

A close-up of an hourglass with blue sand, set against a solid blue background. The sand is flowing from the top bulb to the bottom bulb. The hourglass is positioned on the right side of the frame.

This webinar will begin shortly.

**FIA**

# Litigating Under the CEA

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# Reminders

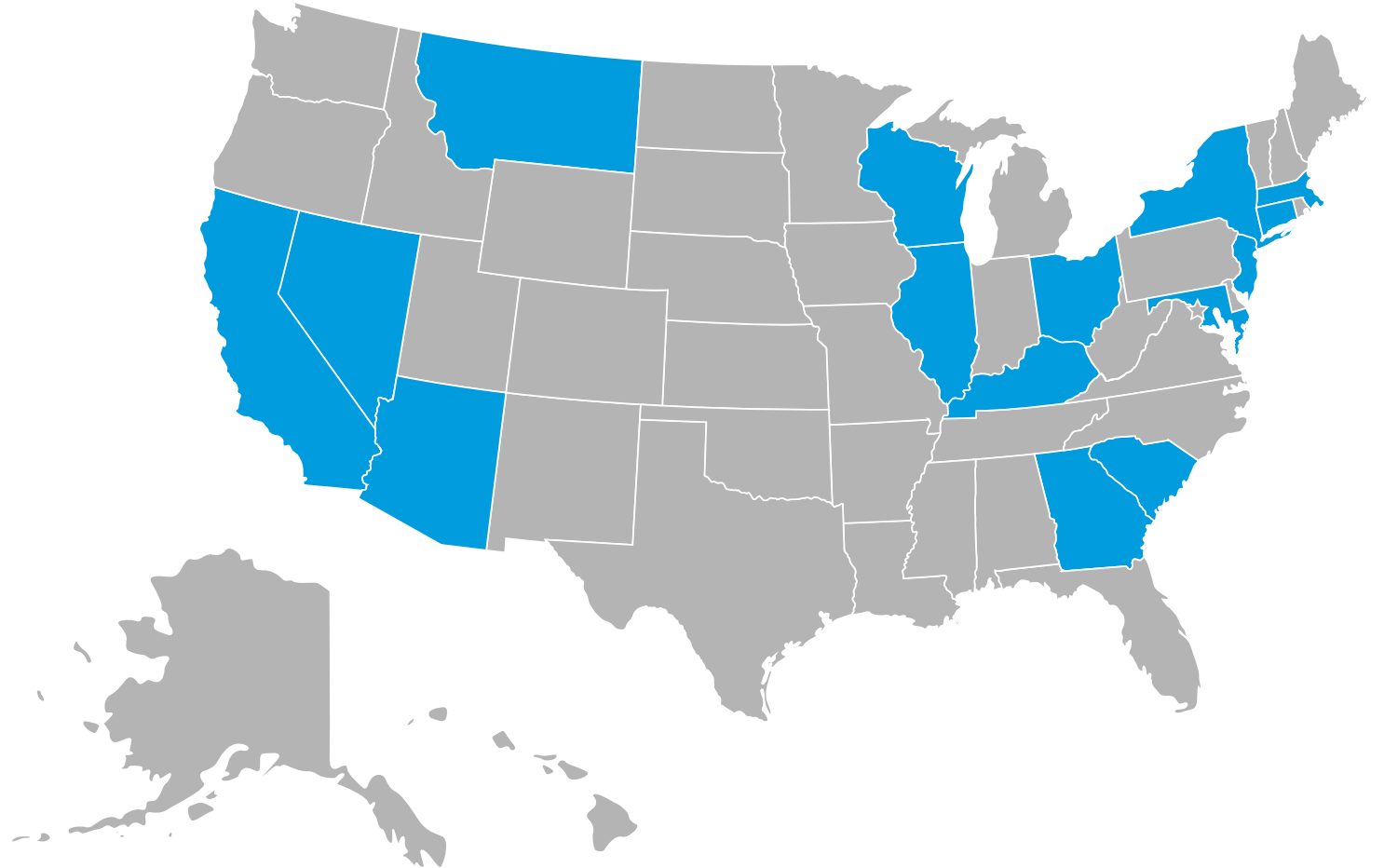
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- Overview of ongoing litigation involving prediction markets and event contracts
- Those cases highlight many legal and practice issues relevant to other litigation that involves other derivatives contracts and commodities
- The lessons from these ongoing cases may help you understand how to approach issues that arise in other litigation involving derivatives and commodities, whether as function of the CEA or otherwise

# States With Pending or Threatened Action (All Causes of Action)

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- Arizona
- California
- Connecticut
- Georgia
- Illinois
- Kentucky
- Massachusetts
- Maryland
- Montana
- Nevada
- New York
- New Jersey
- Ohio
- South Carolina
- Wisconsin



- Litigation initiated by various actors: private parties, state gambling regulators and attorneys general, and CFTC-regulated entities in response to cease and desist letters from state gaming regulators
- State Court v. Federal Court



# Kalshi State Litigation

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- Common Premise: Kalshi is violating state gambling laws by offering event contracts
  - New derivative products have been challenged by states as gambling in the past
  - Many have explicit carve outs for transactions listed on a board of trade





