

Spring 2017

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Recommended Citation

Paul Suh, *Daily Fantasy Sports: A Call for Clear Guidelines*, 13 HASTINGS BUS L.J. 351 (2017).
Available at: http://repository.uchastings.edu/hastings_business_law_journal/vol13/iss3/2

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Daily Fantasy Sports: A Call for Clear Guidelines

By Paul Suh*

Professional sports are no longer what they used to be. Imagine rooting for a “fantasy” team that consists of professional athletes, who may or may not have ties to your hometown, from different teams within the same amateur or professional organization. You question whether the countless hours of research spent in drafting your fantasy team were sufficient to win money from other contestants or participants by accruing “fantasy points” based on the statistical performances of individual athletes on a yearly or daily basis.¹

As described in the scenario above, a fantasy sport contest is a variation of an online game where contestants create an imaginary team, consisting of real athletes of an amateur or professional sport, in order to compete with others and win prize money.² The goal of fantasy of sports is simple: collect the most productive players across numerous positions.³ In yearly fantasy sports leagues, participants take turns drafting players to form a team and manage such team for the duration of the entire season.⁴ In yearly leagues, participants are unable to draft an athlete that has already been selected.⁵ In daily fantasy sports, however, participants must draft a team of athletes based on a salary cap, but without the restriction of drafting a player that no other contestant has already selected.⁶ In addition, the entire duration of a daily fantasy sport contest lasts between one to seven days as opposed to an entire season in a yearly fantasy sports contest.⁷

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1. Jim McCormick, *So You Want to Play Fantasy Football?*, ESPN (July 9, 2010), <http://www.espn.com/fantasy/football/fil/story?page=nfldk2k10howtoplay>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Playing Daily Fantasy Sports for Dummies And Er... You!*, DAILYFANTASYSPORTS101, <http://www.dailyfantasysports101.com/basics/>.

7. *Id.*

Unlike traditional yearly fantasy sports, daily fantasy sports offer the immediate benefit of obtaining cash prizes within the same day, similar to the way casinos payout cash prizes to its winning patrons.⁸ As a result, daily fantasy sports has recently attracted contestants who wish to play professionally for a living. Although an element of chance undoubtedly exists, a great amount of skill is also necessary to perform at such professional level. This is important because their livelihood depends on whether daily fantasy sports games have enough elements of skill, while lacking the elements of chance, in order for such online games to be classified as legal.

A loophole in the legal framework allows daily fantasy sports⁹ sites to freely operate.¹⁰ Legislation with respect to the legality of daily fantasy sports sites remains ambiguous because there is no clear guideline that helps classify it as a game of skill or chance. This article helps demystify the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) in order to provide states with a mechanism to determine whether or not daily fantasy sports games involves enough skill to allow states to regulate the industry.¹¹ Without clear mechanisms, some fundamental values of American society—consumer protections, industry safeguards, governmental tax revenues, and judicial landscape—are largely at stake. Until Congress equips states with a clear guideline, payment processors may continue to eschew business with daily fantasy sports companies in the United States (the “U.S.”), which could thwart the burgeoning \$2 billion industry.¹²

Congress and states regulate games very differently. Congress created the UIGEA to prohibit entities from accepting payments in connection with unlawful

8. Darren Heitner, *The Hyper Growth of Daily Fantasy Sports Is Going to Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015), <https://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/>.

9. *See id.* A fantasy sport is a variation of an online game where contestants create an imaginary team that consists of real players of a professional sport. McCormick, *supra* note 2. While traditional fantasy league play is centered around drafting a team once prior to the start of the season, DFS offers daily drafts with the added benefits of immediate cash prizes that are available the same day. Heitner, *supra* note 9.

10. As John Oliver, a British comedian, puts it, “it’s [as if] lawmakers built a doggy door for beloved [pooches], [but] daily fantasy [sports sites] came bursting through like a pack of wolves” and disguising themselves as “legal dogs.” Matthew Kitchen, *John Oliver Explains Why Daily Fantasy Sports Is Gambling*, MEN’S JOURNAL (last visited Jan. 30, 2016), <http://www.mensjournal.com/adventure/races-sports/john-oliver-explains-why-daily-fantasy-sports-is-gambling-20151116>.

11. *See generally* 31 U.S. Code §§ 5361-67 (2012).

12. The UIGEA imposes a duty on payment providers to prohibit restricted transactions in order to avoid sanctions. *See generally* 31 U.S. Code § 5361-67. Consequently, Vantiv, one of DraftKings and FanDuel’s major payment processors, discontinued its services to daily fantasy sports sites in the United States. Joe Drape, *Payment Processor to Stop Working with Daily Fantasy Sports Clients*, N.Y. TIMES (Jan. 30, 2016), <http://www.nytimes.com/2016/01/30/sports/draftkings-fanduel-vantiv-daily-fantasy.html>. Vantiv’s withdrawal could lead to daily fantasy sports’ collapse unless another payment processor or major bank takes its place. *See id.* However, it does not look likely that another entity would intervene because the “clarity and long-term certainty around the regulatory and judicial landscape” of daily fantasy sports remains uncertain. *Id.*

internet gambling, while exempting fantasy sports or educational games as long as the results reflected the skillfulness of the participants.¹³ The UIGEA, however, does not provide a clear mechanism for states to use in classifying whether or not a game involves skill.¹⁴ Different states, therefore, have created variations of “dominant factor” tests to decide whether or not a game contains enough skill to classify it as a lawful game.¹⁵

The Shortcomings of the UIGEA as Exhibited in its Application to Online Poker

On April 15, 2011 (“Black Friday”), the government used the UIGEA to purge the flourishing online poker community by prohibiting players to engage in financial transactions with poker sites.¹⁶ States did not, however, apply their “dominant factor test,” which had traditionally been applied to determine the legality of offline poker and casino games that involves elements of skill and chance, because the prosecution involved money laundering in international commerce subject to federal law.¹⁷ As a result, online poker firms did not wish to operate in the U.S. or accept payments even though U.S. poker players were legally allowed to play online poker.¹⁸

The Proposal

Although the federal landscape of online poker’s legal status remains uncertain, this article proposes that daily fantasy sports should be treated the same as online poker with respect to the classification of skill. The economists Thomas Miles, Steven Levitt and Andrew Rosenfield asserted that it is wrong to classify poker a ‘game of chance,’ and, thus, they developed a series of tests to quantify the

13. 31 USC §§ 5362(1)(A), (1)(E)(ix).

14. Steven D. Levitt, Thomas J. Miles & Andrew M. Rosenfield, *Is Texas Hold ‘Em a Game of Chance? A Legal and Economic Analysis*, 101 GEO. L.J. 586, 636 (2013).

15. *Id.* at 583.

