Business and Professions

Chapter 336: Protecting Minors’ Online Reputations and Preventing Exposure to Harmful Advertising on the Internet

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Code Sections Affected

Business and Professions Code §§ 22580–22581 (new).
SB 568 (Steinberg); 2013 STAT. Ch. 336.

I. INTRODUCTION

The Internet presents many risks to users, including the loss of their personal privacy and exposure to harmful or offensive content. These risks especially affect minors, who “are at a greater risk than adults as they navigate through the digital world.” As minors visit websites, generate personal profiles, and post content online, they create digital histories that may cause them harm in the future. A college admissions counselor or hiring manager can easily peruse an applicant’s online profile to discover evidence of improper behavior and deny the student admission or select another applicant for the job.

Minors also risk exposure to harmful advertising. Junior Shooters, an online magazine dedicated to young aspiring shooters and hunters, uses banner advertisements to market handguns, rifles, and ammunition. Safesearchkids.com, a “search tool designed to help keep kids safe,” displays a full slate of sponsored

5. FACT SHEET, supra note 2.
advertisements for searches like “buy beer” or “I want a gun.” These examples highlight the need “to ensure that children are not bombarded with inappropriate advertisements while they are learning to be responsible consumers” and citizens online. Chapter 336 addresses these problems by giving minors the ability to manage their online identities and limiting their exposure to harmful advertising.

II. LEGAL BACKGROUND

In 1998, Congress passed the Children’s Online Privacy Protection Act (COPPA); pursuant to the act, the Federal Trade Commission (FTC) promulgated regulations to give parents control over what information websites collect from their children. In 2012, FTC amended the regulations to improve privacy protections and “give parents greater control over the personal information that websites and online services may collect from children under 13.”

COPPA requires operators of websites or online services (operators) that collect personal information from children to “provide notice . . . of what information is collected, . . . how the operator uses such information, and the operator’s disclosure practices for such information.” COPPA also requires operators to obtain “verifiable parental consent” to collect, use, or disclose information that they collect from children. Upon request, operators must provide parents with a description of the personal information they collect, and parents may demand that the operator cease using or maintaining the information. Also, operators cannot condition a child’s participation in an Internet activity on the child’s disclosure of “more personal information than is reasonably necessary.” COPPA defines “children” as individuals under thirteen-years-old.

8. FACT SHEET, supra note 2.
11. See 16 C.F.R. § 312.2 (2012) (incorporating amendments that expanded the list of personal information that requires parental consent and changed the definition of “operator” to include third parties that collect information on websites).
15. Id. § 6502(b)(1)(B)(i)–(ii).
16. Id. § 6502(b)(1)(c).
17. Id. § 6501(1).
III. CHAPTER 336

Chapter 336 protects minors who use the Internet by restricting advertising and allowing minors to remove content they have posted to a website, “online service, online application, or mobile application” (online service).

A. Advertising to Minors

An operator who directs an online service to minors or has actual knowledge that a minor is using the service cannot market or advertise several prohibited products, including alcoholic beverages, firearms, and tobacco. Similarly, an operator cannot “knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of a minor” if the operator has actual knowledge that a third party will use the information to advertise the prohibited products.

Operators who permit third parties to advertise on their online services must tell the third party that the service targets minors. Once an operator notifies the third party, that party cannot advertise the prohibited products.

An operator is “any person or entity that owns an . . . online service,” but does not include “any third party that operates, hosts, or manages” the service for the owner. An online service is directed to minors if the online service, or a portion of the service, “is created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general

18. See CAL. BUS. & PROF. CODE § 22580(d) (enacted by Chapter 336) (defining minors as children under the age of eighteen).
19. See FACT SHEET, supra note 2.
20. See BUS. & PROF. § 22580(b)(2) (enacted by Chapter 336) (requiring that the visitor actually be a minor and that the advertising is specifically directed to the minor based on “information specific to that minor, including . . . the minor’s profile, activity, address, or location”).
21. See id. § 22580(k) (enacted by Chapter 336) (“Marketing or advertising means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service.”).
22. Id. § 22580(a)–(b) (enacted by Chapter 336).
23. Id. § 22580(i) (enacted by Chapter 336) (listing nineteen prohibited products: alcoholic beverages; firearms or handguns; ammunition or reloaded ammunition; handgun safety certificates; aerosol containers of paint capable of defacing property; etching cream that is capable of defacing property; any tobacco, cigarette, or cigarette papers, or blunt wraps, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance; BB devices; dangerous fireworks; tanning in an ultraviolet tanning device; dietary supplement products containing ephedrine group alkaloids; tickets or shares in a lottery game; Salvia divinorum or Salvinorin A; body branding; permanent tattoos; drug paraphernalia; electronic cigarettes; obscene matter; and a less lethal weapon).
A service is not directed to minors if it links to another online service that is directed to minors. Chapter 336 does not require an operator to “collect or retain age information about users.”

