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NO CONTEST? AN ANALYSIS OF THE LEGALITY OF THOROUGHBRED HANDICAPPING CONTESTS UNDER CONFLICTING STATE LAW REGIMES

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The traditional gaming market-share held by thoroughbred horse race wagering has significantly eroded over the past several years¹ due to the increased availability of mainstream gambling alternatives (i.e. land-based casinos and internet poker rooms).² The popularity and availability of alternative gambling options has forced racing facilities and industry groups to initiate new and innovative methods to maintain customer loyalty and to improve overall marketability.³ Arguably, the most successful of these initiatives to date has been the establishment and continued growth of the Daily Racing Form/NTRA National Handicapping Championship.⁴ The National Handicapping Championship (“NHC”) is the final event in a year-long series of National Thoroughbred Racing Association (“NTRA”) sanctioned handicapping contests and tournaments conducted by numerous “racetracks, casino racebooks, off-track betting facilities and horse racing” websites across North America.⁵ In 2008 alone, more than 100,000 contestants participated in 93 regional qualifying events to earn the

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¹ See, e.g., Ray Paulick, *Handle...It's Worse Than You Think*, THE PAULICK REPORT, Dec. 8, 2008, <http://www.paulickreport.com/blog/handle%E2%80%A6its-worse-than-you-think/> (last visited Feb. 11, 2009) (citing statistics from the Jockey Club Online Factbook).

² See, e.g., Ray Paulick, *Pope's Upside-Down Business Model Proves Hot Topic*, THE PAULICK REPORT, Dec. 20, 2008, <http://www.paulickreport.com/blog/popese-upside-down-business-model-proves-hot-topic/> (last visited Feb. 16, 2009) (contending that many horseplayers feel that the horse racing industry has failed to effectively compete with other forms of gambling).

³ See, e.g., Saviero R. Scheri III, Managing Director, WhiteSand Consulting, Address at the University of Arizona Racing and Gaming Summit: Learning to Compete (Dec. 7, 2004), available at http://cals.arizona.edu/rtip/Symposium/2004/04_transcripts/04tues/learning_compete.pdf; NAT'L THOROUGHBRED RACING ASS'N, STRATEGIC PLAN FOR 2006-2010 (2005), available at http://www.ntra.com/content/StrategicPlan06_10.pdf.

⁴ See *infra* § 1(B).

⁵ Eric Wing, *DRF and NTRA Introduce NHC Tour*, NATIONAL THOROUGHBRED RACING ASSOCIATION, Jan. 16, 2008, <http://www.ntra.com/content.aspx?type=news&id=30412> (last visited Apr. 7, 2009); see also NOEL MICHAELS, *HANDICAPPING CONTEST HANDBOOK: A HORSEPLAYER'S GUIDE TO HANDICAPPING TOURNAMENTS 95-97* (rev. ed. 2005).

opportunity to secure one of approximately 300 qualifying spots in the NHC national finals.⁶ The nationwide appeal of this contest is not without its attendant complications however. Gambling is an area of substantial state regulation, and as such, the legal viability of a given gambling-related activity may differ significantly from state to state⁷—a handicapping contest that is specifically tailored to comply with the laws of one state may constitute a violation of the criminal laws of another. The purpose of this Article, therefore, is to examine the legality of a standard format handicapping contest in Kentucky⁸ and Florida,⁹ two states with important thoroughbred racing industries and divergent gambling law regimes. This paper concludes that the significance of handicapping contests to the thoroughbred industry, when contrasted with the diversity and inconsistency of state gambling laws, requires a concerted effort by industry leadership to encourage the enactment of state-specific regulation (at the administrative or legislative level) expressly authorizing such handicapping contests.

I. HANDICAPPING CONTESTS

A. *Rules and Format*

A handicapping contest, in its most rudimentary form, is a competitive event in which horseplayers attempt to compile the largest total bankroll by wagering set amounts on a predetermined slate of thoroughbred horse races. It is impractical to provide a more detailed description of a typical event, as the formats of individual contests tend to vary depending upon the preferences and goals of the host facility. The NHC, for instance, does not require that its qualifying events abide by any particular format to maintain their status as NTRA-sanctioned contests and/or NHC Tour events.¹⁰ For purposes of this article, however, any subsequent reference to

⁶ Wing, *supra* note 5; Dave Tuley, *A Title on the Line in Vegas*, DAILY RACING FORM, Jan. 22, 2009, <http://www.drform.com/news/article/101194.html> (last visited Feb. 16, 2009).

⁷ See Martin D. Owens, Jr., *If You Can't Beat 'em, Will They Let You Join? What American States Can Offer to Attract Internet Gambling Operators*, 10 GAMING L. REV. 26, 31 (2006). ("Because gambling was considered a criminal offense at the time of the country's founding, it fell under the police power, reserved by the Tenth Amendment to state control. And so American gambling law is predicated on the laws of the states, which have license to experiment widely. There is no constitutional error when state gambling policies vary hugely . . . or when the quality of these laws is wildly uneven.")

⁸ See *infra* § 2.

⁹ See *infra* § 3.

¹⁰ John Angelo, *Improving Your Tournament Play*, AMERICAN TURF MONTHLY, available at <http://americanturf.com/current/tournament.cfm> ("The general consensus is against uniform rules at handicapping contests," Michaels, the online editor of the Daily Racing Form, explained in an interview. "The NTRA wants tracks to be able to devise contests that best suit the wants and needs of their

a handicapping contest, absent a statement to the contrary,¹¹ will be a reference to a contest with the following basic format, which will hereinafter be described as the “standard handicapping contest:”

- the contest consists of twelve (12) races¹²
- six (6) races are “mandatory” and six (6) races are “optional”¹³
- players must place a “fictional” \$2 win wager and \$2 place wager on each race¹⁴
- odds on a given horse are “capped” at 20-1 for win wagers and 10-1 for place wagers¹⁵
- the contest winner is the player with the highest earnings at the conclusion of the contest¹⁶
- each player pays an entry fee to compete in the contest and all entry fees paid are returned to the players by way of prize money¹⁷ and
- in addition to prize money, the overall winner receives an all-expense paid entry to the DRF/NTRA National Handicapping Championship¹⁸

customers. The many different formats give handicappers options to choose from when selecting contests they want to play in and travel to.”).

¹¹ In instances where the standard handicapping contest is likely in violation of a given state’s statutory gambling prohibition (*i.e.*, under Florida law), this paper will introduce amendments to the standard format to determine whether such alterations are sufficient to remove the contest from the scope of liability. *See infra* § 3(B).

¹² The larger the number of races wagered upon, the smaller the influence of chance in the overall result of the contest. This is a pertinent factor for purposes of subsequent analysis. *See infra* § 2(C)(iii).

¹³ An ideal contest format should include both mandatory and optional races. All contestants must wager on mandatory races (which typically represent varying distances, classes, and surfaces), but are entitled to select any group of races from a pre-set selection of tracks for purposes of their optional wagers. *See* NOEL MICHAELS, HANDICAPPING CONTEST HANDBOOK: A HORSEPLAYER’S GUIDE TO HANDICAPPING TOURNAMENTS 28-29 (rev. ed. 2005).

¹⁴ *Id.* at 25, 32.

¹⁵ *Id.* at 33 (“One of the most important ways to ensure a fair contest is to install an odds cap on all winning payoffs.”); *Id.* at 34 (“Contests should not be won with a single horse, and the installation of odds caps can usually prevent that from happening.”).

¹⁶ *Id.* at 26.

¹⁷ MICHAELS, *supra* note 13, at 6.

¹⁸ *Id.* at 27 (“All NTRA-member tournament venues can send one or more three-player teams to the National Handicapping Championship. The NTRA charges venues a flat rate per team, and the

This structure is based upon many of the features that are common to some of the more popular handicapping contests¹⁹ and provides a sufficient template for subsequent analysis.

B. *Industry Significance*

In response to declining pari-mutuel handle and general customer malaise, the thoroughbred industry has consistently sought out new and unique opportunities to diversify and strengthen its fan base.²⁰ The NTRA and other industry groups have taken an active role in conducting the grassroots research necessary to evaluate the success or failure of these various undertakings.²¹ While most of these initiatives have experienced mixed reviews, handicapping contests (specifically the DRF/NTRA National Handicapping Championship)²² have received universally favorable feedback, as evidenced by the popularity and growth of such contests.²³ This broad-based support is not a particularly unexpected result to industry insiders, given the incredible growth and cultural prominence of fantasy sports leagues in recent years – the standard handicapping contest is, for all intents and purposes, a race-driven variation of this very same format.²⁴

i. *Popularity with Horseplayers*

money collected from qualifying sites goes to fund the purse for the NHC finals. Venues must also pay the Las Vegas-related travel and hotel expenses for their qualifiers.”).

¹⁹ See, e.g., Churchill Downs, *Who's the Champ?: 2008 Fall Meet Handicapping Challenge Rules*, <http://www.churchilldowns.com/sites/churchilldowns.com/files/WhosTheChamp-Rules.pdf> (last visited Feb. 17, 2009).

²⁰ See Scheri, *supra* note 3.

²¹ See, e.g., BloodHorse Staff, *Marketing Summit to Focus on New Fans*, THE BLOODHORSE, Aug. 20, 2008, available at <http://news.bloodhorse.com/article/46656.htm>; *Demographics Survey Surprises NTRA*, STREET & SMITH'S SPORTS BUSINESS JOURNAL, Nov. 8, 1999, available at <http://www.sportsbusinessjournal.com/article/25979> (discussing demographics research of racing fans and how this research will help improve customer service and spur home betting).

²² MICHAELS, *supra* note 13, at ix-x (“The NHC Tournament has become the National Thoroughbred Racing Association’s single greatest marketing outreach program to the fans of the sport.”).

²³ *Id.*, at x.

²⁴ See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1196 (2007) (“[F]antasy sports are now a cultural phenomenon that motivate viewers to watch professional sports beyond those games that involve or impact their favorite teams or athletes. This has value to sports leagues through increased viewership . . . [and] [u]ltimately, this translates to increased revenues through advertising and other sales.”). In the case of thoroughbred handicapping contests, the correlation is even more direct, as the racing facilities themselves (rather than intermediaries) are able to conduct these contests and reap their immediate benefits in terms of increased pari-mutuel wagering, increased on-track attendance, etc.