16. Matt Richtel, *U.S. Cracks Down on Online Gambling*, N.Y. TIMES (Apr. 15, 2011), <http://www.nytimes.com/2011/04/16/technology/16poker.html>. On Black Friday, the F.B.I. and the D.O.J. thwarted the poker industry by disclosing its grand jury indictment of the three largest online poker sites—Full Tilt Poker, Absolute Poker, and PokerStars—along with their founders, and payment processors. *Id.* The accusations consisted of money laundering, bank fraud, and illegal gambling offenses. *Id.* The government seized \$3 billion and approximately seventy-six bank accounts in fourteen countries that were associated with the offenses. *See* Press Release, U.S. Att’y S.D.N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds, at 3 (Apr. 15, 2011) *available at* <https://www.justice.gov/archive/usao/nys/pressreleases/April11/scheinbergetalindictmentpr.pdf>.

17. Darren Heitner, *Online Gaming Legalized in New Jersey and Virgin, Others Building Virtual Boardwalk Empires*, FORBES (Feb. 4, 2014), <https://www.forbes.com/sites/darrenheitner/2014/02/04/is-online-gambling-virgin-on-new-territory-in-the-garden-state/#ac0e36b5d494>.

18. *Id.*

influence of skill to suggest that skill is an important factor in poker.¹⁹ Because both games are highly similar with respect to their pool of skillful and recreational players, an application of such tests to daily fantasy sports could prove to be a beneficial tool for states to utilize.

This article also proposes that calibration, a method used to predict market prices and behavior that uses all relevant information over an extended period of time rather than a one off event, could provide the government with a better way to determine whether or not daily fantasy sports is classified as skillful.²⁰ As a result, such alternative method might prove to be a more efficient mechanism to mitigate the issue of “dominance” when games clearly involve some element of skill and chance.

Roadmap

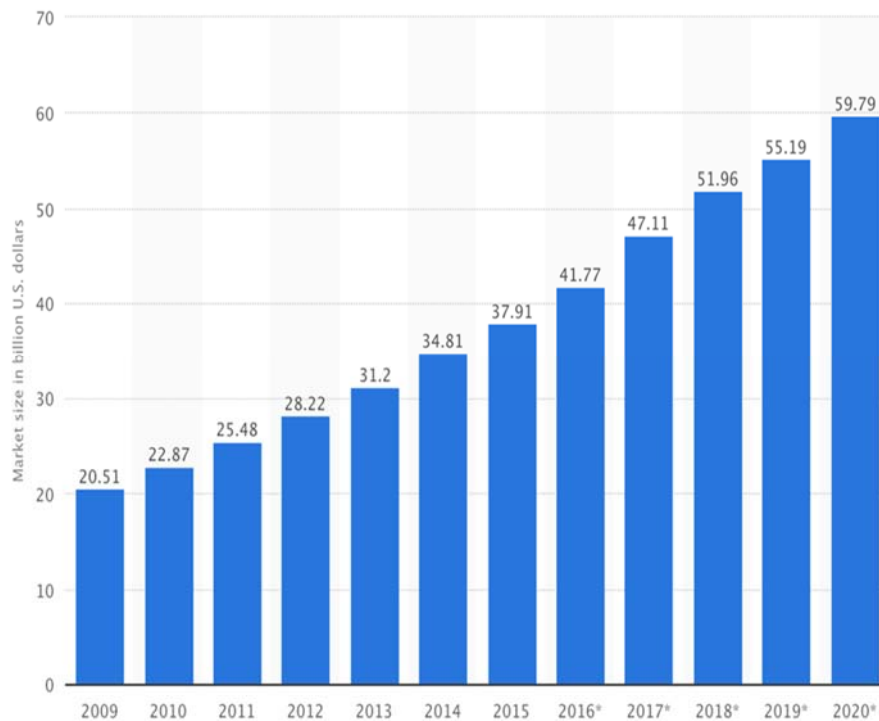
Part I provides an account of the rapid expansion of online gambling and daily fantasy sports while discussing trade-offs involved in regulating such games. Part II explains how Congress and states approach game classification issues and their lack of a uniform mechanism to classify a game as skillful or not. Part III proposes applications of two different approaches in determining whether skill is a dominant factor in daily fantasy sports: (i) an empirical test that assesses skill involved in poker, and (ii) calibration as a metric of prediction markets. Part IV discusses how the UIGEA applied to online poker and why daily fantasy sports should be viewed similarly to online poker.

¹⁹ Levitt et al., *supra* note 15, at 636.

²⁰ John Crawford, *Predicting Failure*, 36 VA. J.L. & BUS (2012).

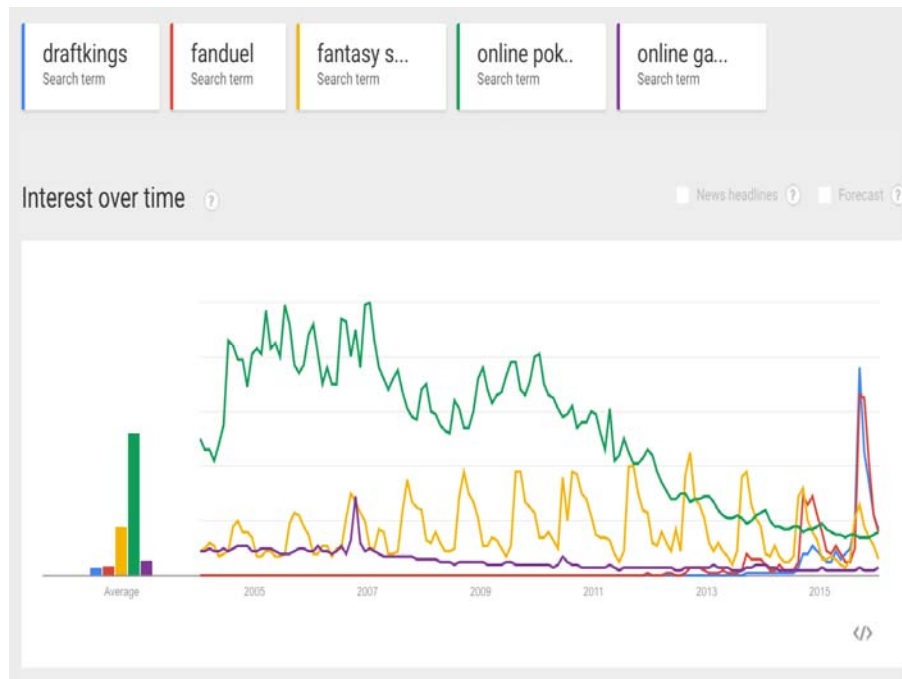
I. RAPID EXPANSION OF ONLINE GAMBLING AND DAILY FANTASY SPORTS

The online gambling market has steadily grown while projecting astronomical revenue predictions:



This graph indicates that the global online gambling industry is projected to be \$59.79 billion in year 2020.²¹ Furthermore, daily fantasy sports sites have recently erupted in the United States. In 2015, 81.9% of Google users who searched the terms Fanduel and Draftkings were within the United States and 16.4% and 1.7% in Canada and the United Kingdom, respectively:

21. *Size of the online gambling market from 2009 to 2020*, STATISTA (last visited May 20, 2017), <https://www.statista.com/statistics/270728/market-volume-of-online-gaming-worldwide/>. “Online gaming, or gambling, is the wagering of something of value, usually money, on the outcome of an event or game using the internet[.]” which includes such activities as poker, casinos (where people can play traditional casino games, like roulette or blackjack, but online), sports betting, bingo and lotteries.