B. The Eraser Button: Removing Content from Online Services

An operator of an online service that is directed to minors who has “actual knowledge that a minor is using” the online service must allow minors who are registered users to “remove or . . . request and obtain removal of, content or information posted” on the online service. An operator shall also provide notice and clear instructions regarding how minors can remove or request the removal of publicly posted content. An operator must also indicate that removing content or information “does not ensure complete or comprehensive removal.”

Chapter 336 contains several exceptions to the removal requirements. An operator does not need to remove content if a third party “stored, republished, or reposted” the content. An operator can also avoid removing content by “anonymizing” the content so the minor “cannot be individually identified.” An operator does not need to remove content if a “federal or state law requires the operator or third party to maintain the content,” the minor does not follow the instructions for requesting information removal, or the minor was paid for posting the information. Additionally, Chapter 336 does not limit law enforcement’s ability to obtain information pursuant to a court order.

An operator is compliant with Chapter 336 if it prevents other users from viewing the content, even though the information still exists on the operator’s servers, and even if it “remains visible because a third party has copied the posting or reposted the content.”

28. Id. § 22580(e) (enacted by Chapter 336).
29. Id. § 22580(e) (enacted by Chapter 336).
30. Id. § 22580(g) (enacted by Chapter 336).
31. Id. § 22581(a)(1) (enacted by Chapter 336). Posted information is “content or information that can be accessed by a user in addition to the minor who posted the content or information . . . .” Id. § 22581(f).
32. Id. § 22581(a)(2)–(3) (enacted by Chapter 336).
33. Id. § 22581(a)(4) (enacted by Chapter 336).
34. Id. § 22581(b) (enacted by Chapter 336).
35. Id. § 22581(b)(2) (enacted by Chapter 336).
36. Id. § 22581(b)(3) (enacted by Chapter 336).
37. Id. § 22581(b)(1) (enacted by Chapter 336).
38. Id. § 22581(b)(4) (enacted by Chapter 336).
39. Id. § 22581(b)(5) (enacted by Chapter 336).
40. Id. § 22581(c) (enacted by Chapter 336).
41. Id. § 22581(d)(1) (enacted by Chapter 336).
42. Id. § 22581(d)(2) (enacted by Chapter 336).
IV. ANALYSIS

Section A addresses how Chapter 336 expands existing privacy protections for children and whether the expansions will be effective.\(^{43}\) Section B highlights the Center for Democracy & Technology’s (CDT) concerns about how operators will comply with Chapter 336.\(^{44}\)

A. Expanding Protections for Minors on the Internet

Ninety-five percent of teens between ages twelve and seventeen access the Internet regularly,\(^{45}\) up from seventy-three percent in 2000.\(^{46}\) The dramatic increase in Internet use among teenagers has triggered the need to expand protections,\(^{47}\) and Chapter 336 responds to this need by shielding minors from harmful advertising and allowing minors to remove content they have posted online.\(^{48}\)

1. Shielding Minors from Harmful Advertising

COPPA, the existing federal law that covers Internet privacy for children, protects children under thirteen-years-old by allowing parents to control the information that website operators collect.\(^{49}\) Chapter 336 extends COPPA’s protection by shifting the burden away from parents and placing the responsibility directly on operators.\(^{50}\) Under COPPA, operators must obtain parental consent to collect personal information,\(^{51}\) while Chapter 336 restricts operators from collecting personal information for the purpose of advertising prohibited products directly to minors.\(^{52}\)

When the Federal Trade Commission (FTC) amended COPPA in 2012 to improve privacy protections and give parents more control of what information

\(^{43}\) See infra Part IV.A (explaining how Chapter 336 expands COPPA).

\(^{44}\) See infra Part IV.B (highlighting concerns about Chapter 336).


\(^{47}\) SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 4 (Apr. 23, 2013).

\(^{48}\) See generally CAL. BUS. & PROF. CODE § 22580–22581 (enacted by Chapter 336) (prohibiting website operators who direct sites to minors from marketing specified products and requiring them to remove content posted by minors upon request).


\(^{50}\) BUS. & PROF. § 22580(a) (enacted by Chapter 336).


\(^{52}\) BUS. & PROF. § 22580(a) (enacted by Chapter 336).
website operators collect from children, FTC Chairman Jon Leibowitz recognized that operators collect personal information from children to build vast marketing profiles, which are used to target advertising to specific users. Minors, who are “more susceptible to online marketing of harmful products” and are “still developing their ability to use sound judgment,” are vulnerable to targeted advertising campaigns. Since minors are vulnerable to advertising, proponents of Chapter 336 assert that the state should make sure that minors are not overwhelmed by inappropriate advertisements while they are using the Internet. By prohibiting operators from marketing certain products and collecting information for the purpose of marketing directly to minors, Chapter 336 helps preserve minors’ safety online.