## Nevada

- U.S. District Court for Nevada preliminarily sided with Kalshi, holding that the CEA grants the CFTC exclusive jurisdiction over the events contracts and that Kalshi would face irreparable harm if the injunction isn't granted
- However, in November 2025, the court dissolved the injunction
- Kalshi has appealed the dissolution to the Ninth Circuit



## New Jersey

- Kalshi secured a preliminary injunction in New Jersey when the court prevented the state from enforcing a cease-and-desist order that would have halted Kalshi's operations in the state
- New Jersey has appealed the case to the Second Circuit where it is pending



## Maryland

- U.S. District Court for Maryland rejected Kalshi's Motion for Preliminary Injunction, allowing the state to enforce its state gambling laws
- The court rejected the field preemption argument, holding that Congress had not clearly intended to preempt state and tribal authority to regulate gambling under the CEA
- Kalshi has appealed the decision to the Fourth Circuit



## Massachusetts

- Massachusetts has taken an offensive stance by suing Kalshi in state court before the company could seek a declaratory judgment
- The state alleged that the event contracts closely resembled sports wagers and that the company never applied for a state sports wagering license
- Kalshi sought to remove the suit from state to federal court, but the request was denied

\*Other actions have been initiated but have not yet received any rulings from their respective courts.



# Tribal Litigation

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- **IGRA regulates the conduct of gaming on Indian Lands** and grants tribe the exclusive right to regulate and conduct gaming on their lands
- Three distinct classes of gaming:
  - **Class I Gaming:** All traditional or ceremonial forms of gaming employed by a tribal community
  - **Class II Gaming:** Bingo and non-banked card games
  - **Class III Gaming:** All other types of gaming not covered by the first two categories
- **Purpose of the law** is to support:
  - Tribal economic independence
  - Tribal sovereignty

- **UIGEA regulates online gaming**
- Prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the Internet and is illegal under federal or state law
- **Specifically excludes:**
  - Certain fantasy sports
  - Skill games
  - Legal intrastate and tribal gambling

- **The Lanham Act is the primary federal law governing trademark law**
- Prior to its passage, trademark law was solely regulated by state-level common law
- **Regulates false advertising** by prohibiting a company from making any statement that "misrepresents the nature, characteristics, or qualities of its own or a competitor's products or services"
  - Broad scope for what "statement" means

- **The RICO Act penalizes acts done on behalf of an ongoing criminal enterprise**
- There are both **civil and criminal** causes of action
- **Elements** of a RICO claim:
  - 1) Predicate acts
  - 2) Pattern of racketeering activity
  - 3) Enterprise
  - 4) Effect on interstate conduct





# Statute of Anne Background

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Statute of Anne laws are derived from an 18th century English legislation which was eventually incorporated into American laws

- They contain two causes of action:

1

Contracts founded on a gambling consideration are void and the **individual who lost money** can sue for recovery

2

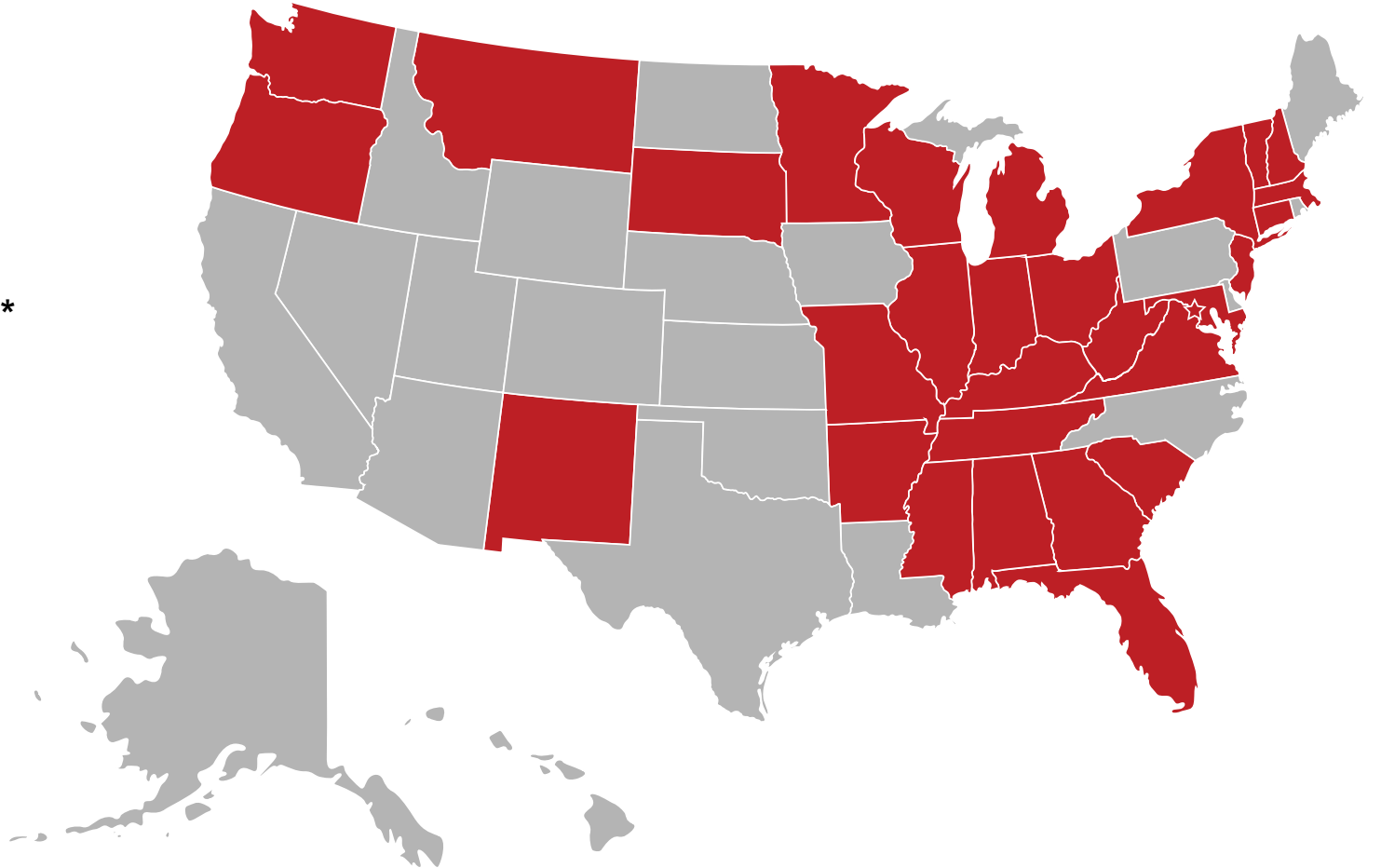
A **third-party** statutory cause of action to sue for recovery if the individual does not sue within a requisite period of time