Although trends may not be correlated to the revenues of an industry, they show that the industry has made a clear mark on American society. The spike in 2015 comes just before the start of the National Football League's ("NFL") season, which could be due to several factors. One major factor could be DraftKings' considerable efforts to market its product.²² Though some people have characterized daily fantasy sports sites' advertisements as deceptive, such advertisements have nonetheless made a forceful mark.²³ Because of the large revenue that such sites generate for sports organizations, Draftkings and Fanduel have sponsorships with major broadcasting companies, every NFL team, and most professional U.S. basketball, hockey, and

22. Hayden Bird, *You're Not Crazy, DraftKings Commercials Really Are on All the Time*, BOSTINO (Last visited Jan. 30, 2016) (Sept. 10, 2015), <http://bostinno.streetwise.co/2015/09/10/draftkings-advertising-stats-total-spending-in-2015-moves-to-number-one-in-time-for-nfl-kickoff/>. Statistics show that DraftKings tops the chart by spending \$22,535,747 with 6,053 national airings in 2015. *Id.* They spent more on advertising than companies like AT&T, Warner Brothers, Geico, and Universal Pictures. *Id.*

23. Darren Rovell, *New York Attorney General Amends Lawsuit Against Daily Fantasy Sites*, ESPN (Jan. 2, 2016), http://www.espn.com/chalk/story/_/id/14458955/new-york-attorney-general-wants-draftkings-fanduel-return-profits.

baseball teams.²⁴ Accordingly, these deals suggest that the daily fantasy industry is encouraged to raise awareness and legitimize the multibillion dollar industry.

A. Trade-offs Involved in Regulating Daily Fantasy Sports

Before Congress determines whether or not to legitimize the multibillion dollar industry by classifying daily fantasy sports as a game of skill, Congress must first consider the potential trade-offs involved in regulating such industry. As noted earlier, if the government abstains from regulating daily fantasy sports, consumer protections, industry safeguards, and governmental tax revenues could be at stake.

As daily fantasy sports sites continue to operate in an unregulated market, consumer protections and industry safeguards remain the biggest concerns. In a recent scandal, a Draftkings employee used insider information at FanDuel, one of its competitors, to win \$350,000 during the 2015 NFL Season.²⁵ It is, therefore, rather alarming that Congress has yet to address the notion of insider trading with respect to daily fantasy sport sites.

i. Regulating Daily Fantasy Sports would Protect Consumers and Safeguard the Industry

Currently, the UIGEA does not have any provision that protects consumers from the use of insider information.²⁶ In comparison, the purpose of securities regulation is to “create a competitive market for sophisticated professional investors and analysts (information traders).”²⁷ In an effort to maintain such goal, securities regulations impose restrictions on insider trading.²⁸ Similar to those restrictions that prohibit insiders from undercutting the efforts of information traders to recoup their investments, the government needs to impose similar restrictions in order to protect daily fantasy sports players from insiders who seek to inhibit participants’ ability to recoup their investments.²⁹ Otherwise, daily fantasy sports players could be driven out of the market and the industry could collapse.

24. *FanDuel Announces Series E Financing of \$275 Million from KKR, Google Capital and Time Warner*, VENTURE BEAT (July 14, 2015), <http://venturebeat.com/2015/07/14/fanduel-announces-series-e-financing-of-275-million-from-krk-google-capital-and-time-warner/> (broadcasting companies include Google Capital, Time Warner Investments, Turner Sports, NBC Sports Ventures, and Comcast Ventures); see also *DFS Partnership / Sponsorship Tracker*, LEGAL SPORTS REPORT (last visited Jan. 30, 2016), <http://www.legalsportsreport.com/dfs-sponsorship-tracker/>.

25. Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

26. See generally 31 U.S. Code §§ 5361-67 (2012).

27. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 711 (2006).

28. Securities Exchange Act of 1934, 15 U.S.C. § 78t-1 (2012).

29. See Goshen et al., *supra* note 28, at 716 (explaining how restrictions protect information traders in the context of securities).

1. Gambling Addiction and Potential Remedies for Problematic Gamblers

Addiction remains to be a prevalent problem for habitual gamblers. Dr. Timothy Fong, a gambling addiction expert, suggests that the addictions of internet gambling remained unclear until recently.³⁰ Because people expect consideration upon the uncertain outcome of an event, scholars believe that daily fantasy sports sites are considered gambling.³¹ Dr. Timothy Fong advocates that the debate on whether daily fantasy sports is a game of skill or luck is immaterial.³² The government, however, could provide further consumer protection by creating national problem gambling programs like those implemented by Nevada and New York.³³

Moreover, remedies for problematic gamblers have been proposed. Kurt Eggert suggests that gambling institutions should provide informational disclosures to gamblers.³⁴ Such disclosures would provide accurate price information, which is essential to an efficient market, and allow gamblers to compare such information in order to determine how to spend their limited funds.³⁵ Not only would disclosure help recreational gamblers, but it would also assist pathological gamblers to alleviate any misperceptions of odds and underestimation of losses.³⁶ If the government regulated the daily fantasy sports industry, they could require daily fantasy sports sites to disclose vital information in order to protect consumers from gambling addictions.

ii. *Preserving and Protecting Local Tax Revenues from Departing Overseas*

In addition to protecting consumers and providing industry safeguards, regulating daily fantasy sports could provide immense tax revenues within the United States. Despite Black Friday,³⁷ estimates show that Americans spent \$4 billion, while the global gambling market exhibited over \$33 billion in revenues.³⁸ Estimates also show that Americans spend more than \$100 billion annually to offshore sites that provide no tax benefits or consumer protection for the United

30. Josh Isreal, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal and Completely Unregulated*, THINK PROGRESS (May 7, 2015), <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/>.

31. *Id.*

32. *Id.*

33. Dallis Nicole Warshaw, *Breaking the Bank: The Tax Benefits of Legalizing Online Gambling*, 18 CHAP. L. REV. 289, 303 (2014). These states used their gambling tax revenues to create programs like education and problem gambling programs. *Id.*

34. Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 MD. L. REV. 217, 219 (2004).

35. *Id.* at 220.