Because the advertising restriction is unclear, skeptics wonder whether it will help minors or simply hinder website operators by creating questions about compliance. Although facially clear, the phrases “personal information,” “advertising service,” and “specifically directing an ad to a minor” do not have precise definitions, leaving operators uncertain of their responsibility. Personal information can include virtually any data related to a website visitor, and while advertising services include “ad networks like Google AdSense,” Chapter 336 does not specify whether other actors in the Internet advertising industry are affected, such as “ad serving technology providers” and ad agencies. Yet despite this lack of clarity, most operators will likely make the required good faith effort to become compliant.

Critics also suggest that Chapter 336 cannot survive a judicial challenge. Because Chapter 336 restricts how operators market and advertise, operators may

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53. See supra text accompanying note 12.
55. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 6 (Apr. 23, 2013).
56. Id.
57. Id.
59. Id.
60. Id.
61. CAL BUS. & PROF. CODE § 22580(b)(2) (enacted by Chapter 568).
62. See Goldman, supra note 58 (explaining that even Google and Facebook did not challenge the new law, likely because they plan to comply).
63. Id.
64. See id. (suggesting that all state regulation of the Internet violates the Dormant Commerce Clause and that suppressing advertising may violate the right to free speech).
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claim that Chapter 336 violates their right to free speech, which includes the right to advertise. However, restricting commercial speech (including advertising) is permissible if the government has a “legitimate interest in protecting consumers from ‘commercial harms.’” Under the United States Supreme Court’s four-part test to determine whether a restraint on commercial speech is valid, the California Attorney General will argue that it “has a strong interest in taking steps to prevent illegal products from being sold to minors.”

Because the state can assert a strong interest that “rational and carefully crafted restrictions” are allowed, the operators’ claim for violation of free speech is not strong.

2. Allowing Minors to Remove Content

Chapter 336 moves beyond COPPA and allows minors to remove content they post to websites. The legislature created these protections because “a large part of a child’s social and emotional development occurs online, and children have a tendency to “self-reveal before they self-reflect.” Some revelations may be ill-advised and therefore “[c]hildren should be allowed to erase” their posts. A foolish post can “follow a young person for a long time” and possibly impact important life events such as getting into college or gaining employment.

A Career Builder survey shows that over “[a] third (34 percent) of hiring managers who . . . research candidates via social media . . . have found information that has caused them not to hire a candidate.” Hiring managers look for provocative and inappropriate information, posts showing the candidate

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65. U.S. CONST. amend. I.
66. See Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (stating that the commercial nature of advertisements does not strip First Amendment rights).
68. See Cent. Hudson Gas v. Pub. Serv. Comm’n, 447 U.S. 559, 566 (1980) (explaining that a valid restriction “must concern lawful activity and not be misleading,” there must be a substantial government interest in limiting the speech, the regulation must “directly advanc[e] the governmental interest asserted,” and the regulation cannot be “more extensive than is necessary to serve that interest”).
69. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 6 (Apr. 23, 2013).
71. CAL. BUS. & PROF. CODE § 22581(a)(1) (enacted by Chapter 336).
74. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 568, at 7 (Apr. 23, 2013).
75. Id.
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consuming alcohol or drugs, and discriminatory comments. 77 Similarly, a Kaplan Test Prep Survey of college admissions officers “show[s] that schools are increasingly discovering information on Facebook and Google that negatively impacts applicants’ acceptance chances.” 78 A Pew Research Center report explains that “[t]eens are cognizant of their online reputations, and take steps to curate the content and appearance of their social media presence.” 79 The Chapter 336 “eraser button” 80 will help minors prune and revise profile content to protect their online reputations. 81

Critics contend that the eraser button will not be effective because it does not cover third-party posting, does not extend to adults who wish to remove content that they posted as minors, 82 and “nearly every imaginable service [already] offers a delete button.” 83 One San Francisco high school student highlights that “[e]ven if you make sure not to post photos of yourself, you can’t stop your friends from doing so. If you use drugs and there are pictures of you doing that and you apply for a job, you won’t get hired.” 84 Similarly, most online posts do not exist by themselves—others interact with the posts by liking, commenting, or sharing. 85 Yet Chapter 336 does not protect third-party posting or re-posting—leaving a large amount of potentially harmful content freely available to anyone who has an Internet connection. 86 Others question the eighteen-year-old cutoff, wondering if minors actually become more careful about what they post after turning eighteen. 87