The appeal of handicapping contests to the average horseplayer is multi-dimensional. As an initial matter, handicapping contests provide participants with a far greater level of “value” than traditional wagering formats.²⁵ In the typical pari-mutuel scenario, both the racing facility and the state regulatory authority are entitled to a percentage of the total funds wagered prior to their distribution to winning bettors (the “takeout”).²⁶ In the standard handicapping contest, however, all entry fees received by the host facility are returned to the contestants in the form of cash prizes.²⁷ Thus, a handicapping contest offers horseplayers the chance at a significant monetary reward accompanied by a zero percent takeout.²⁸ Directly connected to this takeout reduction is the size of the contest prize pools—the 2009 DRF/NTRA National Handicapping Championship, as one prominent example, offers a first prize of \$500,000.²⁹ As such, contest players are able to compete for a sizeable return on the basis of a fixed minimum investment. In addition, the typical pari-mutuel horseplayer must consistently place his or her winnings in jeopardy in order to establish a working bankroll. In contrast, a handicapping contest eliminates this element of risk because the player’s potential losses are capped at the amount of the entry fee, while still maintaining this same upside potential.³⁰ It is this same concept that has contributed to the popularity of large poker tournaments as opposed to ‘cash games’ and pick-six or other exotic wagers in lieu of standard win, place and show betting.³¹

Beyond the scope of these tangible fiscal returns, handicapping contests offer “new respect and new recognition for handicappers.”³² The placement of a typical pari-mutuel wager is an entirely faceless and

²⁵ MICHAELS, *supra* note 13, at 4-5.

²⁶ *Id.* at 5 (“The takeout on horse racing ranges from 15 to 30 percent of every dollar wagered, depending on the type of bet and the takeout laws of individual racing jurisdictions.”); *See, e.g., KY. REV. STAT. ANN. § 230.3615* (West 2006 & Supp. 2008).

²⁷ MICHAELS, *supra* note 13, at 6.

²⁸ It is the differential in takeout percentages that often distinguishes a winning handicapper from a losing handicapper over the long run, and is the basis for the establishment of rebate shops. *See Joe Drape, Horse Racing’s Biggest Bettors are Reaping Richest Rewards*, N. Y. TIMES, April 26, 2004, available at <http://www.nytimes.com> (click the ‘search’ button; then click the ‘advanced search’ button; then type the name of the article in double quotation marks in the search bar; Drape’s article should be the result) (“Even the most proficient horseplayers are hard-pressed to make a profit at the track because they cannot beat the takeout . . . [R]ebates have transformed skilled horseplayers into high-volume, low-margin investors.”).

²⁹ Eric Wing, *New Yorker John Conte Captures DRF/NTRA National Handicapping Championship and \$500,000 First Prize*, NATIONAL THOROUGHBRED RACING ASSOCIATION, Jan. 24, 2009, <http://www.ntra.com> (click the ‘site search’ button at the top of the site; enter the article title in double quotation marks in the ‘site search’ bar; article is first search result).

³⁰ *See generally* MICHAELS, *supra* note 13, at 1-10 (outlines the basics of handicapping contests, the benefits versus traditional handicapping, and so on).

³¹ *Id.* at 1-2.

³² *Id.* at 2.

impersonal endeavor.³³ Handicapping contests, by contrast, personalize the betting process and magnify the level of competition present in each wager.³⁴ The action now occurs in a venue that contains easily identifiable players, both friends and adversaries; the play is essentially head to head and the thrill of victory is far more tangible.³⁵ Furthermore, the ultimate winner of the DRF/NTRA National Handicapping Championship does not only receive the adulation of those individuals present, but is also awarded the title of “Handicapper of the Year” at the thoroughbred industry’s prestigious Eclipse Awards ceremony—an honor in and of itself.³⁶

ii. *Popularity with Host Facilities*

From the perspective of the host racing facility, the appeal of a handicapping contest is readily apparent given the desires of its customer base. A properly structured and marketed contest is an effective tool to introduce and attract new players to the host facility and to reward regular customers for their patronage.³⁷ Two of the primary issues facing racetracks today are the flow of bettors to off-track wagering facilities and the growth of account and online wagering. By staging a handicapping contest, these off-site bettors are compelled to return to the track to both compete in the contest itself and, as a fortunate byproduct, place their other daily wagers.³⁸ Even if a contest fails to boost a facility’s long-term business prospects (which is certainly the desired goal), it necessarily provides a “noticeable short-term shot in the arm” for the on-track handle during the contest period.³⁹ This is true whether a tournament is conducted through the pari-mutuel system or not.⁴⁰ In sum, facilities that have

³³ The bettor places a wager at an electronic tote machine; the wager is pooled with other wagers placed on that same race by anonymous individuals at unidentified locations; the winning bettor returns to the electronic terminal and receives his voucher.

³⁴ See MICHAELS, *supra* note 13, at 8.

³⁵ *Id.* at 8-9.

³⁶ *Id.* at 4 (“This is priceless recognition as a representative for all horseplayers, and an acknowledgment that bettors have as big a part in horse racing as owners, trainers, jockeys and even breeders.”).

³⁷ *Id.* at 7.

³⁸ *Id.* (“Tracks prefer larger on-track handle and attendance because they make more money from bets made on-track than they do from bets made off-track. On-track fans also spend money eating, drinking, parking, etc. . . . Tracks can attract fans who might normally go to OTBs or sit at home and wager via their phone accounts.”).

³⁹ MICHAELS, *supra* note 13, at 8.

⁴⁰ The exclusion of contest wagers from the pari-mutuel system is irrelevant to the host’s overall increase in handle from such contests. Horse race wagering is an “opinion driven activity.” Before placing a contest wager, the handicapper must form an opinion as to all of the races that are a part of the contest schedule. Once that opinion has been formed, it is likely that the handicapper will place wagers outside of the contest based upon that same opinion. See e-mail from David Cuscuna, professional bettor, (Jan. 11, 2009) (on file with author).

conducted handicapping contests have experienced a net benefit from their relatively modest expenditures and have pledged significant portions of their marketing budgets to the facilitation of subsequent contests.⁴¹ It is this fact that has led the NTRA to establish the NHC Tour as an added incentive for broad-based contest participation.⁴²

For these reasons, it is crucial that industry leadership take proactive measures to ensure the continued feasibility of these important handicapping events. To achieve this, the first step must be an evaluation of the legality of handicapping contests under the gambling laws of the various contest states. One cannot be concerned with the fiscal and marketing repercussions of different contest formats until one is assured of the legal foundations upon which they are grounded.

II. KENTUCKY

A. *Gambling Law Basics*

Under Chapter 528 of the Kentucky Revised Statutes, promoting and/or permitting gambling activity constitutes a criminal offense.⁴³ “Gambling,” for purposes of the statute, is defined as:

[S]taking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome.⁴⁴

This definition,⁴⁵ like that in most states,⁴⁶ consists of three distinct elements: (1) the payment of consideration (typically money) (2) to participate in a game of chance (3) for the opportunity to win a prize

⁴¹ MICHAELS, *supra* note 13, at 7-8.

⁴² See *infra* § 1(B), §1(B)(i)-(ii).

⁴³ E.g., KY. REV. STAT. ANN. § 528.020 (West 2006); KY. REV. STAT. ANN. § 528.030 (West 2006); KY. REV. STAT. ANN. § 528.040 (West 2006); KY. REV. STAT. ANN. § 528.070 (West 2006). Each of the above offenses requires that one “advance gambling activity.” According to KY. REV. STAT. ANN. § 528.010(1) (West 2006), “[a] person ‘advances gambling activity’ when, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. The conduct shall include, but is not limited to, conduct directed toward the establishment of the particular game, contest, scheme, device or activity involved”

⁴⁴ KY. REV. STAT. ANN. § 528.010(3) (West 2006).

⁴⁵ *Id.*

⁴⁶ See Anthony Cabot & Louis V. Csoka, *The Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 199 (2004).

(typically more money).⁴⁷ Any activity that satisfies these three criteria, absent some express statutory exemption, constitutes an act of prohibited gambling in Kentucky.⁴⁸ As such, for a handicapping contest to operate in compliance with Kentucky's general gambling prohibition it must either (a) be the subject of an express exemption from liability⁴⁹ or (b) fail to satisfy one of the three definitional elements of "gambling."⁵⁰

i. *Gambling Exemptions*

The Commonwealth of Kentucky has carved out statutory and/or constitutional exemptions for the following wagering-related activities: licensed charitable gaming,⁵¹ pari-mutuel wagering on horse racing,⁵² state lottery,⁵³ and social gaming.⁵⁴ Despite the facial appeal of the statutory exemption for pari-mutuel wagering on horse racing,⁵⁵ none of the aforementioned exemptions are readily applicable to thoroughbred handicapping contests. The standard format handicapping contest, although technically a form of horse race wagering, is not conducted through the pari-mutuel system⁵⁶ and funds paid to winning contestant(s) are not

⁴⁷ *Id.*

⁴⁸ *But cf.* KY. REV. STAT. ANN. § 528.010(7) (West 2006) ("Player' means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without rendering any material assistance to the establishment, conduct, or operation of the particular gambling activity. . . . The status of a 'player' shall be a defense to any prosecution under this chapter.") Thus, if a handicapping contest is considered "gambling," it is not illegal to participate in such a contest, but it is illegal to host such a contest.

⁴⁹ *See infra* § 2(A)(i).

⁵⁰ *See infra* § 2(A)(ii).

⁵¹ *See* KY. CONST. § 226(2) (West 2006); KY. REV. STAT. ANN. § 238.500 (West 2006); KY. REV. STAT. ANN. §§ 238.510-238.995 (West 2006 & Supp. 2008). *See also* KY. REV. STAT. ANN. § 238.505 (West 2006 & Supp. 2008) ("Charitable Gaming' means bingo, charity game tickets, raffles and charity fundraising events conducted for fundraising purposes by charitable organizations licensed and regulated under the provisions of this chapter. 'Charitable gaming' shall not include slot machines, electronic video gaming devices, wagering on live sporting events, or simulcast broadcasts of horse races[.]")

⁵² *See* KY. REV. STAT. ANN. §§ 230.210-230.990 (West 2006 & Supp. 2008); 810 KY. ADMIN. REGS. 1:011(1) (2007).