36. *Id.*

37. See Heitner, *supra* note 18.

38. Warshaw, *supra* note 34, at 301.

States.³⁹ Consequently, if the government continues to abstain from regulating daily fantasy sports, the U.S. could similarly encounter tax revenue and consumer protection failures as of those exhibited by the prohibition of alcohol and prostitution.⁴⁰ As a result, the lack of clear guidelines could push such activities overseas.⁴¹

Some states have curbed the issue of sending activities overseas by regulating online gambling within state borders. Regulating online gambling within some states has proven to be a successful stream of revenue.⁴² Such measure, however, limits the amount of revenue within such legalized states. In order for the government to reap the benefit from the tax revenues of daily fantasy sports, Congress, therefore, should legislate to regulate the market by providing states with a clear guideline to determine the skillfulness of the game.

II. LEGISLATION

Federal legislation—the UIGEA—does not provide a clear legal framework for states to use in order to determine whether or not daily fantasy sports games contain enough skill to allow states to regulate the industry. Without such mechanism, it is difficult to determine whether or not a game classifies as unlawful gambling.⁴³ Instead, the UIGEA relies on state courts' dominant factor test that does not inquire into the amount of skill or chance involved in a game. Unfortunately, there have been many variations of the test that make its application unpredictable, and, thus, Congress needs to clearly define the term "skill" in order to protect the country's judicial landscape of gambling laws.⁴⁴

39. *Id.*

40. *Id.* This does not mean that the government has no other options of increasing revenues for the government. As Warshaw suggests, the government might continue to borrow money in order to raise revenues, which ultimately could create more problems such as inflation. *See id.* at 289–90, 290 n.6.

41. *Id.* at 302.

42. Elana K, *All Time High Revenue for NJ Online Gaming in February*, ONLINE CASINO REPORTS (Mar. 17, 2016), <http://www.onlinecasinoreports.com/articles/all-time-high-revenue-for-nj-online-gaming-in-february.php>. *Id.* For example, New Jersey's online gaming revenue has been the highest since online gambling had been legalized in 2013. *Id.* New Jersey's online gambling revenues were \$13.7 million and \$14.7 million in January and February, respectively.

43. Levitt et al., *supra* note 15, at 586.

44. Gautham Nagesh, *Republican Drawing Up Bill to Legalize and Regulate Online Poker Sites*, THE HILL (May 4, 2011), <http://thehill.com/policy/technology/162983-barton-goes-all-in-for-online-poker-bill>.

A. Federal Legislation

i. *The UIGEA Defined*

Congress created the UIGEA due to concerns of fraud, money laundering, pathological gambling, and underage gambling.⁴⁵ It prohibits people “engaged in the business of betting or wagering” from knowingly accepting payments but it does not make it outright illegal for players to engage or place bets on internet gambling websites.⁴⁶ The UIGEA simply seeks to regulate website owners and financial intermediaries that attempt to provide the bridge between internet casinos and internet gamblers.⁴⁷ The UIGEA defines the terms “bet or wager” as “staking or risking . . . something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”⁴⁸ While the UIGEA classifies outcome determinative events such as games of chance or sporting events as a bet or wager, it carves out language which excuses certain types of activities or transactions.⁴⁹

ii. *Carve Out Rule: The Fantasy Sports Exception within the UIGEA*

The UIGEA is drafted in a manner that carves out participation in fantasy sports. Pursuant to the UIGEA, people may participate in fantasy or simulation sports games in which no such team is currently comprised of membership of an actual team that is part of an amateur or professional organization, as defined by the Professional and Amateur Sports Protection Act of 1992 (“PASPA”)⁵⁰, as long as (1) all prizes offered to winners are known to the participants in advance and such prize value is not determined by the amount of participants or their paid fees, (2) the winning results are based on participants’ knowledge and skill and primarily derived from an accumulation of statistical analysis of an athlete or individual’s performance “in multiple real-world sporting . . . events,” and (3) any winning result is not based on the point-spread or score of a “single real-world team or any combination of such team; or solely on” an individual athlete’s performance in any single sporting event.⁵¹

Although the carve out provision was intended to exempt yearly “fantasy” sports, whether it can be interpreted to exempt “daily” fantasy sports sites, e.g.

45. Warsaw, *supra* note 34, at 302.

46. 31 U.S.C. § 5363 (2012).

47. 31 U.S.C. § 5362(10)(A) (2012).

48. § 5362(1)(A) (2012).

49. § 5362(1)(E) (2012).

50. 28 U.S.C. § 3701 (2012).

51. 31 U.S.C. § 5362(1)(E)(ix) (2012).

DraftKings and Fanduel, remains controversial.⁵² Daily fantasy sports sites may satisfy the first⁵³ and third⁵⁴ conditions of the UIGEA, but the second condition remains to be the controversial lifeline for such sites to continue operations. It requires that the results “reflect the relative knowledge and skill” of those participating in these events through the use of statistics of real athletes’ performances. Companies like Fanduel, therefore, state that their site is a “game of skill” without any mention of the word “chance” or “chance.”⁵⁵ Unfortunately, state courts are burdened with the difficult task to interpret the UIGEA and determine whether skill or chance predominates the other.

B. State Regulation

i. The Need for Congress to Provide States with a Clear Guideline

A clear guideline to determine whether daily fantasy sports is classified as a game of skill or chance would have an effect on how daily fantasy sports sites operate. Because daily fantasy sports sites like Draftkings and Fanduel want to avoid being classified as unlawful gambling institutions and in turn, subjecting themselves to strict regulations, the words “luck” and “chance” do not appear on

52. *The Hot New Form of Fantasy Sports is Probably Addicted, Potentially Illegal and Completely Unregulated*; Josh Israel (May 7, 2015) (last visited Jan. 30, 2016) (Thinkprogress.org) <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/>. Former Republican Jim Leach, author of the UIGEA, admits that he reluctantly inserted the minor fantasy exception because other members would not support it if he had not added the exception. Leach assumed that “nothing in the endeavor could be used to incentivize corruption of any actual sports contests being played.” His original intent was “to constrain a growing gambling ethos in America that could bring the casino to the home, the work station, college dorm, even the treadmill. [His] concern was that a savings and investing country could too easily become a country where too many would bet wantonly on unrealistic hopes of obtaining a big payoff.” He raises issues that align with major policy concerns of previous federal gambling statutes, such as PASPA of 1992.

53. *Terms of Use, DRAFT KINGS* (Mar. 2, 2017), <https://www.draftkings.com/help/terms> (because the prize payouts of the designated leagues are published at the creation of each new event, the first condition of the UIGEA is likely satisfied).

54. Because daily fantasy sports teams are also based on the accumulation of individual athletes’ performance on different sporting events, the third condition of the UIGEA may also assist in classifying daily fantasy as legal. Unless someone’s fantasy sports team consists of players entirely from a single team or game, fantasy sports would be in violation of the UIGEA. As a result, a fantasy sports match could not take place on a championship game because there is only one outcome-determinative game to be played. If the UIGEA’s language stated that no fantasy team is based on the current membership of an actual “player” of an actual sports team, fantasy leagues would likely not be exempt from the UIGEA.