77. Id.
79. MARY MADDEN ET AL., supra note 45.
81. MARY MADDEN ET AL., supra note 45, at 63.
84. Id.
86. CAL. BUS. & PROF. CODE § 22581(b)(2) (enacted by Chapter 336).
87. Waldman, supra note 85 (implying that a nineteen-year-old would be just as interested in removing damning content that he posted just one year earlier).
Despite these concerns, Senator Steinberg notes that many young people do not know that they can delete information because it is not easy to do so. Another optimist believes that despite the preexisting ability to delete information on many sites, Chapter 336 “forces companies to really incorporate privacy into their design, rather than as an afterthought.” It remains to be seen whether Chapter 336 will “help protect teens from . . . embarrassment and harm to job and college applications from online posts they later regret” because California is the first state to allow minors to remove their postings.

3. Protecting More Minors

COPPA only protects children under thirteen-years-old, yet ninety-five percent of teens ages twelve to seventeen access the Internet regularly. Teenage Internet activities include social networking, shopping, reading the news, and sharing content such as artwork, pictures, or stories. The type of Internet activity that merits protection also increases in the teenage years, as teens ages fourteen to seventeen are more likely to post pictures, share their relationship status, and display their cellphone number. Some teens also “choose to enable . . . location information when they post,” which provides information that marketers can use for targeted advertising campaigns. In light of teenagers’ widespread Internet use, COPPA’s limited protection of children under thirteen-years-old falls short; Chapter 336 provides necessary expanded protection to minors under eighteen-years-old.

B. Operators May Have Trouble Complying with Chapter 336

On June 25, 2013, CDT presented criticisms of Chapter 336 to the Assembly Committee, a nonprofit organization that works to keep the Internet open,

90. Miles, supra note 80.
92. MARY MADDEN ET AL., supra note 45, at 8.
94. MARY MADDEN ET AL., supra note 45, at 4.
95. Id. at 5.
97. CAL. BUS. & PROF. CODE § 22580(d) (enacted by Chapter 336).
innovative, and free argued that Chapter 336 includes language that “leaves operators uncertain of their obligations” and may actually cause operators to collect more information from minors.99

1. Chapter 336 Is Vague and Unclear

CDT worries that the phrase “directed to minors” could “leave operators with no certainty of their obligations under the law.”100 Chapter 336 defines a website directed to minors as one “created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults,” yet does not provide a method for evaluating this standard.101 CDT notes that COPPA contains an effective “look and feel test” for determining whether a website is “directed to children,” including the subject matter and use of animated characters.102 But this test does not help define a website that is directed to minors up to the age of eighteen.103 Since it is more challenging to determine whether content is directed to teenagers than to children, many operators will be uncertain about the classification of their online service.104 The problem compounds for operators directing only portions of their websites at minors by forcing them to evaluate each portion and determine whether they can continue marketing the prohibited products.105 Because operators may struggle to determine whether their sites are directed to minors, many operators may “comply with the law by prohibiting minors from registering for their sites.”106

2. Operators May Actually Collect More Information

Ironically, Chapter 336 may encourage operators to collect more information from minors.107 Chapter 336 states that operators are not required to collect age

99. Id. at 4.
100. Id.
101. BUS. & PROF. §§ 22580(e) (enacted by Chapter 336).
102. 16 C.F.R. § 312.2 (2012).
103. See Llanso, supra note 98, at 5 (noting that it can be simple to identify information directed to children, but difficult to distinguish between information targeted at teenagers and adults).
104. Id. (noting that it is hard to delineate between content directed at sixteen-year-olds and content directed at young adults and older groups and identifying sites like Tumblr, Instagram, and apps like Angry Birds that may be uncertain).
105. Id. (using Hulu.com as an example of a website that is attracts a general audience, but also provides content for minors).
106. Id. at 8.
107. See id. at 7 (noting that distinguishing between minors and adults requires operators to collect information).
information, but in order to comply with Chapter 336, operators must have “actual knowledge” that a minor is using the online service. Therefore, to obtain actual knowledge that a minor is visiting its online service, the operator will likely collect “information about its users to distinguish minors from adults and California residents from users elsewhere in the country and world.” Paradoxically, operators would need to “maintain richer profiles about the users of their sites” in order to comply with Chapter 336, which is designed to deter collection of personal information.

V. CONCLUSION

Although Chapter 336 expands upon existing privacy protections provided by COPPA, it might not have a strong impact on minors’ experience on the Internet because it does not protect against third-party posting and does not provide a novel protection since most sites already provide an eraser button. Also, vague provisions such as websites “directed to minors” may leave operators uncertain of their obligations under the law. Despite its problems, the Senate passed Chapter 336 without a single no vote and even the critics “applaud the California legislature’s continued focus on issues of online privacy.”