⁵³ *See* KY. CONST. § 226(1)(West 2006); KY. REV. STAT. ANN. §§ 154A.010-154A.990 (West 2006 & Supp. 2008).

⁵⁴ *See* *Dill v. Commonwealth*, 154 S.W.2d 543, 544 (Ky. 1941) (noting that participants in a social game of chance are not punishable under Kentucky law). This is consistent with the statutory exclusion of "players" from criminal liability. *See supra* note 48.

⁵⁵ A handicapping contest, distilled to its essence, is nothing more than a test of one's ability to wager on thoroughbred racing, utilizing the odds calculated under the pari-mutuel system as the means of measuring one's relative ability. As such, it would seem logical that such a contest would be included under the auspices of the pari-mutuel system.

⁵⁶ *See, e.g., Oneida County Fair Board v. Smylie*, 386 P.2d 374, 376 (Idaho 1963) ("The pari-mutuel system is a term of art for the mathematical method by which the amounts to be paid to successful patrons are computed. All money paid into the system is paid out to the patrons except for a small percentage retained by the state and [the racing facility pursuant to the Pari-Mutuel Wagering

derived from the pari-mutuel pool.⁵⁷ Although this may appear to be an overly formalistic distinction, the Kentucky Horse Racing Authority is explicit in its rejection of all forms of wagering at racing facilities other than those conducted by means of the pari-mutuel system,⁵⁸ and requires regulatory pre-approval of all non-standard pari-mutuel wagers.⁵⁹ This is not to say that a method for conducting handicapping contests through the pari-mutuel system cannot be devised⁶⁰ or that the Kentucky Horse Racing Authority does not have the power under its broad legislative mandate to explicitly permit handicapping contests if it so chooses,⁶¹ but merely that as of the present date, the standard handicapping contest is not exempt from the state's gambling prohibition as a result of the pari-mutuel wagering exception. As such, if a handicapping contest is to be "legal" under Kentucky law, it must be because it is not "gambling" in the statutory sense of the term, rather than because there is an applicable statutory out that removes it from the scope of liability.

ii. *Gambling Definition*

The statutory definition of gambling in Kentucky consists of three elements: (1) consideration; (2) chance; and (3) prize.⁶² In the case of a standard handicapping contest there can be no dispute that the elements of consideration and prize are satisfied by the payment of entry fees and the receipt of cash prizes by the contestants.⁶³ Therefore, the critical

Act.] Odds on a particular horse are determined only by the amount of money paid on such horse by patrons in comparison to other horses in the race.”)

⁵⁷ See, e.g., Churchill Downs, *Who's the Champ?: 2008 Fall Meet Handicapping Challenge Rules*, <http://www.churchilldowns.com/sites/churchilldowns.com/files/WhosTheChamp-Rules.pdf> (last visited Feb. 17, 2009). This is true even in contests that require real-money (rather than fictional) contest wagers, as the entry fee itself and the prizes derived therefrom are not a part of the pari-mutuel system. It is the payment of the contest entry fee that constitutes the act of wagering, not the contest selection.

⁵⁸ See 810 KY. ADMIN. REGS. 1:011(1) (2007) (“All systems of wagering other than pari-mutuel, including but not limited to bookmaking and auction-pool selling, shall be prohibited.”).

⁵⁹ *Id.* at 1:011(9) (“Each association desiring to . . . offer exotic wagering, shall first apply in writing to the authority and obtain specific approval of . . . the type of wagering to be offered.”)

⁶⁰ The California Horse Racing Board is currently entertaining such a proposal. See Debbie Arrington, *CHRB Hears World Poker Tour Concept*, THE BLOODHORSE, March 1, 2008, available at http://www.bloodhorse.com/viewstory_plain.asp?id=43847.

⁶¹ See KY. REV. STAT. ANN. § 230.215(1) (West 2006); KY. REV. STAT. ANN. § 230.361(1) (West 2006); see *infra* § 4.

⁶² See KY. REV. STAT. ANN. § 528.010(3) (West 2006).

⁶³ Under Kentucky law, both the consideration and prize elements of the gambling definition require the payment or receipt of “something of value.” KY. REV. STAT. ANN. § 528.010(3) (West 2006). “Something of value” is defined as “any money or property, any token, object, or article exchangeable for money or property, or any form of credit or . . . a privilege of playing at a game or scheme without charge.” KY. REV. STAT. ANN. § 528.010(9) (West 2006). As such, a handicapping contest that does not pay cash prizes, but merely offers a free entry to the DRF/NTRA National Handicapping Championship, still satisfies the “prize” element of gambling.

determination under Kentucky law, as is typical in most instances, is whether a handicapping contest is “based upon an element of chance” or stated more generically, whether it is considered a “game of chance” or a “game of skill.”⁶⁴ To answer this question, one must determine both the common law test utilized by Kentucky courts to distinguish skill from chance⁶⁵ and the level of skill or chance implicit in a standard thoroughbred handicapping contest.⁶⁶

B. *The Skill-Chance Distinction in Kentucky*

i. *Generally*

The judicially-mandated distinction between skill and chance is not an exercise that is readily amenable to strict classification. All human endeavors, no matter how skill-laden, necessarily contain some element of chance (and vice versa).⁶⁷ The crucial question, therefore, is not whether a given activity contains an element of chance, but whether it contains a sufficient level of chance to constitute a prohibited “game of chance” under the applicable statute. The particular level of chance that must be present to constitute a statutory violation is solely dependent upon the common law test utilized by that jurisdiction. In general, state courts have utilized one of five approaches to assess the degree of chance in a particular activity: (1) the Dominant Factor or Predominance Test;⁶⁸ (2) the Pure Chance Rule;⁶⁹ (3) the Any Chance Test;⁷⁰ (4) the Material Element Test;⁷¹

⁶⁴ The elements of consideration and prize are almost necessarily satisfied in the analysis of any wagering-related activity. Therefore, the majority of literature and case law discussing the applicability of the definition of “gambling” has focused upon the skill/chance distinction. Notably, there has been a significant volume of academic commentary discussing the distinction between skill and chance in the context of both poker and fantasy sports. See, e.g., Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443 (2005); Cabot & Csoka, *Fantasy Sports*, *supra* note 24; Michael A. Tselnick, Note, *Check, Raise or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617 (2007); Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257 (2008).

⁶⁵ See *infra* § 2(B)(i)-(ii).

⁶⁶ See *infra* § 2(C)(i)-(iii).

⁶⁷ See generally Cabot & Csoka, *Games People Play*, *supra* note 46 (explaining that many recreational games consist of elements of both skill and chance and courts have inconsistently drawn lines between the two). For example, even the games of chess and scrabble (clearly games of skill) contain an element of chance in that a random draw determines which player is entitled to the first move.

⁶⁸ See *infra* note 75.

⁶⁹ Under this doctrine (also known as the English Rule), only a scheme in which the result is determined solely by chance (“pure chance”) is considered gambling; if skill plays any part, the scheme is not gambling. See, e.g., *Braddock v. Family Finance Corp.*, 506 P.2d 824 (Idaho 1973). This approach has fallen into great disfavor, and is typically only utilized in the context of determining whether a given activity falls under a state’s constitutional lottery prohibition. By utilizing the pure chance rule, states with constitutional lottery prohibitions are able to pass legislation authorizing

or (5) the Gambling Instinct Test.⁷² At present, it is uncertain whether a Kentucky court, if presented with this issue, would choose to utilize the Predominance/Dominant Factor Test or the Any Chance Test to gauge the level of chance implicit in a handicapping contest.⁷³

The Predominance/Dominant Factor Test is the standard utilized by the majority of states and the federal government to assess the existence of the gambling element of chance.⁷⁴ In applying this test, a court asks whether “player skill” or “uncontrollable chance” is the factor most likely to influence the outcome of a given contest.⁷⁵ “The test is not whether the game contains an element of chance or an element of skill, but which one of them is the dominating factor in determining the result.”⁷⁶ Simply stated, a game of chance is one in which the chance element “predominates” over

additional forms of gambling without the burden of a constitutional amendment. *See, e.g.*, 05 Ky. Op. Atty. Gen. 003 (2005), Ky. OAG 05-003, available at <http://ag.ky.gov> (search “OAG 05-003” in the search bar in the top right corner; first result will be the requested document).

⁷⁰ *See, e.g.*, Cabot & Csoka, *Fantasy Sports*, *supra* note 24, at 1205 (2007); *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993) (“Even a contrivance that is predominately a game of skill may be determined by chance A player’s level of skill may influence the degree of chance involved, but it does not eliminate the element of chance altogether. The outcome is always determined by chance because no player, through the exercise of skill alone, can control the outcome of any given trial.”).

⁷¹ Under the Material Element Test, even though skill may predominate over chance in a particular game, that game is still one of chance as long as chance is a material element in the outcome of the game. *See, e.g.*, *Thole v. Westfall*, 682 S.W.2d 33, 37 n 8 (Mo. App. 1984) (“In Missouri, chance must be a material element in determining the outcome of a gambling game [in order for the game to be considered one of chance].”); *Plato’s Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426, 428 (N.Y. App. Div. 1985) (“a gambling device depending ‘in a material degree upon an element of chance,’ notwithstanding that skill may be involved, is a contest of chance.”).

⁷² The Gambling Instinct Test looks at the essential nature of a particular activity in order to determine whether it appeals to the average person’s “gambling instinct.” *See, e.g.*, *State v. Prevo*, 361 P.2d 1044 (Haw. 1961); *City of Milwaukee v. Burns*, 274 N.W. 273 (Wis. 1937); *State v. One Hundred and Fifty-Eight Gaming Devices*, 499 A.2d 940 (Md. 1985).

⁷³ The issue could have been resolved in the recent Kentucky Court of Appeals case of *Interactive Media Entm’t and Gaming Ass’n v. Wingate*, No. 08-CI-01409, 2009 WL 142995 (Ky. Ct. App. 2009). However, the court did not reach the skill-chance distinction when rendering its verdict, so the issue is still unresolved by the Kentucky courts.

⁷⁴ *See, e.g.*, Cabot & Csoka, *Games People Play*, *supra* note 46, at 223; Chuck Humphrey, *State Gambling Law: Summary Chart*, Sept. 30, 2007, <http://www.gambling-law-us.com/State-Law-Summary/> (last visited Apr. 7, 2009).