55. See discussion *infra* to State Regulation section II.b (State Regulation). “Winners are determined by the criteria stated in each contest rules. For each contest, winners are determined by the individuals who use their skill and knowledge of relevant professional sports information and fantasy sports rules to accumulate the most fantasy points. Fantasy points are accumulated through the performance of individual athletes across multiple sports events. All entries in FanDuel must be made up of players drawn from a minimum of two sporting events.” *Terms of Use, FANDUEL* (Oct. 28, 2016), <https://www.fanduel.com/terms>.

their “terms of use” pages.⁵⁶ Rather, both companies incorporate the word “skill” in order to convey that their winners are those who employ “skill and knowledge of relevant sports information and fantasy sports rules to accumulate the most points according to the corresponding rules.”⁵⁷ Despite its attempts, the daily fantasy sports industry faces an uphill battle if it wishes to categorize itself as a game of skill because the UIGEA does not provide states with a clear legal framework to do so.

ii. *A Lack of a Uniform Approach of The Dominant Factor Test*

Courts have historically ruled that games like checkers, bowling, and billiards are skillful games of skill while roulette, dice, and lotteries are games of pure chance.⁵⁸ Differing state regulations, however, make it difficult to apply the “Dominant Factor” test, a method used by most U.S. jurisdictions to determine whether or not a game constitutes as gambling, to games comprised of both skill and chance.⁵⁹ In an effort to inquire into the proportions of skill and chance, some states have taken a more permissive⁶⁰ approach while others have taken a more restrictive⁶¹

56. FANDUEL, *supra* note 56; DRAFT KINGS, *supra* note 54.

57. *Id.*

58. See Levitt et al., *supra* note 15, at 593; see also *Commonwealth v. Plissner*, 4 N.E.2d 241, 244 (Mass. 1936); *Stearnes v. State*, 21 Tex. 692, 692 (Tex. 1858) (defining chess and billiards as games of pure skill, and raffles and “simple lotter[ies]” as games of pure chance).

59. See Levitt et al., *supra* note 15, at 583. In other words, a “game of chance” is more likely to be classified as gambling while a “game of skill” is not likely to be classified as gambling. A large number of states use varying forms of phrases, such as a “bona fide contest of skill,” to define a game as skillful without provide a clear mechanism to apply the test.

60. See Levitt et al., *supra* note 15, at 590. In order for the game to classify as unlawful, “the element of chance must reach a certain level of significance[.]” *Id.* For instance, New York’s statute defines a game of chance as one in which “the outcome depends in a *material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein” and further defines “gambling” as a “contest of chance.” N.Y. PENAL LAW § 225.00(1)–(2) (McKinney 2012) (emphasis added). Other states have adopted nearly identical language. See, e.g., ALASKA STAT. § 11.66.280 (West 2010); HAW. REV. STAT. § 712-1220(3) (West 2009); MO. REV. STAT. § 572.010(3) (West 2011); N.J. STAT. ANN. § 2C:37-1(a) (West 2005); OR. REV. STAT. § 167.117(6) (West 2011); WASH. REV. CODE ANN. § 9.46.0225 (West 2010). Miller, Levitt, and Rosenfield state that a game that has a “material degree of chance” is one where chance dominates skill.

61. See Levitt et al., *supra* note 15, at 589–90. For example, Georgia’ statute defines a “bet” is “an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value.” GA. CODE ANN. § 16-12- 20(1) (West 2012) Also, games involving “an element of chance,” games where the result “is uncertain or a matter of chance,” and the “act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or future contingent” are classified as gambling and prohibited in Utah, Virginia, and Arizona respectively. Consequently, the plain meaning of these restrictive state statutes suggests that an inquiry into the skillfulness of a game is pointless, so long as there is any speck of chance involved. *Id.* at 590. Other states employing similar language in their statutes include Minnesota, New Mexico, Tennessee, and Wisconsin. See MINN. STAT. § 609.75 (West 2005) (defining “gambling device”); N.M. STAT. ANN. § 30-19- 1(B) (West 2012) (defining “bet”); TENN. CODE ANN. § 39-17-501(1) (West 2010) (defining “gambling”); WIS. STAT. § 945.01(1) (West 2010) (defining “bet”).

approach. Because states do not have a uniform approach, they often limit their application in assessing the role of skill involved in a game.

1. The Limitation of a Single Round Approach of the Dominant Factor Test

Almost all states apply some variation of a dominant factor test to determine whether a game contains more skill than random chance, but scholars argue that some courts' approach to the test's application has been "unduly narrow and unscientific."⁶² Many courts have narrowly applied a dominant factor test by using a flawed "single round of play" approach, which looks solely at the outcome of a single event as opposed to multiple outcomes, in order to assess whether skill outweighs chance or vice versa.⁶³ This conceptual misstep has led to inconsistencies among states, and, thus, some courts have erroneously concluded that certain games constitute as illegal gambling.⁶⁴ For example, when courts try to apply a more qualitative approach to poker by assessing only a single round of play, they tend to overlook the importance of mathematical skill and ignore the skill of bluffing which takes skilled players multiple rounds of play to employ successfully.⁶⁵ Therefore, the narrow application of such test, which uses a single round of play, fails to equip courts with a tool to classify which types of games constitute as lawful gambling.⁶⁶

iii. *Alternative Approaches are Necessary to Assist States in Determining whether Skill or Chance is the Dominant Factor*

The majority of card games, including Texas Hold 'Em⁶⁷, prove why skill is not always observable after a single round of play. Rather, skill is observable after multiple rounds of play.⁶⁸ Because they encompass a "sequence of hands" that prolong over an extended period of time, such games are not restricted to a single round of play.⁶⁹ As a result, a courts' focus on a single round of play has limited their scope and "ailed to analyze the game as most people define it."⁷⁰ Experts,

62. See Levitt et al., *supra* note 15, at 583.

63. *Id.*

64. *Id.* at 606.

65. *Id.* at 584.

66. *Id.* at 587.

67. *Id.*; See *United States v. DiCristina*, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012). In 2012, the Eastern District of New York ruled that No-Limit Texas Hold 'Em was a game of skill and is therefore not illegal. *Id.* It represented the first time a federal court had recognized it as a game of skill. See *id.*; see also *Warshaw*, *supra* note 34, at 299. "Skilled players can expect to do better than their relatively unskilled counterparts at least three quarters of the time after 1,471 hands have been played." *Hard Evidence: Is Poker a Game of Chance or Skill?*, THE CONVERSATION (Mar. 26, 2015) <http://theconversation.com/hard-evidence-is-poker-a-game-of-chance-or-skill-39224>.