108. CAL. BUS. & PROF. CODE § 22580(g) (enacted by Chapter 336).
109. Id. § 22580(b)(1) (enacted by Chapter 336).
110. Llanso, supra note 98, at 7.
111. Id.
112. Alexander, supra note 82.
113. Ferenstein, supra note 83.
114. Llanso, supra note 98, at 4.
116. Llanso, supra note 98, at 8.
Chapter 438: Giving California a Competitive Edge as a Breeders’ Cup Venue

Jacquelyn Loyd

Code Sections Affected
Business & Professions Code § 19605.74 (amended).
SB 819 (Wright); 2013 STAT. Ch. 438 (Effective September 30, 2013).

I. INTRODUCTION

“‘It is not best that we should all think alike; it is a difference of opinion that makes horse races.’”¹ Not only do such differences make for exciting betting and possible large payouts, competing opinions heavily influence the evolution of the horse racing industry.² With televised races, electronic betting, and synthetic track surfaces, racing has come a long way from the narrow hippodrome tracks of ancient Greece.³ Today, the richest weekend of racing in the world is the Breeders’ Cup, also called the Super Bowl of horse racing.⁴

Hollywood Park, a California racetrack, hosted the first Breeders’ Cup races in 1984.⁵ The meet originally moved to a different track each year, but, modernly, it is common for the same track to host the races two years in a row.⁶ The Breeders’ Cup previously held eight races over the course of a single day, but, in 2007, three new races were added and held the day before the original eight.⁷ Presently, there are fourteen races held over the course of two days, and the meet is the richest in the country as far as purses⁸ go, with twenty-five million dollars awarded by the end of the weekend.⁹

² 2. See Lenny Shulman, Racing’s Grand Experiment Is Under Way, BLOOD-HORSE, Dec. 8, 2007, at 5, 6 (noting that changes to racing typically come about slowly and that the rapid move to synthetic footing on some tracks was influenced by track and horse owners beliefs that the footing would prevent lameness and hold up better to weather).
⁶ 6. See id. (documenting where each meet was held and indicating that it was never held at the same track in successive years until 2008 and 2009 at Santa Anita, California).
⁷ 7. See id. (containing information on which races were held each year and the dates those races were held on).
Despite growing purses, the popularity of thoroughbred racing in America has sharply declined over the last few decades. All over the country, racetracks have experienced declines in attendance and, frequently, in handle. There are many explanations for the drop in popularity: accessibility of other forms of gambling, high takeout—the amount of money removed from the betting pool before distributing the winnings—resulting in lower returns on betting, drugging controversies, and horse injuries, to name a few. Regardless, many states have implemented measures to try and bring new life to the races, like installing slot machines at tracks and experimenting with adjusting percentages of takeout. California has made several changes in the law in an attempt to draw more horses to California races, but Chapter 438 aims specifically at drawing the lucrative Breeders’ Cup to the state on a more permanent basis.
II. LEGAL BACKGROUND

Horse racing differs from other forms of gambling in that the horseplayer bets against other bettors in what is called parimutuel wagering. This type of wagering is more similar to a game of poker rather than a game like blackjack, where the players bet against the casino. This Section will explain both the particulars of betting on horseraces as well as the various statutes and regulations in place that police racing in California.

A. What is Takeout?

In thoroughbred racing, a certain percentage of the money bet on races, called takeout, is pulled from the betting pool in order to fund race purses, to provide revenue to the track, and to pay taxes. The remaining amount is split between the winning tickets. There is an essential balance to takeout in racing: if the takeout is too high, bettors will move to other forms of gambling and the racetrack and government will not make money; if the takeout is too low, the bettors might be happier, but the track will not be able to pay its costs or the purses and will risk closing.

B. Changes to Racing Law Under Chapter 283

In 2010, Chapter 283 enacted California Business and Professions Code Section 19602. This provision raised the takeout on exotic, multiple interest bets by two percent for bets involving two separate picks (exacta and double) and by three percent for bets involving three picks (trifecta and Pick 3) or more.
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(subfecta\textsuperscript{33} and Pick 4, 5, and 6\textsuperscript{34}). \textsuperscript{35} Effective in 2011, Chapter 283 raised takeout to 22.68 percent for bets including two horses and to 23.68 percent for bets involving three or more horses.\textsuperscript{36}

Chapter 283 also enacted Section 19605.74.\textsuperscript{37} This provision allocated the funds taken out of the betting pool in accordance with Section 19601.02 (two or three percent depending on the bet) at Breeders’ Cup races to the organizers of the Breeders’ Cup for their use in promoting and sponsoring the race.\textsuperscript{38} Funds allocated under Section 19601.02 for other California horse races go directly to the purses for those races.\textsuperscript{39}