⁷⁵ *See, e.g.*, *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (holding that a “game should be classified as one of skill or chance depending on the dominating element, not on the presence or absence of a small amount of skill”); *State v. Stroupe*, 76 S.E.2d 313, 316 (N.C. 1953) (citing authorities that indicate that a game of chance is one in which the element of chance predominates over the element of skill); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961) (“The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element.”); *Opinion of the Justices*, 795 So.2d 630, 635 (Ala. 2001) (citing multiple cases holding that the dominant factor test is the majority rule in the United States); *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995); *In re Advisory Opinion to Governor*, 865 A.2d. 320 (R.I. 2004); *Johnson v. Collins Entm’t Co.*, 508 S.E.2d 575 (S.C. 1998); *State v. Hahn*, 586 N.W.2d 5 (Wis. App. 1998); *Bayer v. Johnson*, 349 N.W.2d 447 (S.D. 1984); etc.

⁷⁶ *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (citing multiple cases that apply the “dominant factor” test).

the skill element, and a game of skill is one in which the skill element “predominates” over the chance element.

In contrast to the above approach, a limited number of states have examined the element of chance by determining whether a particular game contains any element of chance at all (the “Any Chance Test”).⁷⁷ Under this formulation, if a contest contains any element of chance, no matter how minimal, wagering on such a contest is prohibited as gambling.⁷⁸ As every game contains some element of chance,⁷⁹ a literal application of the Any Chance Test would result in an absolute prohibition on wagering. Thus, the test is only applied in those states whose statutory language is explicit in stating that the presence of a mere scintilla of chance is sufficient to constitute a gambling violation.⁸⁰

ii. *The Skill-Chance Distinction in Kentucky*

The Office of the Kentucky Attorney General has consistently asserted that “the dominant factor test is in effect in Kentucky.”⁸¹ Although no Kentucky court has affirmatively supported or denied this position, the opinion of the Attorney General is based upon the language and mode of analysis utilized by the Kentucky Supreme Court in *Commonwealth v. Allen*⁸² and *Steely v. Commonwealth*.⁸³ Notwithstanding this persuasive authority, however, there is case law which could be used to support the contention that Kentucky is one of a minority of states to adopt the Any Chance Test.⁸⁴ The Kentucky Court of Appeals’ recent decision in *Fall v.*

⁷⁷ See, e.g., Cabot & Csoka, *Fantasy Sports*, *supra* note 24, at 1205.

⁷⁸ *Id.*

⁷⁹ See *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993) (“Even a contrivance that is predominately a game of skill may be determined by chance. . . . A player’s level of skill may influence the *degree* of chance involved, but it does not eliminate the element of chance altogether. The outcome is always determined by chance because no player, through the exercise of skill alone, can control the outcome of any given trial.”) (emphasis in original).

⁸⁰ See e.g., TEX. PENAL CODE ANN. §47.01 (Vernon 2003) (gambling definitional statute).

⁸¹ See, e.g., 93 Ky. Op. Atty. Gen. 58 (1993), Ky. OAG 93-58, *available at* <http://ag.ky.gov> (search “OAG 93-58” in the search bar in the top right corner; first result will be the requested document) (“the dominant factor rule is in effect in Kentucky”); 79 Ky. Op. Atty. Gen. 215 (1979), Ky. OAG 79-215 (finding that “table-soccer” was a game of skill based on a number of factors indicative of a predominance-type approach).

⁸² *Commonwealth v. Allen*, 404 S.W.2d 464, 466-467 (Ky. 1966) (holding that a referral selling scheme was prohibited because “chance permeated the entire scheme.”).

⁸³ *Steely v. Commonwealth*, 164 S.W.2d 977, 978 (Ky. App. 1942) (holding that a pinball machine was a game of chance because “the opportunity for skill to have any appreciable effect on the result of the play is almost completely overshadowed by the element of chance”). The references to chance “permeating” an activity, *Allen*, 404 S.W.2d at 466-467, and chance “overshadowing” the exercise of skill, *Steely*, 164 S.W.2d at 978, seem to indicate a weighing of the levels of skill and chance consistent with the Dominant Factor Test.

⁸⁴ See e.g., *Smith v. Harris*, 102 S.W.2d 385, 386 (Ky. App. 1936) (determining that a pinball machine was a gambling device because “notwithstanding any question of skill in the operation of the machine, the element of hazard and chance still remained”). Despite the use of this case by some to

*Commonwealth*⁸⁵ is one such case. All of these decisions, however, are simply conclusory; they provide no mention of the actual test utilized by the court or the rationale dictating the choice of that particular approach. Given this judicial stalemate and the lack of a well-reasoned opinion, the most prudent tack seems to be a direct examination of the plain language of Kentucky's statutory gambling definition.⁸⁶

"Gambling," as stated previously, is defined by KRS § 528.010(3) as "staking something of value upon the outcome of a contest . . . which is based upon an element of chance . . ." ⁸⁷ The critical part of this definition, for purposes of quantifying the required level of chance, is the modifying phrase, "based upon." The American Heritage Dictionary states that a given event is "based" upon some thing or some factor if that factor is "the fundamental ingredient or chief concept" of the event.⁸⁸ Under this definition, a game "based" upon chance is a game in which chance is the "fundamental principle or underlying concept." A requirement that a specific element be "fundamental" is a requirement that that element "predominate" over all other elements.⁸⁹ Therefore, in the context of KRS § 528.010(3), the term "based upon" means more than merely "contains" or "has present," it means that the element of chance must actually predominate.

Given the above statutory interpretation and the nationwide preference for adoption of the Dominant Factor Test,⁹⁰ it is reasonable to conclude that a Kentucky court, if presented with this issue, would choose to assess the legality of a handicapping contest through application of the predominance standard. The analysis that follows will proceed on the basis

support the Any Chance formulation, it is not directly on point, as it deals with the definition of a "gambling device" rather than the definition of "gambling." This is a significant difference between the two as a gambling device "only requires the application of an element of chance" (KY. REV. STAT. ANN. § 528.010(4)(West 2006)), whereas "gambling" requires that an activity be "based upon an element of chance" (KY. REV. STAT. ANN. § 528.010(3)(a)(West 2006)).

⁸⁵ *Fall v. Commonwealth*, 245 S.W.3d 812 (Ky. App. 2008). In *Fall*, the Court concluded (not surprisingly) that cockfighting was a "game of chance" because "gambling as defined under KRS § 528.010 requires only that there be an 'element of chance.'" *Id.* at 814. The problem with this decision, besides its brevity, is that the court ignored the modifying language initially preceding the phrase "an element of chance" – the words "based upon." See *supra* §2(B)(i)-(ii).

⁸⁶ An analysis of a statute must begin with the statute's plain language. See *e.g.*, *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002); *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994); *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. App. 1962).

⁸⁷ This statutory analysis is based almost entirely on the analysis conducted by the Poker Players' Alliance in their amicus brief for the case of *Vicsbingo.com v. Wingate*, 2008-CA-2036, 2009 WL 142995 (Ky. Ct. App. 2009). See *In re Mays Case*, 852 N.E.2d 1120 (Mass. App. 2006) (extensively discussing the meaning of the term "predominant").

⁸⁸ American Heritage Dictionary of the English Language, 148 (4th ed. 2000).

⁸⁹ See *In re Mays Case*, 852 N.E.2d 1120 (Mass. App. 2006) (extensively discussing the meaning of the term "predominant").

⁹⁰ See *supra* note 74.

of that assumption.⁹¹ It is important to recognize, however, that one cannot guarantee such an outcome, especially at the trial court level, as there is sufficient authority to justify a contrary finding.⁹² The test that is ultimately selected by the court will likely be determinative of the actual result, and thus without certainty as to the test to be applied, there can be no certainty as to the court's ultimate finding.⁹³

C. *Skill vs. Chance in Handicapping Contests*

i. *Methodology*

Despite the widespread judicial acceptance of the Dominant Factor Test and its conceptual simplicity, there is little to no consensus among courts as to the proper methodology by which to determine whether skill or chance predominates in a given activity.⁹⁴ In the context of games such as chess (clearly a game of skill) or roulette (clearly a game of chance), the lack of a prescribed analytical approach is not problematic. As to the multitude of games that exist in the morass between these two poles, courts are left to resolve this fact-specific inquiry without much-needed substantive guidance.⁹⁵ To state that a game containing 51% chance and 49% skill is a "game of chance" for purposes of the Predominance Test is a rather simple matter; to determine the actual percentage of chance and skill contained in a given activity, such that one can make the foregoing declaration, is another problem entirely.⁹⁶ As such, courts have essentially resorted to a de facto subjective analysis, whereby they examine the

⁹¹ See *infra* § 2(C).

⁹² See *supra* notes 84 and 85.

⁹³ The possible application of the Any Chance Test should be somewhat troubling to proponents of handicapping contests, as one cannot assert in good faith that the standard handicapping contest (or any contest for that matter) is completely devoid of the element of chance. Thus, implementation of the Any Chance Test would definitively eliminate the possibility of negating the element of chance and would result in the inclusion of handicapping contests in the definition of prohibited gambling.

⁹⁴ See, e.g., *State v. Ricciardi*, 114 A.2d 257, 259 (N.J. 1955) ("The difficulty lies, of course, in determining whether in the particular case one or the other element . . . predominates. We know of no test by which the boundary lines may be clearly marked for all the myriad forms of activity in which men engage."); 93 Ky. Op. Atty. Gen. 58 (1993), Ky. OAG 93-58, available at <http://ag.ky.gov> (search "OAG 93-58" in the search bar in the top right corner; first result will be the requested document); Cabot & Csoka, *Games People Play*, *supra* note 46, at 198-202, 216.

⁹⁵ See Cabot & Csoka, *Fantasy Sports*, *supra* note 24, at 1204-1205.

⁹⁶ The difficulty inherent in this exercise is clearly indicated by the fact that certain activities have been declared both "games of chance" and "games of skill" by different courts. Compare *Wetmore v. State*, 55 Ala. 198 (Ala. 1876) (finding that backgammon is a game that is "brought about much more by the skill of the contestants, than by the accidental fall of the dice"), and *Boardwalk Regency v. New Jersey*, 457 A.2d 847, 851 (N.J. 1982) (finding that despite any skill necessary, backgammon contained certain factors (*i.e.*, the doubling technique) which constituted "uncontrollable elements of chance").