68. See Levitt et al., *supra* note 15, at 597.

69. *Id.* at 597.

70. *Id.*

therefore, have devised an empirical test that could provide courts with a better framework in determining whether skill predominates chance or vice versa.⁷¹

2. APPROACH I: Empirical Testing and the Law Of Large Numbers

In order to assess the role of skill and chance involved in a game like poker, scholars created a hypothetical game involving pure chance and identified four properties⁷² that a game involving skill would not exhibit.⁷³ After applying it to a large data set, if such game did not possess one or more of these four components, “it [was] evidence that a player’s skill influenced the outcome of the game.”⁷⁴ In order to support their prediction that online poker was a game of skill, they used statistical properties of “the law of large numbers,” which states that probabilistic predictions can be satisfied only with an infinite amount of data,” because a finite sample would cause deviations in the analysis.⁷⁵ Courts, therefore, should adopt a similar statistical approach when assessing the role of skill and chance involved in daily fantasy sports.

3. APPROACH II: Calibration Approach Used in Prediction Markets

Because sports betting involves immense amount of data, daily fantasy sports could prove to be well calibrated and efficient enough to utilize the prediction market metrics in order to assess whether or not skill is the dominant factor of a game.⁷⁶ Here, I provide how such metrics could equip courts with a better mechanism than the current dominant factor test in determining whether a game is skill-driven over a long period of time as opposed to the one off event.

a. Prediction Markets: Accuracy Versus Calibration

Prediction markets—markets used to forecast future events—have been accurately used to bet on outcomes of real-world events.⁷⁷ The concept behind these markets is the use of information aggregation to evaluate the efficiency of market prices.⁷⁸ Essentially, “individuals . . . seek out information and trade on it, at once

71. *Id.*

72. *Id.* at 584. The four properties include: (1) All players have the same expected payoffs; (2) Payoffs do not vary systemically with the observable characteristics of players; (3) Payoffs do not correlate with the actions a player takes during the game; and (4) A player’s past success (or failure) does not predict his future likelihood of success (or failure). *Id.*; see also *id.* at 617-635 (further analysis of the hypothetical test); see discussion *infra* to Section IV (Similarities) for further application of the empirical test.

73. See Levitt et al., *supra* note 15, at 584.

74. *Id.* at 585.

75. *Id.* at 618, 624.

76. Crawford, *supra* note 21.

77. *Id.*

78. *Id.* at 36–38.

profiting and moving the market toward the ‘correct’ price.”⁷⁹ “Because successful contracts allow bets on clearly observable and verifiable events[,]” such contracts generally provide for a more reliable test of the value of information integrated into their prices.⁸⁰

There are two metrics that determine the prices in prediction markets: accuracy and calibration.⁸¹ With respect to traditional sports gambling markets, accuracy merely answers whether or not the team with better odds wins.⁸² In addition, accuracy does not use statistics to explain the result, but rather solely addresses the one-off outcome of such result. Calibration, however, takes a more comprehensive approach by using aggregated information and statistical mechanisms to read into the given odds or market prices over an extended period of time.⁸³ Calibration, thus, is a better metric than accuracy in determining the value of information imbedded into market prices.

A brief example illustrates the point: if team X trades at \$0.60 to win over team Y, then it is implied that the market believes team X has a 60 percent chance to win.⁸⁴ Over the course of a season, if team X continues to win 60 percent of the time at that same price while “teams that trade at \$0.70 win 70 percent of the time, and so on,” then the market is known to be perfectly calibrated.⁸⁵ As a result, prediction markets and sports betting venues are generally highly calibrated.⁸⁶

b. Application of Calibration to Daily Fantasy Sports

The distinction between accuracy and calibration as applied to the way states use the dominant factor test seems relevant. If states take the “accuracy” approach with respect to the dominant factor test, they would be limited to a one-off event to assess whether skill is the dominant factor of the game, and, thus, courts would not be able to assess anything other than the data of a single event. The “calibration” approach, however, suggest a holistic view and uses aggregated information to determine whether skill is the dominant factor when games clearly involve elements of both skill and chance. States, therefore, should adopt a more statistical and “calibrated” approach in applying the dominant factor test.

79. *Id.* at 39.

80. *Id.* at 40.

81. *Id.*

82. *Id.*

83. *Id.* at 40–41.

84. *Id.* at 40.

85. *Id.*

86. *Id.*

III. CASE STUDY: ONLINE POKER AND THE CONTROVERSY OF BLACK FRIDAY

A clear and statistical approach for Congress to use in determining skillfulness of a game could have benefitted the online poker industry. As noted earlier, Black Friday purged the online poker industry because payment processors became unwilling to process payments from major poker companies—Full Tilt Poker, Absolute Poker, and PokerStars—after the government seized such companies for using fraudulent mechanisms to circumvent the UIGEA’s provisions, which prohibits money transfers from operators to players.⁸⁷ Such poker sites could not continue business operations until they pledged to prohibit U.S. players’ participation, and, thus, Black Friday altered “the landscape of online gambling” by reducing advertising and marketing revenue, World Series of Poker entrants, player sponsorships, and reliable companies.⁸⁸ In addition, Black Friday failed to address the main issue of whether or not online poker was a game of skill. As a result, such issue still persists for other online gaming industries like daily fantasy sports.

A. Current Landscape of Online Poker

Shortly after Black Friday, the future of the online poker industry showed promise when a federal court classified poker as a game of skill by reasoning that it is more a game of skill than that of chance, and, thus, such game operators should not be indicted under the federal laws that prohibit running illegal gambling operations.⁸⁹ Although the decisions came too late, states like Nevada, Delaware, and New Jersey legalized and regulated online gambling for people over twenty-one years of age within the state.⁹⁰ However, Congress has still remained silent in addressing whether or not online poker is a game of skill, which has caused a disparity amongst states.

i Limitation: Has It Struck the Right Balance?

The largest poker site—Pokerstars—recently launched operations in New Jersey after the government brought allegations on Black Friday.⁹¹ The New Jersey branch of Pokerstars states that it is a federal offense for those physically located

87. McCormick, *supra* note 2; Warshaw, *supra* note 34, at 302.

88. *Id.*

89. See Levitt et al., *supra* note 15, at 590; United States v. DiCristina, 886 F. Supp. 2d 164, 235 (E.D.N.Y. 2012).

90. Jake Vaughn, Legal Status of Online Poker in the United States, available at <https://www.onlinecasinobuebook.com/poker-rooms/legal-status-of-online-poker-in-the-united-states/>.