C. Public Reception of Increased Takeout

After the California Legislature raised the takeout on exotic bets in 2011, horseplayers decided to boycott California races in protest.\textsuperscript{40} However, even with the 2010 change and the enactment of Section 19601.02, the takeout on exotic bets in California was still only average compared with other tracks across the country.\textsuperscript{41} Nevertheless, horseplayers vowed to return California takeout to its pre-2010 percentage of 20.68 percent for exotic bets.\textsuperscript{42}

Despite horseplayers’ objections to the raised takeout, several California groups, including the Thoroughbred Owners of California (TOC)\textsuperscript{43} and the California Authority of Racing Affairs,\textsuperscript{44} as well as national groups like the Thoroughbred Owners and Breeders Association, supported the legislation.\textsuperscript{45}

\begin{footnotesize}
\begin{enumerate}
\item 32. \textit{Id.} (explaining that the Pick 3 requires the horseplayer to pick the winners of three successive races).
\item 33. \textit{See Types of Horse Racing Wagers, supra note 28} (defining the superfecta as a bet in which the horseplayer chooses the first, second, third, and fourth place horses in a single race).
\item 34. \textit{Id.} (explaining that the Pick 4, 5, and 6 bets require the horseplayer to choose the winners of either four, five, or six successive races respectively).
\item 35. \textit{CAL. BUS. \\& PROF. CODE} \textsection 19601.02(a) (West Supp. 2013).
\item 37. \textit{BUS. \\& PROF.} \textsection 19605.74(a).
\item 38. \textit{Id.}
\item 39. \textit{Id.} \textsection 19601.02.
\item 40. LaMarra, \textit{supra} note 36.
\item 42. LaMarra, \textit{supra} note 36.
\item 43. \textit{See id.} (stating that the TOC supported Chapter 283).
\item 44. \textit{See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 1072, at} 5 (Feb. 17, 2010) (listing CARA as support for Chapter 283).
\item 45. \textit{See LaMarra, supra} note 36 (reporting that all national racing groups supported Chapter 283 and that the Thoroughbred Owners and Breeders Association expressly supported the TOC).
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These supporters pointed out that New York and Pennsylvania both have even higher takeout on exotic bets than California post-2010, and that their track revenues have actually increased. The Horseplayer’s Association of North America (HANA) argues that the ideal balance of takeout is lower than present levels, but the organization has not yet been successful in returning takeout amounts in California to pre-2010 percentages.

While the stated goal of the legislature was to draw more entries to California races by increasing purses with the funds from Section 19601.02, race attendance actually declined in 2011. Additionally, average handle at California tracks plunged. While the HANA boycott is one explanation for this drop in betting, the public trend away from horse racing to other forms of gambling could be responsible. Either way, the legislature’s 2010 changes to horse racing law failed to halt the decline in popularity for one of California’s most treasured pastimes.

III. CHAPTER 438

Chapter 438 pertains only to Breeders’ Cup races held in California. It amends Section 19605.74 to allow organizers of the Breeders’ Cup horse races to use money obtained from takeout pursuant to Section 1901.02 to fund the purses of those races. Chapter 438 still allows organizers to use the funds to promote and support the race, but it gives them discretion as to the best use of the takeout and explicitly permits the use of takeout funds for financing race purses. Chapter 438 also specifies that the Breeders’ Cup organizers shall enter into a written agreement with the host venue that specifies how the funds will be set aside, and that the California Horse Racing Board will receive a final report on how the funds were used within ninety days of the Cup.
Furthermore, Chapter 438 authorizes the board to use not only funds from parimutuel wagering at the Breeders’ Cup, but it also states that the board can choose one non-thoroughbred race held on the same day as the Cup and appropriate funds from its exotic bets for the promotion of the Breeders’ Cup. \(^{58}\) Lastly, Chapter 438 contains provisions to clarify that no reimbursement is necessary under the California Constitution, and that the revisions are urgent and will take effect before the 2013 Breeders’ Cup. \(^{59}\)

**IV. ANALYSIS**

The Breeders’ Cup Classic is one of the richest, most prestigious horse races in existence. \(^{60}\) It draws horses not just from around the United States, but from around the world. \(^{61}\) With such prestige, the weekend of racing draws large crowds and has the potential to employ hundreds of people as well as generate an estimated sixty million dollars in revenue. \(^{62}\) With such an economic boost, it is no wonder that Chapter 438 reflects an effort by the California Legislature to bring the Breeders’ Cup to California permanently. \(^{63}\) While Chapter 438 only makes a small change in the law, it gives California venues an edge to bring the Breeders’ Cup to the state on a more regular basis. \(^{64}\)

**A. Every Little Bit Helps a Struggling Industry**

The horse racing industry is floundering in the poor economy compared to other, cheaper forms of gambling. \(^{65}\) Like many states, the Breeders’ Cup organizers have taken steps to attract more horses to the races. \(^{66}\) The organizers have provided travel allowances for horses from out of state and out of country in the past, but in 2013 they raised the amounts of these allowances to $10,000 for an out-of-state horse and $40,000 for a horse traveling from a foreign country. \(^{67}\)

\(^{58}\) Id. § 19605.74(d) (amended by Chapter 438).