“nature” of a particular activity and determine on the basis of anecdotal evidence, statistical analysis, and sheer instinct whether the element of skill or chance is the one that predominates in that particular activity.⁹⁷ This paper will evaluate the skill inherent in handicapping contests in this same informal manner—focusing first on horse race wagering generally,⁹⁸ followed by a contest-specific analysis.⁹⁹

ii. *Horse Race Wagering Generally*

The majority of courts that have examined pari-mutuel horse race wagering, including the Kentucky Supreme Court, have determined that it is a “game of skill.”¹⁰⁰ This assertion is far less conclusive than it would initially appear, however, as most of these decisions were made in the context of constitutional lottery prohibitions¹⁰¹ and thus according to a “pure chance” rather than “predominance” analysis.¹⁰² Notwithstanding this contextual inconsistency, these cases do set forth a common theme that bears repetition in the context of this discussion. “Skill,” according to this case law, entails the ability to exercise one’s reason, judgment, and acquired knowledge in response to specific information.¹⁰³ An experienced handicapper, in selecting a horse upon which to wager, is engaging in this exact same exercise and thus would seem to be engaging in a skill-based activity.¹⁰⁴

⁹⁷ See Cabot & Csoka, *Fantasy Sports*, *supra* note 24, at 1204-1205.

⁹⁸ See *infra* § 2(C)(ii).

⁹⁹ See *infra* § 2(C)(iii).

¹⁰⁰ See, e.g., *Engle v. State*, 90 P.2d 988, 993 (Ariz. 1939); *Longstreth v. Cook*, 220 S.W.2d 433 (Ark. 1949); *Ginsberg v. Centennial Turf Club*, 251 P.2d 926, 928-930 (Col. 1952); *People v. Monroe*, 182 N.E. 439, 441-442 (Ill. 1932); *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 992-1009 (Ky. 1931); *Gandolfo v. Louisiana State Racing Comm.*, 78 So.2d 504, 506-516 (La. 1954); *Rohan v. Detroit Racing Ass’n*, 22 N.W.2d 433, 438-440 (Mich. 1946); *Utah State Fair Ass’n v. Green*, 249 P. 1016, 1018-1030 (Utah 1926); *Oneida County Fair Bd. v. Smylie*, 386 P.2d 374, 391 (Idaho 1963); *Opinion of the Justices*, 795 So.2d 630, 638-644 (Ala. 2001).

¹⁰¹ See, e.g., 93 Ky. Op. Atty. Gen. 58 (1993), Ky. OAG 93-58, available at <http://ag.ky.gov> (search “OAG 93-58” in the search bar in the top right corner; first result will be the requested document) (stating that the *Ky. Jockey Club* opinion should “not be regarded as a source of legal reasoning that can be exported to other factual situations”).

¹⁰² See *supra* note 69.

¹⁰³ See, e.g., *Opinion of the Justices*, 698 So. 2d 107, 111 (Ala. 1997) (rev’d on other grounds) (The Alabama Supreme Court defined “skill” in the context of activities . . . “merely the exercise, upon known rules and fixed probabilities, of ‘sagacity,’ which is in turn defined as ‘quickness or acuteness of sense perceptions; keenness of discernment with soundness of judgment; shrewdness; [the] ability to see what is relevant and significant.’” (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2198 (2d 1953))).

¹⁰⁴ See, e.g., *Rohan*, 22 N.W.2d at 440 (“In a horse race, the winner is not determined by chance alone, as the condition, speed, and endurance of the horse and the skill and management of the rider are factors affecting the result of the race. The better [sic] has the opportunity to exercise his judgment and discretion in determining the horse on which to bet.”).

The derivation of knowledge from statistical data is, in fact, the core component of successful thoroughbred handicapping. In advance of every race, a handicapper who chooses to avail himself of only the most basic racing program is provided with the following statistical information, the significance of which is explained in the corresponding footnotes:¹⁰⁵ (1) the number of previous starts by the horse;¹⁰⁶ (2) its wins and purses earned;¹⁰⁷ (3) its order of finish in recent races;¹⁰⁸ (4) its pedigree;¹⁰⁹ (5) its age and sex;¹¹⁰ (6) the distance covered in recent races;¹¹¹ (7) its fractional times in those races;¹¹² (8) the condition of the track;¹¹³ (9) the track surface;¹¹⁴ (10) the weight carried;¹¹⁵ (11) the class of

¹⁰⁵ For an example of a racing program, refer to Equibase, <http://www.equibase.com/samples/newprogram.pdf> (last visited Feb. 18, 2009).

¹⁰⁶ See *supra* note 104.

¹⁰⁷ The most basic principle of horse race handicapping is that the greatest predictor of a horse's future performance is its past performances. All of the subsequent factors that are discussed are little more than a method to understand those past performances more fully in order to increase their predictive power.

¹⁰⁸ See *supra* note 104.

¹⁰⁹ The breeding or parentage of a given horse is often indicative of its propensity to perform under certain conditions. Some sires are known for producing prolific turf runners, others excel at short or long distances, some have an aptitude for handling poor racing surfaces, etc. See STEVEN DAVIDOWITZ, *BETTING THOROUGHBREDS: A PROFESSIONAL'S GUIDE FOR THE HORSEPLAYER* 221-234 (2d ed. 1997). Professional handicappers have developed specific systems, such as "Dosage" and "Tomlinson Ratings," to formalize these assumptions. See DAVE LITFIN, *EXPERT HANDICAPPING: WINNING INSIGHTS INTO BETTING THOROUGHBREDS* 52-55 (2007).

¹¹⁰ It is traditionally believed (whether true or not) that fillies are less likely to win when racing against colts, and 2 and 3 year olds are less likely to win against older horses. See STEVEN DAVIDOWITZ, *BETTING THOROUGHBREDS: A PROFESSIONAL'S GUIDE FOR THE HORSEPLAYER* 186-189 (2d ed. 1997).

¹¹¹ Most racehorses tend to have a particular racing distance at which they are most comfortable—a horse racing at his preferred distance (as determined by his past performances or lineage) is, obviously, more likely to succeed (e.g. a sprinter is more likely to win a sprint against a long distance runner). Even if a horse has not exhibited a distance preference, a change in distance can be a significant handicapping factor – for example, a horse that has been sprinting will most often race closer to the lead or will set the pace in a route event; whereas a horse that has been on the pace in a longer slower route may show improved stretch punch in a sprinting event. These generalities aid a handicapper in predicting the pace characteristics of a particular race. *Id.* at 189-94.

¹¹² For a detailed description of "pace handicapping" and the impact of fractional times, see Steven Davidowitz's pertinent chapters on pace handicapping. *Id.* at 141-81; 323-329.

¹¹³ Certain horses, based on their breeding or other factors, tend to perform better on unfavorable racing surfaces compared to the average horse. It is not that their performance improves per se (although that is possible), but that it does not diminish to the same extent as that of the rest of the field. See *id.* at 20-34.

¹¹⁴ See *supra* notes 95 & 102. One professional handicapper noted that "things have changed dramatically since they[] [Keeneland] paved paradise [the dirt track] and put up a [p]olytrack." Dave Litfin, *Separating Pair of Closely Matched Fillies*, *DAILY RACING FORM*, Apr. 12, 2008, at 14.

¹¹⁵ DAVIDOWITZ, *supra* note 110, at 183-84. In order to create more competitive races for betting purposes, race-secretaries often handicap purportedly superior horses by requiring them to carry additional weight. The effect of minimal weight differentials is typically over-blown, but common sense necessarily "paying some attention to large weight shifts or particularly heavy weight assignments, especially when two or more closely matched contenders are involved." See *id.* at 182-86.

the race;¹¹⁶ (12) the jockey and trainer and their respective records;¹¹⁷ (13) its recent workouts;¹¹⁸ (14) medications;¹¹⁹ (15) equipment;¹²⁰ and sometimes more.¹²¹ It is the task of a given handicapper to process this wealth of information and to determine, based upon the interaction of these various factors, the most likely outcome in a particular race. Once the handicapper has made this critical initial determination, his analysis is still not complete. He must then examine the fluctuations of the pari-mutuel odds to determine which wager, or series of wagers, provides the greatest expected value in light of the player's predicted outcome and his confidence in that assessment.¹²²

Beyond this mere paper-based analysis, there is also an observational element to handicapping that can be best described as the element of "horsemanship." "Skill," in addition to the definitional aspect cited earlier,¹²³ has also been described as "keenness of discernment with

¹¹⁶ See *e.g.*, DAVIDOWITZ, *supra* note 110, at 100-01. Horse races can be divided into three basic categories: (i) claiming races, (ii) allowance races, and (iii) stakes races. At the greatest level of abstraction, stakes races represent a higher quality of competition than allowance races, and allowance races represent a higher quality of competition than claiming races. (This is not a hard and fast rule: many high-end claiming events contain superior horses when compared to low-end restricted stakes events.) Within each classification itself, there are also numerous sub-classifications based upon quality. Thus, determining whether a horse is moving up or down in class is relevant in predicting its performance. *Id.* at 93-110.

¹¹⁷ The trainer of a given horse is a particularly relevant factor, given that it is the trainer who is solely responsible for ensuring that that horse is in adequate racing condition. As such, a change in a horse's trainer (from "good" to "bad" or vice versa) necessarily has an impact on that horse's potential performance. Beyond trainer changes, prudent handicappers also examine the tendencies of trainers in particular scenarios: statistics are readily available which set out a trainer's winning percentage with first-time starters, on turf vs. dirt, first time off a layoff, when combined with a particular jockey, etc. See DAVE LITFIN, *EXPERT HANDICAPPING: WINNING INSIGHTS INTO BETTING THOROUGHBREDS* 69-79 (2007). In the same way that a trainer determines how a horse comes into a race, the jockey determines how the horse performs in that race. Certain jockeys are simply superior to others and a change in jockey can be a significant factor. Additionally, it is important for a handicapper to know which trainers a jockey typically rides "first call" for – a decision by a jockey to ride another trainer's horse may provide evidence of the jockey's level of confidence in that horse. See DAVIDOWITZ, *supra* note 110, at 199-202.

¹¹⁸ For a detailed analysis of workouts and their potential significance, see DAVIDOWITZ, *supra* note 110, at 203-20.