- The first cause of action allows an individual to be made whole for participating in a voided contract
- The second cause of action acts as a “reward” for informing on illegal gambling, and as a “penalty” on the gambler

## States with Statutes of Anne Laws

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- Alabama
- Arkansas
- Connecticut
- **District of Columbia\***
- Florida
- **Georgia\***
- **Illinois\***
- **Indiana\***
- **Kentucky\***
- Maryland
- **Massachusetts\***
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana
- New Hampshire
- **New Jersey\***
- New Mexico
- New York
- **Ohio\***
- Oregon
- **South Carolina\***
- South Dakota
- Tennessee
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin



\* State allows for third party cause of action



# Defenses and Lessons Learned

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**1** **Preemption:** The CFTC has exclusive jurisdiction under the CEA (Section 2 (7 U.S.C. § 2(a))

**2** **Statutory Inapplicability:** State gambling loss-recovery laws/state gaming laws are inapplicable because it is not a game of chance or skill for money or other things of value

**3** **High Cost of Compliance:** Following a patchwork regulatory regime will lead to massive economic costs and will cost cities an increasingly important revenue stream

**4** **Antiquated Laws:** Statute of Anne laws have been superseded by modern gambling laws

- **Appellate Considerations**
- **Importance of Educating the Bench on the CEA**
  - *See, e.g., Commodity Futures & Trading Comm'n v. TMTE, Inc.*, 3:20-CV-2910-X, 2025 WL 2043718 (N.D. Tex. July 21, 2025).
    - The court concluded that metals are not commodities reasoning that:
      - the statutory definition of “commodity” enumerates only agricultural products (and box office receipts) and
      - therefore, the clause “all other goods and articles” must be read as limited to agricultural products (and movie tickets)
    - The court did not address “excluded commodities” as an additional defined category of commodities
    - Similarly, the court did not address the legislative history evidencing Congressional intent to include metals in the definition of “commodity”

- **“Excluded Commodity” definition (7 U.S.C. § 1a(19))**
  - Interest rates, indices, “an occurrence, extent of an occurrence, or contingency” that is “beyond the control of the parties to the relevant contract” and “is associated with a financial, commercial, or economic consequence.”
  - Lack of a physical commodity can add complexity to a court’s analysis
- **Definition of swap (7 U.S.C. §47)**
  - Broad definition with some contracts or transactions explicitly enumerated
  - Includes a transaction that “provides for any purchase, sale, payment, or delivery...that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence”



# **Additional Litigation Risks under the CEA**

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- **7 U.S.C. § 13a-2—Jurisdiction of States**

- States have limited authority to bring an action for violating the CEA or CFTC Regulations on behalf of its residents to enjoin such acts, enforce compliance, or obtain damages or any other relief granted by the court
- States **cannot** bring an action against a contract market, derivatives transaction execution facility, clearinghouse, floor broker or floor trader

- **7 U.S.C. § 25—Private Right of Action**

- Liability for actual damages (does not apply to Registered Entities and RFAs)
- Registered Entities and RFAs liability is **limited** to actual losses that resulted from a failure to enforce or enforcement of bylaws, rules, etc.

- **Exclusive Venue is Federal District Court for Both**



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