\(^{59}\) Id. § 19605.74(2) (amended by Chapter 438); id. § 19605.74(3) (amended by Chapter 438).

\(^{60}\) See Races, supra note 9 (describing the fame and prestige surrounding the five million dollar Classic).

\(^{61}\) See Matt Hegarty, Breeders’ Cup to Provide Travel Allowances, Reduces Entry Fees, DAILY RACING FORM (Mar. 15, 2013), http://www.drf.com/news/breeders-cup-provide-travel-allowances-reduces-entry-fees (on file with the McGeorge Law Review) (noting that the Breeders’ Cup increased travel allowances to draw more horses from overseas).

\(^{62}\) SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 819, at 1–2 (Apr. 23, 2013).

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) See generally Liebman, supra note 10 (putting forth different explanations for the decline in horse racing).

\(^{66}\) See generally Hegarty, supra note 61 (explaining different techniques that the Breeders’ Cup has taken to increase race entries).

\(^{67}\) Breeders’ Cup Awards Travel Allowances for World Championships; Reduces Entry Fees, BREEDERS’ CUP (MAR. 15, 2013), http://www.breederscup.com/article/breeders-cup-awards-travel-allowances-
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Additionally, the Breeders’ Cup lowered the entry fees for each race from three percent of the purse amount down to two percent of the purse amount in order to draw more entries. Even one percent is a significant amount when the purses are worth millions of dollars, making the entrance fee in the hundreds of thousands.

Chapter 438 does not change the percentage of takeout pursuant to exotic bets, and the takeout it makes available to the Breeders’ Cup for funding purses might not seem like a lot (only two or three percent of exotic bets). But with handle for the Breeders’ Cup weekend regularly around $150 million, even a single percent is well over a million dollars. The twenty-five million dollars in purse money for the weekend is the biggest draw for horses to enter the races, and the extra millions of dollars the organizers receive pursuant to Chapter 438 when the meet is held in California will allow them to keep the purse money and prestige of the races high. Combined with the provision allowing money from one non-thoroughbred race to be added to the funds that the Breeders’ Cup organizers can use under § 19601.02, those extra dollars give the organizers plenty of capital to continue to draw horses from around the world.

B. Competition from Other States

Despite the millions of dollars the Breeders’ Cup can make holding the races in California, popularity of the races tends to be higher when they are held at Churchill Downs, Kentucky. Additionally, total handle is higher in Kentucky

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68. Id. (stating that the organizers want to make the Breeders’ Cup races more affordable to enter).
69. See Hegarty, supra note 61 (explaining that entry fees are calculated by percentages of purse money, which is in the millions for most Breeders’ Cup races).
70. See CAL. BUS. & PROF. CODE § 19601.02(a) (West Supp. 2013); id. § 19605.74 (amended by Chapter 438) (empowering the Breeders’ Cup to fund the race purses with the takeout pursuant to Section 19601.02(a)).
71. See Event by Year, supra note 5 (documenting the handle of every Breeders’ Cup weekend under each respective link and demonstrating that handle has been above $145 million every year since 2007, sometimes even reaching above the $170 million mark).
72. See Races, supra note 9 (showing the purse amounts for each individual race, which when added up, total twenty-five million dollars).
73. See 2012 Breeders’ Cup—World Championship Horse Racing Since 1984, OFF TRACK BETTING, http://www.offtrackbetting.com/breeders_cup (last visited June 29, 2013) (on file with the McGeorge Law Review) (noting that the five million dollar Breeders’ Cup Classic is the culmination of the international racing season).
74. BUS. & PROF. § 19605.74 (amended by Chapter 438).
75. Id. § 19605.74(d) (amended by Chapter 438).
76. See 2012 Breeders’ Cup—World Championship Horse Racing Since 1984, supra note 73 (indicating that the race has garnered more international entries over the last few years, which are also the years the race purses have increased).
than in California.\textsuperscript{78} In 2010, Churchill Downs brought in $173,857,697, the single highest handle the Breeders’ Cup has ever garnered.\textsuperscript{79} The statistics, combined with East Coast and Midwest owners’, horseplayers’, and breeders’ opposition to moving the races permanently to California,\textsuperscript{80} are hurdles in the path of the California Legislature and its goal to settle the Breeders’ Cup in California.\textsuperscript{81}