¹¹⁹ DAVIDOWITZ, *supra* note 110, at 236-38. Certain medications, such as Lasix and Bute, are legal in some racing jurisdictions, provided they are administered by a track veterinarian and their use by a given horse is recorded in the program. Many handicappers insist that horses administered Lasix for the first or second time have an increase in performance. *Id.* Whether this is based on general performance-enhancing characteristics or a remedy to a specific medical problem is a matter of some dispute. *Id.*

¹²⁰ DAVIDOWITZ, *supra* note 110, at 194-99.

¹²¹ In addition to this information, horseplayers also have access to BRIS Figures, Beyer Speed Figures, Thoro-graph Sheets, Expanded Past Performances, and a multitude of other compilations of statistical data.

¹²² See DAVIDOWITZ, *supra* note 110, at 243-51; LITFIN at 111-22. In fact, in certain situations, the most positive decision is to not place a wager on a given race due to the interrelation of the odds and one's selections. Thus a handicapper need not only be skilled in selecting race winners, but in determining which races upon which to wager.

¹²³ See *supra* note 103.

soundness of judgment.”¹²⁴ This is an apt description of “horsemanship”—the ability to draw inferences about the condition of a given horse (and thus its potential performance) based upon a cursory examination of that horse prior to, during, or after a race. Handicappers in possession of this skill (whether innate or learned) can watch a horse “scoring down” and gauge whether he is anxious or irritable, whether he is showing signs of lameness or illness, whether he has expended unnecessary energy, etc.¹²⁵ These are all factors which can have a critical impact on the performance of that particular horse and thus the potential outcome of the race in which he is set to compete. A handicapper is able to utilize this same skill-set (with additional refinement) in the analysis of video replays of a horse’s past performances. The ability to effectively watch a race and isolate and decipher the true skill level of a particular horse based upon the specific circumstances under which it ran are crucial to a meaningful understanding of the past performance information provided in the standard program.¹²⁶ The fact that a horse may have finished first or last in his most recent race is not necessarily indicative of his level of performance in that race—only a critical analysis of that race in its entirety can provide this information.

Notwithstanding the above analysis, there are still those who contend that wagering on horse racing is necessarily a game of chance because unforeseen events can (and do) occur before or during the course of a race, which may be determinative of the race’s outcome and can defeat even the most well-reasoned analysis.¹²⁷ The flaw in this contention, however, is that this same possibility exists in almost every human endeavor and the impossibility of eliminating this aspect of uncertainty is the very basis upon which the Dominant Factor Test gained prominence: “In any game there is a possibility that some oversight or unexpected incident may affect the result, and if these incidents are sufficient to make a game in which it may occur one of chance, there is no

¹²⁴ See *supra* note 103.

¹²⁵ See DAVIDOWITZ, *supra* note 110, at 199.

¹²⁶ See *id.* at 4-6. “Watching a race properly is only one of the ways you can acquire greater knowledge about particular horses. To make maximum use of the skill, to put yourself in a position to recognize the unusual, important things that take place, you must first have some clear ideas about limits of thoroughbred performance . . . track condition, trainers, class, and all the other pieces . . .” *Id.* at 6.

¹²⁷ See, e.g., *State v. Lovell*, 39 N.J. Sup. 458-62 (N.J. 1877). “The physical condition of the horse and his rider, the fastenings of his shoes, the honesty of purpose that actuates his rider and his owner in running him, the state of the weather and the track, and these circumstances in the case of every horse that races against him, are all matters about which the judgment of the outside bettor can avail him no more than the arithmetical calculations of chances can avail the dice thrower.” *Id.* A similar argument has been raised in the context of football pool wagering: “[I]t is common knowledge that the predictions even among the so-called ‘experts’ are far from infallible. Any attempt to forecast the result of a single athletic contest . . . is fraught with chance.” *Commonwealth v. Laniewski*, 98 A.2d 215, 217 (Pa. 1953).

such thing as a game of skill.”¹²⁸ The proper question, therefore, for purposes of the skill/chance distinction, is not whether an expert handicapper is ever wrong (he unquestionably is) but whether he is right sufficiently more often than the average horseplayer.¹²⁹ The continual success and profitability of particular players serves as ample justification for this assertion.¹³⁰ In fact, it is the ability to understand and profit from these seemingly anomalous events (*i.e.*, the ability to predict the unpredictable) that distinguishes a good handicapper from a truly great handicapper.¹³¹ The manner in which one responds to the presence of chance in a given activity is an element of skill in and of itself.

iii. *Skill Implicit in Contest Format*

Even if a court were to hold that pari-mutuel wagering on horse racing constitutes a game of chance under the Predominance Test, it is still conceivable (although far less likely) that a handicapping contest may be deemed a game of skill as a result of the additional skill components present in such contests. As an initial matter, the payment of an entry fee to participate in a handicapping contest is, technically speaking, not a wager on horse racing, but rather, a wager on one’s own ability to wager on horse racing. Courts have frequently drawn a distinction between betting on the outcome of a contingent event outside the scope of one’s own control and a scenario in which an individual is an actual participant in the activity wagered upon (*i.e.* wagering on one’s own performance).¹³² In the latter

¹²⁸ Engle v. State, 90 P.2d 988, 993 (Ariz. 1939). See also State v. Gumpton, 30 N.C. 271, 1848 WL 1289 (N.C. 1848) (“It is true, that in these latter instances superiority of skill is not always successful – the race is not necessarily to the swift. Sometimes an oversight to which the most skillful is subject, give an adversary the advantage; or an unexpected puff of wind, or an unseen gravel in the way, may turn aside a quoit or ball make it come short of the aim. . . . The incidents mentioned, whereby the more skillful may yet be the loser, are not inherent in the nature of the games. Inattention is the party’s fault and not his luck; and the other obstacles, though not perceived or anticipated, are occurrences in the course of nature and not chances.”).

¹²⁹ See O’Brien v. Scott, 89 A.2d 280, 283-85 (N.J. 1952) (determining “Skilo” to be a game of skill based on the testimony of a mathematics expert that a skilled player could win substantially more times than a novice player.)

¹³⁰ See DAVE LITFIN, EXPERT HANDICAPPING: WINNING INSIGHTS INTO BETTING THOROUGHBREDS at ix (rev. ed. 2007) (“The skills of the expert handicapper are, in fact, closely comparable to those of the good bridge, poker or chess player. In any such competition, the player who depends on instinct, trial and error, inexpert advice, superstition or reckless guess is at a disadvantage. He cannot hope to hold his own against persons who have acquired an understanding of the game as a whole.” (quoting TOM AINSLIE, AINSLIE’S COMPLETE GUIDE TO THOROUGHBRED RACING (1986))).

¹³¹ *Id.* at 27-43 (discussing concepts, such as “the bounce,” “the recovery line,” and the “pair-up,” which all help explain supposedly anomalous performances). See also DAVIDOWITZ, *supra* note 110, at 69-83 (describing how one can use trainer tendencies and past performance lines to gauge a trainer’s true intentions in entering a horse in a particular race) and DAVIDOWITZ at 266-280 (discussing various methods explaining the success of particular “longshots”).

¹³² Cabot & Csoka, *Fantasy Sports*, *supra* note 24 at 1203, 1211-1212.

case, the element of chance implicit in relying upon the performance of a third party is eliminated and, thus, courts have been more willing to declare that the elements necessary to constitute gambling are not satisfied.¹³³ Contest participation is ubiquitous in our society (from bake-offs to spelling bees) and such activities are typically not viewed as gambling, despite the presence of both consideration and prize.¹³⁴ Handicapping contests bear a striking similarity to these other entry-fee based activities and should, in fairness, be treated in a similar manner.

Another factor contributing to the predominance of skill in handicapping contests is the fact that the outcome of a standard handicapping contest is predicated, not upon the result of a single race, but upon the cumulative results of twelve independent races. As the number of instances where a participant must exercise skill in a given contest increases, the likelihood that the most skilled of the participants will ultimately succeed increases at the same rate. If the number of trials is very small (*i.e.*, a single race), the element of chance will necessarily play a more substantial role in that outcome.¹³⁵ This is a simplistic expression of the "law of large numbers" or the notion of "variance," both of which explain that "as the numbers of trials of a process increase, the percentage difference between the expected value and the actual value [of that process] descends to zero."¹³⁶ The more races included in a given contest, the greater the predominance of skill in that contest. The reduction in variance resulting from this multi-race format is also strengthened by the inclusion of an odds-cap on each contest wager.¹³⁷ This cap ensures that an anomalous result in any one trial does not unduly skew the results of the process as a whole, and it reinforces the necessity of consistent performance. The fact that this proposition can be easily proven through mathematical equation is likely beneficial due to the greater weight it may hold with the potential finder-of-fact, especially in the face of what is otherwise a largely anecdotal analysis.

Lastly, a participant in a handicapping contest will not be successful, regardless of his handicapping prowess, without an in-depth understanding of the strategy necessary to compete in a tournament format.¹³⁸ Merely picking winners is not enough. One must consistently evaluate his or her position relative to other competitors and place wagers

¹³³ See *e.g.*, *supra* notes 69, 71, and 75.

¹³⁴ See Cabot & Csoka, *Games People Play*, *supra* note 46 at 206.

¹³⁵ See Cabot & Csoka, *Fantasy Sports*, *supra* note 24 at 1210-11.

¹³⁶ *Id.*

¹³⁷ MICHAELS, *supra* note 13 at 33-34.

¹³⁸ John Angelo, *Improving Your Tournament Play*, AMERICAN TURF MONTHLY, available at <http://americanturf.com/current/tournament.cfm> ("No experienced horseplayer should toss out any knowledge gained over the years, but tournament play is as different from day to day pari-mutuel wagering as that Renaissance man is from Homer Simpson.")

on that basis.¹³⁹ The appropriate time for utilizing one's optional wagers as well as the odds range from which one will make this selection entirely depends upon external factors.¹⁴⁰ The goal in a handicapping contest is not just to earn a profit over the course of the contest, but to earn a more substantial profit than any other competitor. As such, one must utilize a strategy that ensures the continued feasibility of this outcome given the changing circumstances of the contest environment and the relative size of one's bankroll.¹⁴¹ In sum, an effective tournament strategy is essential to handicapping contest success. The ability to devise and consistently revise one's strategy on the basis of the rules of a particular contest and the wagers already made is an element of skill that is not present in a typical pari-mutuel wagering.

