetracks.¹⁶⁷ Additionally, the ADW platform is able to retain a larger proportion of the takeout rate, primarily at the expense of the host racetrack and horsemen themselves.¹⁶⁸ Since the ADW platform does not have to specifically appease the horsemen at host-tracks, there is no need for a significant allocation of the takeout rate to directly be allocated to them¹⁶⁹ That burden is instead placed on the host-track, which explains why the proportion of the takeout rate for horsemen is higher for on-track wagers as opposed to off-track wagers.¹⁷⁰

The misallocation of the takeout rate between the host-track and an ADW platform further explains why ADW platforms are able to offer rebates for high volume gamblers.¹⁷¹ With higher margins and a larger retention of the takeout rate, ADW platforms incentivize bettors to gamble through their app or website by rewarding funds for larger amounts of money wagered.¹⁷² In hindsight, the increased amount of money wagered through ADW platforms should boost handles nationwide and benefit all stakeholders of the horseracing industry.¹⁷³ In reality, the ADW payment structure system instead allows ADW platforms to dictate how much of the actual handle specific host-racetracks and horsemen are able to receive for every dollar gambled.¹⁷⁴

¹⁶³ *Id.*

¹⁶⁴ Turner, *supra* note 13.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Turner, *supra* note 23.

¹⁷¹ *See generally* Turner, *supra* note 13.

¹⁷² *See generally id.*

¹⁷³ *See generally id.*

¹⁷⁴ *See generally id.*

ii. A need for change

For an ADW operator, the adjusted allocation of the overall takeout rate is lucrative and an effective method to incentivize high volume gambling.¹⁷⁵ Some racetracks, like Churchill Downs, are able to capitalize on the ADW's higher profitability by owning and operating an ADW as a subsidiary (i.e. Twinspires.com).¹⁷⁶ This favorable payout structure enables Churchill Downs to benefit from wagers placed off-track, while also encouraging on-track wagers.¹⁷⁷ Churchill Downs in particular received record handles through online wagers this past year, with the handle from its ADW platform increasing over twenty percent during the 2019 Kentucky Derby.¹⁷⁸

As described previously, the payout structure of an ADW platform effectively reduces the amount of handle that is redistributed to the host-track and horsemen themselves. For Churchill Downs (as owner of Twinspires.com), the smaller percentage returned to the host-track as a result of ADW is likely overlooked due to the subsidiary's large upside. As a result, the horsemen, who receive a comparatively smaller amount of the handle through ADW, are left hobbled by online wagering.¹⁷⁹ One could imagine that the effect of this take-out rate discrepancy is further exaggerated when the host-track is paying a fraction of its ordinary operating expense (as is the case during a global pandemic, in which in-person attendance is limited).

The unfortunate result of this payout structure is the exact opposite of what the IHA amendment originally intended.¹⁸⁰ By granting pari-mutuel wagering across state lines, Congress and the horseracing industry hoped to effectively raise handle and benefit all stakeholders involved.¹⁸¹ Instead of protecting the

¹⁷⁵ *See generally id.*

¹⁷⁶ Ray Paulick, *2019 Kentucky Derby Sets All-Time Handle Records: \$4.1 Million Wagered in Japan*. PAULICK REP. (May 4, 2019, 11:23 PM), <https://www.paulickreport.com/news/the-biz/2019-kentucky-derby-sets-all-time-handle-records-4-1-million-wagered-in-japan/> [https://perma.cc/2QTL-9L57].

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ Turner, *supra* note 23.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

interests of all, however, the IHA and current payout structure for ADW platforms have prevented a uniform approach to the detriment of horsemen.¹⁸² Due to the competing interests of stakeholders within this deeply divided industry, the financial benefit of increased wagering through ADW marginally passes on to the horsemen.¹⁸³ After all, the horsemen themselves are the primary individuals responsible for the longevity of the sport. But if the trend towards ADW persists, the benefit for the horsemen will likely continue to dwindle under the current takeout structure.¹⁸⁴

Therefore, an adjustment to the unintended consequences of the IHA and the spread of online gambling is needed.¹⁸⁵ Specific state legislation can address the disproportional allocation of the takeout rate, by specifically mandating the percentage of ADW handle reserved for the host-track and horsemen.¹⁸⁶ A payout structure addressing all stakeholders within the horseracing industry ensures each respective parties' interests are aligned. For example, the Thoroughbred Owners of California mandates the allocation of the takeout rate for wagers placed through ADW platforms.¹⁸⁷

In California, specific percentages of the total ADW handle are reserved for the horsemen, such as a "backstretch fee" for host-tracks, location fees to cover operation costs, and trainer fees associated with the race.¹⁸⁸ Such allocations of the associated takeout rate can help ensure horsemen equally benefit from wagers placed through ADW platforms. Without such a mandated takeout rate in other states, the horsemen will continue to be undercompensated by the current ADW payout structure.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Turner, *supra* note 13.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Who Gets What: Where the Wagering Dollar Goes*, THOROUGHBRED OWNERS OF CALIFORNIA (2016), <https://www.toconline.com/wp/wp-content/uploads/2016/02/WhoGetsWhatSingles.pdf> [<https://perma.cc/B33N-HV8S>]