But even with Churchill Downs’ better statistics, Santa Anita, California, has hosted the Breeders’ Cup races three out of the last five years.\textsuperscript{82} Southern California certainly has better weather for racing in early November, typically sunny and in the seventies, whereas Kentucky is consistently in the forties and fifties and often raining.\textsuperscript{83} Additionally, Kentucky lacks a measure such as Chapter 438 that would make it a more attractive location for the Breeder’s Cup; it merely has a statute that exempts tracks from state tax when hosting a large, multiple-day racing event like the Breeders’ Cup.\textsuperscript{84} All of this benefit goes to the track rather than to the organizers.\textsuperscript{85} Santa Anita could get some competition from Gulfstream, Florida, since that track announced its intention to bid for the races again in the future.\textsuperscript{86} However, the track is still undergoing a remodel, and is not a current threat.\textsuperscript{87}

In the last decade, the Breeders’ Cup has only been held at four different tracks.\textsuperscript{88} It is common racing knowledge that the number of tracks suitable for hosting the Breeders’ Cup has shrunk considerably in recent years due to bad
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track footing and spectator seating. Among these remaining tracks, California seems to have the edge in weather, state of the art facilities, and the law. Certainly, something is giving the Golden State a leg up, since the Breeders’ Cup is coming to Santa Anita again in 2014.

C. A Permanent Change?

The announcement that the Breeders’ Cup will be held in Santa Anita in 2014 was unprecedented: never before has the Breeders’ Cup been held at the same track for three consecutive years. It has long been rumored that the Breeders’ Cup might make Santa Anita its permanent home, and with the urgency provision added to Chapter 438, the organizers experienced the new benefits of hosting the race in California at the 2013 Breeders’ Cup. The 2013 races saw an increase in both attendance and total betting over the 2012 races despite the elimination of one race from the program. Additionally, NBC, owner of the Breeders’ Cup television broadcast rights, wants the races to settle in Southern California because of the good weather and the ability to broadcast the final race live (at 8 PM ET) across the country. But despite this pressure the organizers have not made a decision on where the race will be held in 2015, and state that they are keeping their options open. Even if the Breeders’ Cup decides against making California its permanent home, the California Legislature has created an advantage in a competitive field with Chapter 438.


91. See CAL. BUS. & PROF. CODE § 19601.02(a) (West Supp. 2013) (enabling California tracks to raise the takeout on exotic bets); id. § 19605.74 (amended by Chapter 438) (empowering the Breeders’ Cup to fund the race purses with the takeout pursuant to Section 19601.02(a)).

92. 2014 Breeders’ Cup World Championships to be held at Santa Anita Park, supra note 90.

93. See Event by Year, supra note 5 (listing all of the venues over the history of the Breeders’ Cup and never showing that it has been at the same track for more than two consecutive years).

94. See Mullen, supra note 80 (on file with the McGeorge Law Review) (“There has been talk for years of Santa Anita being named as a permanent site for the Breeders’ Cup. . . .”).

95. BUS. & PROF. § 19605.74(3) (amended by Chapter 438).

96. See The 2014 Breeders’ Cup, supra note 90 (indicating attendance at the races increased by 5% while betting went up 7%).


98. 2014 Breeders’ Cup World Championships to be held at Santa Anita Park, supra note 90.

99. See BUS. & PROF. § 19601.02(a) (West Supp. 2013); id. § 19605.74 (amended by Chapter 438) (giving
VI. CONCLUSION

The Breeders’ Cup brings jobs and substantial income to California during the years that it is held in the state.¹⁰⁰ In an effort to bring these prestigious races to California permanently,¹⁰¹ Chapter 438 allocates the increased takeout from exotic bets collected under Section 19601.02 directly to the organizers of the Cup.¹⁰² Traditionally, different tracks have hosted the Breeders’ Cup each year, but for the very first time, it will be held at the same track for three consecutive years: in California.¹⁰³ The Breeders’ Cup recognizes California as an ideal place to hold the Championship races,¹⁰⁴ and with so few tracks able to host the Breeders’ Cup,¹⁰⁵ even a small change like the one effected by Chapter 438 could encourage the organizers to pick California more frequently for the Super Bowl of racing.¹⁰⁶

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¹⁰². B US. & PROF. § 19605.74 (amended by Chapter 438).
¹⁰³. 2014 Breeders’ Cup World Championships to Be Held at Santa Anita Park, supra note 90.
¹⁰⁴. I d .
¹⁰⁵. Gardner, supra note 89 (listing the few venues appropriate for hosting the Breeders’ Cup).