It would seem from the previous discussion that a Kentucky court, if presented with this issue, would likely conclude that a handicapping contest is a game of skill. As also noted previously, however, there is a level of uncertainty inherent in this declaration. The skill/chance determination is a fact specific inquiry and thus is dependent upon the quality of the evidence presented, the skill and experience of counsel, and the prudence and/or bias of the finder-of-fact.¹⁴² Furthermore, one cannot be certain that a Kentucky court will necessarily utilize the Predominance Test to make this determination and, even if it does, one cannot predict the methodology by which the court will attempt to reach its conclusion.¹⁴³ Thus, handicapping contests likely do not fall within the scope of Kentucky's gambling prohibition, but given the possibility of criminal repercussions for an incorrect assessment of their legality, one would typically prefer a greater level of assurance than exists at present.

III. FLORIDA

A. *Gambling Law Basics*

Under Chapter 849 of the Florida statutes, permitting or encouraging gambling activity constitutes a criminal offense.¹⁴⁴ Section 849.08 sets forth the state's basic gambling prohibition:

Whoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any

¹³⁹ See MICHAELS, *supra* note 13 at 57-70.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Cabot & Csoka, *Fantasy Sports*, *supra* note 24 at 1205.

¹⁴³ See *supra* § 2(C)(i).

¹⁴⁴ See *e.g.*, FLA. STAT. ANN. § 849.01 and § 849.14 (West 2000).

device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree¹⁴⁵

This statutory language, according to the Florida Supreme Court, represents the traditional three-element definition of “gambling”: (1) consideration, (2) chance, and (3) prize.¹⁴⁶ The inclusion of the chance element in this formulation is somewhat misleading, however, as Section 849.14 of the Florida statutes explicitly prohibits wagering on games or contests of skill.¹⁴⁷ As such, a judicial finding that a handicapping contest is a game of skill¹⁴⁸ would not, in and of itself, remove said contest from the scope of Florida’s gambling prohibition; it would merely alter the character of that violation and the severity of the potential reprimand.¹⁴⁹ Combining these two statutory sections (§ 849.08 and § 849.14), the definition of prohibited gambling in Florida can be more accurately described as follows: (1) payment of consideration (2) to participate in a game of chance *or skill* (3) for the opportunity to win a prize. The standard handicapping contest, as discussed previously, unquestionably satisfies elements (1) and (3),¹⁵⁰ and given the impossibility of compliance with element (2), would necessarily constitute an act of prohibited gambling under Florida law, absent a statutory exemption to the contrary.¹⁵¹

¹⁴⁵ FLA. STAT. ANN. § 849.08 (West 2000).

¹⁴⁶ See e.g., *Little River Theatre Corp. v. State ex rel. Hodge*, 185 So. 855, 861 (Fla. 1939); *Dorman v. Publix-Saenger-Sparks Theatres*, 184 So. 886, 893 (Fla. 1938).

¹⁴⁷ FLA. STAT. ANN. § 849.14 (West 2000) (“Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast . . . or whoever knowingly becomes the custodian or depository of any money or other thing of value so staked, bet or wagered upon any such result . . . shall be guilty of a misdemeanor in the second degree”).

¹⁴⁸ There is Florida case law that suggests that if a handicapping contest is a game of skill, in addition to certain other elements, it may remove said contest from the scope of liability. See *infra* note 154.

¹⁴⁹ See FLA. STAT. ANN. §§ 849.14 (West 2000), 775.082(4)(b) (West 2005 & Supp. 2009), 775.083(1)(e) (West 2005 & Supp. 2009) (an individual who violates § 849.14 by betting on the result of any trial or contest of skill is guilty of a misdemeanor in the second degree and subject to imprisonment for a term not to exceed 60 days and/or a \$500 fine), and FLA. STAT. ANN. §§ 849.01 (West 2000), 775.082(3)(d) (West 2005 & Supp. 2009), 775.083(1)(c) (West 2005 & Supp. 2009) (an individual who violates § 849.01 by maintaining a gambling or gaming establishment or by permitting gambling, as defined in § 849.08, is guilty of a felony in the third degree and subject to a term of imprisonment not to exceed 5 years and/or a \$5,000 fine).

¹⁵⁰ See *supra* § 2(A)(ii).

¹⁵¹ See, e.g., FLA. CONST. Art 10, § 15 (West 1995); FLA. CONST. Art 10, § 7 (West 1995); FLA. STAT. ANN. §§ 24.102 *et seq.* (West 2003) (state-sponsored lotteries); FLA. STAT. ANN. §§ 849.0931, 849.0935 (West 2009) (charitable gaming); FLA. STAT. ANN. §§ 550.001 *et seq.* (West 2007) (pari-mutuel wagering on horse and greyhound racing; jai alai and slot machines at pari-mutuel facilities); FLA. STAT. ANN. § 849.085(2)(a) (West 2000 & Supp. 2009) (low-stakes card rooms at pari-mutuel facilities); FLA. STAT. ANN. § 849.141 (West 2000) (bowling tournaments); FLA. STAT. ANN. §§ 849.0931 (West Supp. 2009), 849.231(2) (West 2000) (so-called “cruises to nowhere”). In addition, Indian tribal governments have the authority to establish gaming operations independent of state regulation provided that the state in question, in this case Florida, permits some form of gaming.

B. *Alternate Approach*

The primary issue with the breadth of Florida's gambling prohibition is its inclusion of activities that were clearly not within the contemplation of the legislature at the time the statute was enacted.¹⁵² If the mere combination of a prize and an entry fee equals "gambling," then "golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even literary or essay competitions are all illegal gambling operations" under § 849.14.¹⁵³ To avoid the absurdity of this result, a line of cases has developed which purport to draw a distinction between bona fide entry fees for a "purse, prize, or premium" and "stakes, bets, or wagers."¹⁵⁴ Under this formulation, the payment of an entry fee (1) to participate in a contest of skill, (2) in which the sponsor does not participate, and (3) where the prizes offered are not derived from the entry fees, does not constitute a "stake, bet, or wager" and thus does not fall under the prohibition of wagering on games of skill under § 849.14.¹⁵⁵

i. *Pooling of Entry Fees*

The critical component of the previous distinction is the notion that the "prize pool" for which the contestants compete, must not be funded by the contestants themselves.¹⁵⁶ The rationale behind this requirement is that

California v. Cabzon Bond of Mission Indians, 480 U.S. 202 (1987). Notwithstanding the length of this list, the standard handicapping contest does not fit within any of these exemptions—including the parimutuel horse racing exemption, for the same reasons as under Kentucky law. See *supra* notes 56 and 57. See also FLA. ADMIN. CODE ANN. r. 61D-7.003 (West, Westlaw through January 16, 2009 issue of the Florida Administrative Weekly).

¹⁵² See *Faircloth v. Cent. Fla. Fair*, 202 So.2d 608, 609 (Fla. Dist. Ct. App. 1967).

¹⁵³ *State v. Am. Holiday Ass'n*, 727 P.2d 807, 809 (Ariz. 1986). "In the absence of explicit legislative intent or specific statutory language, we are reluctant to adopt a statutory interpretation which would turn sponsors of golf, tennis or bridge tournaments, rodeos, livestock, poultry, and produce exhibitions, track meets, spelling bees, beauty contests, and the like into class 6 felons operating gambling games." *Id.* at 812.

¹⁵⁴ See *Creash v. State*, 179 So. 149, 152 (Fla. 1938); *Pompano Horse Club v. State ex rel. Bryan*, 111 So. 801, 813 (Fla. 1927); *Johns v. Smith*, 81 So. 514 (Fla. 1919); *Faircloth*, 202 So.2d at 609; 90 Fla. Opp. Atty. Gen. 58 (1990), available at <http://myfloridalegal.com/> (search "90-58," using the closed double quotation marks, in the search bar in the top left corner; select the first result, entitled 'Gambling, games of skill'); 91 Fla. Opp. Atty. Gen. 03 (1991) available at <http://myfloridalegal.com/> (search "91-03," using the closed double quotation marks, in the search bar in the top left corner; select the first result, entitled 'Gambling/Fantasy Sports League').

¹⁵⁵ See *supra* note 155, 90 Fla. Opp. Atty. Gen. 58. "A contest of skill, such as a hole-in-one golf contest, where the contestants pay an entry fee, which does not directly make up the prize pool, for the opportunity to win a valuable prize by the exercise of skill does not violate the gambling laws of this state." *Id.*

¹⁵⁶ See, e.g., *Pompano Horse Club v. State ex rel. Bryan*, 111 So. 801, 813 (Fla. 1927) (stating that a previous transaction did not constitute illegal gambling because "the transaction possessed none of the essential elements of a 'pool,' in which some of the donors would receive back more than they contributed, while others would lose their contributions.").

when entry fees are unconditional and prizes are guaranteed, the element of risk necessary to constitute “betting” or “wagering” is missing. As stated by the court in *Humphrey v. Viacom, Inc.*:

A bet is a situation in which the money or prize belongs to the person posting it, each of whom has a chance to win it. Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant. Therefore, where all entry fees are unconditional and the prizes are guaranteed, reasonable entrance fees charged by the sponsor of a contest to participants competing for prizes are not bets or wagers.¹⁵⁷

In the standard handicapping contest, all entry fees received by the host facility are returned to the winning participants in the form of cash prizes. Thus, if a handicapping contest is to fit under this “exemption,” the host facility must amend its contest’s payment structure to eliminate the “pooling of entry fees” for prize purposes. The most straightforward method to do so, at least from a legal perspective, would be to eliminate the entry fee requirement entirely and merely offer the DRF/NTRA National Handicapping Championship seat as the sole prize component.¹⁵⁸ This structure is clearly in compliance with the above judicial requirements, but from an operational perspective, would likely act as a significant disincentive to contest participation as it eliminates many of the favorable attributes which have contributed to the popularity of handicapping contests to date.¹⁵⁹ A riskier approach (which may, conceivably, solve the operational issue to a certain extent) would be for a host facility to offer cash prizes funded from their general operating account that would be guaranteed notwithstanding the number of entry fees ultimately received by the host. If the sum of the entry fees received exceeds the guaranteed prize pool, the facility makes a profit. If not, it takes a loss. This approach removes much of the disincentive contained in the previous method.

¹⁵⁷ *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *8 (D.N.J. June 20, 2007) (quoting *State v. Am. Holiday Ass’n*, 729 P.2d 807, 811 (Ariz. 1986)) (internal citation omitted). In the *Humphrey* decision, the court ultimately held that paying an entry fee to participate in certain popular fantasy sports leagues did not constitute an illegal bet or wager. *Humphrey* at *9.