¹⁸⁸ *Id.*

iii. The impact of COVID-19

At the time of this Note, the global pandemic of COVID-19 has swept across the globe and disrupted nearly every aspect of society. The deadly and highly contagious virus directly impacted the horseracing industry, with closed racetracks, furloughed employees, and shuttered casinos.¹⁸⁹ While some federal stimulus packages provide short-term relief for furloughed employees and other small businesses associated with the sport, the financial impact on the horseracing industry is projected to cost millions of dollars in losses.¹⁹⁰ While horsemen are hopeful there will be additional relief for specific economic sectors (like horseracing) directly affected by the pandemic, the competition for limited federal resources to support a rebound from the economic downturn resulting from COVID-19 will be arduous.¹⁹¹

While the impact of COVID-19 forced many racetracks to suspend operations indefinitely or delay future races, some racetracks began to host races in the latter half of 2020 with no (or limited) attendance for spectators and specific sanitation policies for workers.¹⁹² With no fans in attendance, racetracks depended on ADW platforms to generate enough handle to support the race itself and generate some financial return at a time that would otherwise result in a complete loss. The full impact of running races without fans combined with a handle comprised of entirely ADW is unknown, but there is some evidence that the total handle for comparable races is consistent with previous years for some host tracks.¹⁹³ A logical assumption would indicate that individuals who traditionally bet in-person (with a more favorable takeout rate for horsemen), are now turning to ADW platforms (with a less favorable takeout rate for horsemen) to gamble during the pandemic.¹⁹⁴ The uncertainty surrounding the impact of COVID-19 is still swirling; but with a

¹⁸⁹ Frank Angst, *COVID-19 Impact Costing Racing Millions of Dollars*, BLOODHORSE (Mar. 26, 2020), <https://www.bloodhorse.com/horse-racing/articles/239303/covid-19-impact-costing-racing-millions-of-dollars> [<https://perma.cc/7JMA-NFC7>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (describing that Keeneland Racetrack suspended its Spring Meet in 2020, and Churchill Downs delayed the 146th Kentucky Derby from May 2, 2020 to September 5, 2020).

¹⁹³ *See id.*

¹⁹⁴ *See generally id.*

hesitancy to host races at full capacity, host racetracks may continue to sustain millions of dollars of lost revenue due to COVID-19.¹⁹⁵

If host tracks must continue to operate at limited capacity, then the question remains: Why is ADW not formally legalized across all states? ADW legalization across the country would likely attract new fans, enable gamblers to contribute to a higher handle (even if off-track), and allow host tracks to recover some of the losses associated with COVID-19.¹⁹⁶ The ability to wager “off-track” through an ADW platform in some states not only hinders a casual gambler’s ability to bet on live races but also frustrates the horsemen themselves. The disruption caused by COVID-19 has already hindered owners, trainers, breeders, and fans alike. Why not update State Legislation and boost state revenue by legalizing ADW across state lines?

CONCLUSION

The legal landscape of ADW for interstate, off-track horseracing represents a dated, mixed bag of state and federal legislation. The interaction of the Wire Act, the IHA, and the UIGEA created a vague and inconclusive “sense of Congress” to enable ADW on horseracing.¹⁹⁷ Congress passed the 2000 IHA Amendment with the intent to legalize ADW across state lines, provide greater access for individual gamblers, and raise the overall handle to benefit all stakeholders in the industry.¹⁹⁸ However, the IHA’s application is uncertain due to the lack of concrete state legislative amendments resulting in a legal uncertainty for how exactly ADW platforms are permitted to operate in some states.¹⁹⁹

The inaction by individual states to regulate ADW platforms is concerning for the industry as a whole as an appropriate, standardized takeout rate is lacking throughout the

¹⁹⁵ See Angst, *supra* note 189.

¹⁹⁶ See Frank Bonner II, *COVID-19 is having a major impact on the horse racing industry that will last for years* TULSA WORLD (Apr. 11, 2020), https://www.tulsaworld.com/sports/covid-19-is-having-a-major-impact-on-the-horse-racing-industry-that-will-last/article_ec5ae1c6-2423-5d53-a572-250af35c2bc6.html [https://perma.cc/G4XZ-D2XS]

¹⁹⁷ See 31 U.S.C.S. § 5362 (LEXIS through Pub. L. No. 116–158).

¹⁹⁸ See Turner, *supra* note 13.

¹⁹⁹ See *generally* 31 U.S.C.S. § 5362 (LEXIS through Pub. L. No. 116–158).

country.²⁰⁰ Some state's lack of supervision for ADW platforms is allowing ADW platforms to dictate their own takeout rates, primarily at the expense of the horsemen.²⁰¹ If the popularity of ADW continues to rise, the legal landscape and lack of regulation surrounding takeout rates will negatively impact the future success and longevity of the horseracing industry.

²⁰⁰ *See generally id.*

²⁰¹ *See Turner, supra* note 13.