91. Jake Vaughn, *Legal Status of Online Poker in the United States*, ONLINE CASINO BLUE BOOK (2017), <https://www.onlinecasinobuebook.com/poker-rooms/legal-status-of-online-poker-in-the-united-states/>.

outside of New Jersey to partake in Internet wagering through its site.⁹² These types of provisions exist within Nevada and Delaware as well.⁹³ Despite such efforts, the federal legislature is still silent with respect to a “chance of inter-state legal dispute of when players from one state are gambling on a legal online establishment of another state[.]”⁹⁴

Poker is not the typical casino game because the amount of money involved in tournaments depend on the number of entrants. Because all activities are limited to intrastate entrants, prize pools are significantly smaller⁹⁵ which may incentivize people not to spend their money and time participating and, as a result, capping the amount of revenue the poker sites could make. This limitation is most likely why New Jersey’s online poker revenue is decreasing, even though the online casino revenue is growing.⁹⁶

The federal legislature could simply mitigate the issue by regulating the online poker industry through the interstate commerce clause.⁹⁷ Even if Congress, however, regulated the online poker industry, it would still need to provide a clear mechanism for states to apply a uniform dominant factor test to games, comprising of both skill and chance, correctly.

B. FANTASY SPORTS COMPARED TO ONLINE POKER

Both online poker and daily fantasy sports games exhibit similar characteristics that may suggest that they should be viewed the same in order to determine whether skill is the dominant factor in the game. Both games, however, also exhibit differences. Here, I, presuming that online poker should be classified as a game of skill rather than a game of chance, assess both similarities and differences in order to determine whether or not online poker and daily fantasy sports should be treated the same.

i. Similarities

In online poker, players who play only a few amount of poker hands generally do poorly. In addition, the amount of deviation in results shrinks as the sample size of hands played increases due to the “law of large numbers”⁹⁸ Furthermore, large

92. Richtel, *supra* note 17.

93. POKER STARS NJ (last visited Jan. 30, 2016), <http://www.pokerstarsnj.com/> (“PokerstarsNJ” is the name of the New Jersey based Pokerstars).

94. Levitt et al., *supra* note 15, at 597.

95. *Id.*

96. Steve Ruddock, *The Poker Stars of NJ March 16 Soft Launch: Everything You Need to Know*, US POKER.COM (Mar. 14, 2016), <http://www.uspoker.com/blog/pokerstars-nj-soft-launch/13705/>.

97. U.S. CONST. art. I, § 8, cl. 3.

98. Crawford, *supra* note 21, at 40 (stating that the “law of large numbers” states that probabilistic predictions can be satisfied only with an infinite amount of data).

amounts of variation in the return of investment exist across players.⁹⁹ Lastly, estimates show that players across all stakes experience different expected results.¹⁰⁰

Because the skill required to be a professional—top 1.3%—daily fantasy players is so high, recreational players will most likely experience a negative rate of investment.¹⁰¹ These professional daily fantasy sports players submit multiple entries which suggests that they are increasing their sample size for a greater amount of success.¹⁰²

In online poker, players sitting at higher stakes tables have larger big blind losses than those at smaller stakes.¹⁰³ Because the average quality of the players' field increases as the stakes rise, the difficulty of the game increases which requires an additional amount of attention that is not apparent at lower stakes.¹⁰⁴ Furthermore, professional online poker players use certain data mining programs that allow them to keep track of other players' hands.¹⁰⁵ The data, therefore, confirmed that there were more skillful opponents in tournaments with higher entry fees than in those with low entry fees.¹⁰⁶

Similar to the skill variance of poker players at different stakes, the level of skill and strategy required in daily fantasy sports at higher stakes also vary.¹⁰⁷ In addition, daily fantasy players in higher stakes have a large arsenal of knowledge and accessibility to tools that recreational players do not have, similar to the data mining programs of online poker players.¹⁰⁸ The top daily fantasy sports player, Saahil Sud, launched his own startup that offers such tools, which he used to outplay his opponents, to recreational users so they can have the advantages that other

99. Levitt et al., *supra* note 15, at 624.

100. Ed Miller & Daniel Singer, *For Daily Fantasy Sports Operators, the Curse of Too Much Skill*, SPORTS BUSINESS DAILY, 15 (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx>.

101. *Id.*

102. Eric Chemi, *Online Poker vs. Daily Fantasy: Which Creates More Winners?*, CNBC (Oct. 2, 2015), <http://www.cnbc.com/2015/10/02/online-poker-vs-daily-fantasy-which-creates-more-winners.html> (chart is in reference to first half of the 2015 MLB season). Some people believe that the top players have large entry figures because they are taking advantage of the “overlay” the daily fantasy sports sites provide. Overlay is the “money that ... sites have to add to the prize pool that is not covered by player entries.” *Id.* As a result, each entry is worth greater than what they are priced to be, which entices players with bigger bankrolls to submit as many entries as possible. *Id.* The concept is public knowledge, so recreational players who wish to take their game to the next level could also take advantage of this. As a critic puts it, “[i]t’s like Lyft...offering \$5 or \$10 rides anywhere in Manhattan, even though they lose money on each ride[.]” See Overlay Poker Glossary, POKERTIPS.ORG, <http://www.pokertips.org/glossary/w/OVERLAY>. Unsurprisingly, overlay exists in poker sites as well.

103. Levitt et al., *supra* note 15, at 627. The best way to measure poker’s winnings across different stakes is to use big blinds per 100 hands (BB/100).

104. *Id.* at 626.

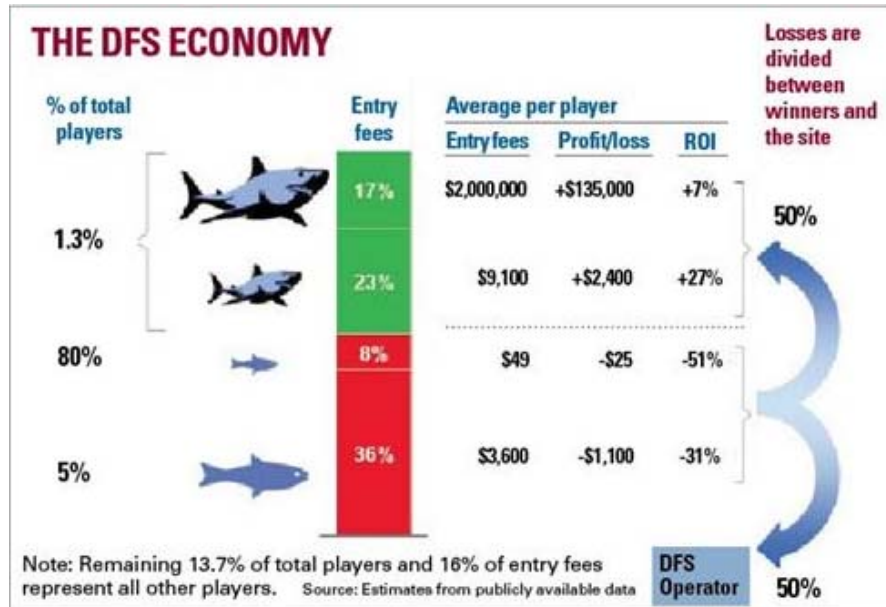
105. David Huber, *Poker Software – Why Is It Taboo?*, POKERUPDATE (Mar. 16, 2016), <http://www.pokerupdate.com/poker-opinion/3162-poker-software-why-is-it-taboo/>.