¹⁵⁸ The lack of entry fees would not impact the ability of a host facility to offer the National Handicapping Championship seat as a prize, as none of the entry fees in a standard contest are used to fund the N.H.C. entry. See MICHAELS, *supra* note 13, at 26-27.

¹⁵⁹ The opportunity for the “big score” and the ability to wager on races without the standard pari-mutuel takeout have fueled the growth of thoroughbred handicapping contests. See *supra* § 1(B)(i). Unfortunately, the termination of cash prizes eliminates both of these benefits.

Nevertheless, it comes with the attendant risk that a host facility may suffer significant fiscal repercussions if the level of participation in a given contest does not meet its prior expectations.¹⁶⁰ Additionally, the viability of the second approach has not been expressly validated by the Florida courts. The Supreme Courts of Arizona and Nevada, however, have permitted such a scheme in the context of this same analysis, and thus, a similar adoption by Florida courts is a foreseeable outcome.¹⁶¹

ii. *Skill vs. Chance*

Assuming that a racing facility was to adopt one of the above amendments to its contest's payment structure, the next issue is whether, under Florida law, a handicapping contest constitutes a game of skill or a game of chance. The entire "purse, prize or premium" analysis is predicated on the negation of the "stake, bet or wager" language in § 849.08. As a result, if a handicapping contest is deemed to be a game of chance, rather than a game of skill, this potential "exemption" is likely not available.¹⁶² The manner in which the skill-chance determination is to be made in this instance is the same as under Kentucky law: (i) determine the common law test utilized by the Florida courts and (ii) examine the level of skill and chance implicit in a handicapping contest.¹⁶³

Given the fact that Florida prohibits wagering on both games of chance and games of skill, there is understandably little case law discussing the appropriate test to be utilized to distinguish between these two classes. The Office of the Florida Attorney General has opined, however, that any such distinction must be made on the basis of the predominance standard.¹⁶⁴

¹⁶⁰ The possibility of a surplus may be problematic from a marketing perspective as the host facility would be unable to return the excess funds to the contestants as "added money" without jeopardizing this exemption. This problem can be addressed by placing a cap on the number of entries and setting the purse amount accordingly. On the other hand, whether a facility can avoid the possibility of a conceivable shortfall by requiring a minimum number of entries below which the contest would be cancelled is a dicier proposition.

¹⁶¹ See *State v. Am. Holiday Ass'n*, 727 P.2d 807, 810 (Ariz. 1986); *Las Vegas Hacienda Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961) (holding that paying an entry fee to win a \$5,000 prize in a hole-in-one contest is not a bet or wager).

¹⁶² *But see Las Vegas Hacienda*, 359 P.2d at 87 (holding that the skill-chance determination is irrelevant if there is no bet or wager); *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *8 (D.N.J. June 20, 2007) (stating that "courts have made clear that the question whether the money awarded is a *bona fide* prize (as opposed to a bet or wager) can be determined without deciding whether the outcome of the game is determined by skill or chance.") (emphasis in original).

¹⁶³ See *infra* § 2(B)(i).

¹⁶⁴ 91 Fla. Op. Atty. Gen. 03 (1991) available at <http://myfloridalegal.com/> (search "91-03," using the closed double quotation marks, in the search bar in the top left corner; select the first result, entitled 'Gambling/Fantasy Sports League') ("Contests in which the skill of the contestants predominates over the element of chance, such as in certain sports contests, do not constitute prohibited lotteries.") See also 90 Fla. Op. Atty. Gen. 58 (1990), available at <http://myfloridalegal.com/> (search

Obviously, such an opinion is not binding on courts, but given the lack of precedential authority, it seems reasonable to proceed on that basis, at least for purposes of this analysis. Despite the fact that both Kentucky and Florida arguably utilize the Dominant Factor Test, it is entirely conceivable that different results may be reached by the courts in these respective states. The primary reason for this perceived differential, besides the lack of certainty inherent in any judicial decision, is that Florida, unlike Kentucky, is one of a minority of states that have explicitly ruled that pari-mutuel wagering on horse racing is a game of chance.¹⁶⁵ Therefore, to convince a Florida court that a handicapping contest is a game of skill, one must prove that either: (1) the Florida Supreme Court's decision in *Pompano Horse Club* was in error¹⁶⁶ or (2) that handicapping contests contain additional skill elements not present in standard pari-mutuel wagering, such that a handicapping contest is a game of skill notwithstanding the fact that pari-mutuel wagering has been deemed otherwise.¹⁶⁷ In either event, it is clear that the proponent of this argument will be facing an uphill battle and will need to bear significant expense in presenting evidence to the court to dispel any judicial preconceptions.

In sum, conducting a handicapping contest is not a violation of Florida's gambling laws if and only if: (1) the Florida Supreme Court continues to recognize the judicial distinction between "stakes, bets, or wagers" and "purses, prizes, or premiums"; (2) the host facility amends the standard contest format to eliminate the pooling of entry fees for prize purposes; and (3) the particular contest is deemed a game of skill. As such, the potential existence of a "purse, prize, or premium" exception for handicapping contests is highly contingent. It is far from prudent for these authors (or any other attorney) to advise a host facility to proceed with a handicapping contest on the basis of the certainty (or perhaps more appropriately, the lack of certainty), provided by this line of cases. This possible exception is, for all intents and purposes, more theoretical than practical, as it would require a racing facility to risk criminal sanction (and thus its pari-mutuel license) merely to take advantage of a niche marketing opportunity. Potential host facilities are better served by working toward a legislative or regulatory solution, as described below, rather than engaging in the judicial equivalent of a true game of chance.

"90-58," using the closed double quotation marks, in the search bar in the top left corner; select the first result, entitled 'Gambling, games of skill').

¹⁶⁵ *Pompano Horse Club v. State ex rel. Bryan*, 111 So. 801, 812 (Fla. 1927) ("Regardless of whether horse racing within itself, is a 'game' or a 'sport,' or, if a game, whether it be one of 'skill' or of 'chance'—when a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain . . . that process becomes a 'game of chance' . . .").

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* § 2(C)(iii).

IV. A REGULATORY SOLUTION IS REQUIRED

As a result of intensive state regulation, there is little consistency in the gambling laws of the various states. The determination of whether a given activity constitutes prohibited gambling in a particular state is dependent upon that state's constitutional, statutory and regulatory text and the judicial interpretation of that text. This determination is further complicated by the advanced age of most relevant gambling decisions and the fact-specific nature of the examination. One cannot assert with great confidence, with four notable exceptions,¹⁶⁸ that conducting a handicapping contest is an entirely legal endeavor in a particular jurisdiction. In some states, such as Florida, the State Attorney General and/or regulators have, in fact, taken a strong position that such contests are not permitted.

The thoroughbred industry is, therefore, left with three primary options: (1) discontinue the operation of handicapping contests in their entirety; (2) proceed in the current manner, notwithstanding the risk of liability; or (3) take proactive steps to eliminate this specter of illegality. The last option is clearly the most palatable and is already the approach selected by four states that are heavily invested in racing and/or wagering.

New York, New Jersey, Oregon¹⁶⁹ and Washington have enacted legislation, under the auspices of their state's pari-mutuel laws, expressly authorizing handicapping contests.¹⁷⁰ New York's law is the most detailed of the four and addresses many of the pertinent arguments found in this paper. Section 906 of the New York Statutes states, in pertinent part, as follows:

(1) Notwithstanding any other provision of law . . . a thoroughbred racing corporation . . . may operate a handicapping tournament at which the participants may be charged an entry fee if the tournament is conducted in accordance with this section.

(2) (a) The operator of a handicapping tournament shall distribute all of the entry fees as prizes to the winners of the tournament. Nothing herein shall preclude an operator from providing additional prizes or promotions.

¹⁶⁸ See *supra* note 158.

¹⁶⁹ Oregon is the jurisdiction of the major account wagering entities such as TVG, Xpress Bet and Youbet.com.

¹⁷⁰ N.J. STAT. ANN. § 5:5-63.2 (West Supp. 2008); N.Y. [RAC. PARI-MUT. WAG. & BREED.] LAW § 906 (McKinney 2000 & Supp. 2009); OR. REV. STAT. § 462.145 (2007); WASH. REV. CODE § 67.16.251 (2009).

(b)

(c)

(3) A handicapping tournament operated in accordance with the provisions of this section shall be considered a *contest of skill* and shall *not be considered gambling* (emphasis added).¹⁷¹

This formulation expressly exempts a handicapping contest from the gambling statutes, and contemplates that the legality of a handicapping contest in New York, absent the existence of this statutory section, would be determined on the basis of the skill-chance distinction discussed earlier in this paper. New York regulators recognized the importance of handicapping contests to the state's racing industry and the uncertainty inherent in that determination at the judicial level. A simpler approach is taken by Oregon¹⁷² and Washington¹⁷³ in their respective racing rules.

A model rule, based upon the New York format (specifically addressing each of the essential characteristics of a handicapping contest including entry fees, prizes, skill and an exemption from gambling) should be promulgated by industry leadership and adopted by each racing jurisdiction that does not have an express authorization for handicapping contests. Such a rule would benefit the racing industry by reassuring operators and permitting the growth of handicapping contests in such jurisdictions. It would also protect the betting or playing public by facilitating a state's oversight of racing and wagering.

¹⁷¹ N.Y. [RAC. PARI-MUT. WAG. & BREED.] LAW § 906 (McKinney 2000 & Supp. 2009).

¹⁷² "Notwithstanding ORS 167.108 to 167.164, a race meet licensee, with the prior approval of the Oregon Racing Commission, may conduct handicapping contests for race meet patrons. Such contests may include, but are not limited to, competitions for prizes for the highest percentage of correct selection of the order of finish of animals from among predetermined races that are live races conducted at the licensee's race course or simulcast races offered by the licensee, or any combination thereof. Prizes offered for handicapping contests are not part of the pari-mutuel wagering system." OR. REV. STAT. § 462.145 (2007).

¹⁷³ "Class 1 racing associations may conduct horse race handicapping contests. The commission shall establish rules for the conduct of handicapping contests involving the outcome of multiple horse races." WASH. REV. CODE § 67.16.251 (2009).