106. Levitt et al., *supra* note 15, at 626.

107. Ethan Haskell, *5 Secrets of All Daily Fantasy Sports*, ROTOGRINDERS (last visited Jan. 30, 2016), <https://rotogrinders.com/blog-posts/5-secrets-of-all-daily-fantasy-sports-28915>.

108. *Id.*

professionals have.¹⁰⁹ In order to be competitive, he suggests that elements to daily fantasy sports exist that are unattainable unless one has certain tools: repeatable process to analyze information, awareness and diversification of risk, back-testing one's strategy, and scaling winning strategies.¹¹⁰



ii. *Skillful and Selective Actions Affect the Outcome*

A skillful poker player's selective action correlates with positive outcome of a given event.¹¹¹ The results of statistical analysis suggest that unskillful players who fail to comply with conventional poker wisdom by, for example, playing too many hands, lose greater amounts as opposed to the skillful players who avoid playing too many hands. As a result, the choice that a skillful poker player makes will undoubtedly affect the outcome.¹¹² Similarly, a daily fantasy sports player's skillful action correlates with positive outcomes. In daily fantasy sports, it is

109. Curt Woodward, *Top Fantasy Sports Player Uses Software, Analytics to Reap Millions*, BOSTON GLOBE (Dec. 23, 2015), <https://www.bostonglobe.com/business/2015/12/23/from-boston-penthouse-world-best-fantasy-player-plunges-into-startup-world/QHNpLh0O3QMMyUDqTd4t27N/story.html>; see also RotoQL, <http://rotoql.com/>.

110. *Id.*

111. Levitt et al., *supra* note 15, at 631.

112. *Id.*; see also *supra* note 68.

conventional wisdom to avoid feeling “stuck on certain players.”¹¹³ A participant can easily draft the same athlete every week because such athlete either has done well for the participant’s team in the past or has a particular bias for such athlete.¹¹⁴ Top daily fantasy sports players forego most of their “fan hood” because a bias for a particular player could negatively affect their outcome.¹¹⁵ Also, if daily fantasy sports players only draft the highest projected and expensive athletes for the week, their winnings will not be as high as one who drafts high-value athletes—lowly priced with a high ceiling on performance.¹¹⁶ A player’s action, therefore, correlates with outcome in daily fantasy sports, which suggests that an element of skill is involved.

iii. *Persistence is Key to being a Skillful Player*

A poker player’s return on investment correlates over time, which implies persistence in skill.¹¹⁷ Without skill, “success in one period should be uncorrelated with success in other periods.”¹¹⁸ The rate of investment of top-ranked professional poker players generate an average return of investment of 30.5% as opposed to a negative 15.6% return for all others.¹¹⁹ Similarly, the top 1.3% of daily fantasy sports winners who made profits of \$2,400 every \$9,100 entry fees and another \$135,000 profit on two million dollar entry fees yielded twenty-seven percent (27%) and seven percent (7%) return rates in the first half of the 2015 Major League baseball league respectively, compared to -51% and -31% returns for other players.¹²⁰ Because a correlation of a player’s return overtime in daily fantasy sports also exists, an element of persistence in skill that is usually observed in other skillful games such as poker also exist.

113. Ethan Haskell, 5 Secrets of All Daily Fantasy Sports, ROTOGRINDERS (last visited Jan. 30, 2016) <https://rotogrinders.com/blog-posts/5-secrets-of-all-daily-fantasy-sports-28915>.

114. *Id.*

115. Jon Bales, Value vs. Against-the-Grain Strategies, ROTOGRINDERS (last visited Jan. 30, 2016), <https://rotogrinders.com/articles/value-vs-against-the-grain-strategies-489593> (discussing how it’s advantageous to draft sports players who may not “publicly” be projected to do as well because there is a chance they could produce an unexpectedly explosive performance which other fantasy participants bypassed).

116. Levitt et al., *supra* note 15, at 631; *see also supra* note 68.

117. Levitt et al., *supra* note 15, at 631.

118. *Id.*

119. *Id.*

120. Chemi, *supra* note 103.

C. Differences

iv. *Intentionally Losing Signifies that a Game may be more of Skill than Pure Chance*

Experts have suggested that another way to assess the role of skill involved in a game, is not to consider the winning aspect of a game, but rather determine whether or not it is possible to intentionally lose at a game.¹²¹ In poker, a player can intentionally lose.¹²² In games like roulette, craps, or Baccarat, however, a player cannot intentionally lose—meaning one does not have control over the outcome.¹²³ Such games, therefore, would most likely be classified as gambling.

In comparison to daily fantasy sports, it is possible to intentionally draft a team with a low chance of winning players by choosing “bad” athletes, statistically projected to do poorly. A small likelihood, however, exists where such athlete might perform unduly well that the results of the remaining athletes become insignificant in an effort to intentionally lose.¹²⁴

Moreover, one cannot simply “fold a hand” and give up potential prize money as one could in poker. Once a participant has entered into the contest after drafting a team, such participant is unable to lose intentionally. Although it is possible to refrain from accepting prize money, doing so does not necessarily mean that one can intentionally lose in a daily fantasy sport contest.¹²⁵

Despite these differences, more similarities between online poker and daily fantasy sports exist, and, therefore, such games should be viewed similarly to one another in assessing whether skill or luck is the dominant factor. In doing so, it may prevent a potential “Black Friday”¹²⁶ for daily fantasy sports.

IV. CONCLUSION

To safeguard the fundamental values of American society, Congress should provide states with a clear guideline that helps classify daily fantasy sports as a game of skill or chance. Without a clear guideline, consumer protections, industry safeguards, governmental tax revenues, and a uniform judicial landscape are in jeopardy. The approaches proposed in this article may assist federal legislatures in developing a clear mechanism to implement the federal policies of the UIGEA, but

121. Stephen J. Dubner, *Poker: Skill vs. Chance*, FREAKONOMICS (May 3, 2007), <http://freakonomics.com/2007/05/03/poker-skill-vs-chance/>.

122. *Id.*

123. *Id.*

124. TwoGun, *Top 10 Tips for New Players: DFS Beginner's Guide*, ROTOGRINDERS (last visited Jan. 30, 2016), <https://rotogrinders.com/articles/top-10-tips-for-new-players-dfs-beginners-guide-616423>.

125. FANDUEL, *supra* note 56; DRAFT KINGS, *supra* note 54.

126. Richtel, *supra* note 17.

will not on their own mitigate the issue of game classification for daily fantasy sports.