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Busted on the Big Stage: The Detering Impact of the Department of Justice's Prosecution of Professional Athletes for Health Care Fraud in Professional Sports Leagues.

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Abstract

This analysis discusses the impact and incentives for the Department of Justice to prosecute instances of health care fraud in professional sports leagues in the United States. In recent years, the Department of Justice has been emphasizing the prevention and prosecution of health care fraud in the United States. One technique available to the Department of Justice in preventing all crime, not just health care fraud, is general deterrence. General deterrence refers to the effects of legal punishment on the general public and potential offenders. This concept of general deterrence can help to shed light on the recent cases of health care fraud that the Department of Justice recently disrupted in both the NFL and the NBA, despite these cases being “atypical” in regard to cases the Department of Justice routinely pursues.

This analysis concludes that a significant factor in the Department of Justice’s prosecution of retired NFL and NBA players, who have committed or are alleged to have committed health care fraud, is general deterrence and the impact that these prosecutions have on the general public.

Table of Contents

Introduction.....	3
I. Health Care Fraud in the United States.	6
A. Health Care Related Criminal Enforcement Tools.....	6
B. Modern Health Care Fraud.....	8
II. Healthcare Fraud in the National Football League and National Basketball Association... 	11
A. Healthcare Fraud in the National Basketball Association.....	12
B. Healthcare Fraud Scheme in the National Football League	15
III. Deterrence Theory and its Application in Professional Sports.	18
IV. General Deterrence in Other High Profile Cases	24
V. Conclusion.....	27

Introduction

Of the \$5.6 billion the Department of Justice reported in settlements of civil cases involving fraud and false claims in Fiscal Year 2021, more than \$5 billion of the dollars recouped relate to the healthcare industry.¹ Health care related crimes cost the United States billions of dollars each year.² One of the more prevalent crimes relating to the healthcare industry is health care fraud. In 2020, the government recouped \$1.8 billion specifically related to health care fraud judgments and settlements.³ Health care fraud costs government programs like Medicare and Medicaid billions each year.⁴ In addition to harming government programs, health care fraud can also have negative effects on private insurers their beneficiaries. According to the Department of Justice, the government is aggressively pursuing health care related crime with increasing vigor.⁵ This aggressive approach to prosecuting health care related crime provides key externalities to the Department of Justice, “by preventing billions more in losses by deterring others who might try to cheat the system for their own gain.”⁶

While there are many statutes the Department of Justice have at their disposal to prosecute healthcare related crimes, one of these statutes is 18 U.S.C. § 1347, which is also known as “health care fraud.” The health care fraud statute is not exclusive to schemes involving government programs like Medicare and Medicaid, as it is also applicable in schemes targeting private insurers. Health care fraud is considered a white collar crime, and can be broadly defined as when dishonest health care claims are filed by people in order to turn a profit.⁷ In turn, these

¹ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, Justice Department’s False Claims Act Settlements Exceed \$5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), <https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year>.

² Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, 19 Defendants Charged with Defrauding The National Basketball Association Players’ Health And Welfare Benefit Plan (Oct. 7, 2021), <https://www.justice.gov/usao-sdny/pr/19-defendants-charged-defrauding-national-basketball-association-players-health-and>.

³ *Health Care Fraud and Abuse Report for Fiscal Year 2020*, The Dep’t of Health and Human Services and The Dep’t of Justice (2021). <https://oig.hhs.gov/publications/docs/hcfac/FY2020-hcfac.pdf>.

⁴ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, National Health Care Fraud Enforcement Action Results in Charges Involving over \$1.4 Billion in Alleged Losses (Sep. 17, 2021). <https://www.justice.gov/opa/pr/national-health-care-fraud-enforcement-action-results-charges-involving-over-14-billion>.

⁵ The U.S. Dep’t. of Justice Off. of Pub. Affairs, *supra* note 1.

⁶ *Id.*

⁷ *Healthcare fraud*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/healthcare_fraud.

costs and losses resulting from the fraud in health care benefit plans are passed on to the consumer, whether it be the taxpayer or private beneficiaries.⁸

Deterrence is an important factor considered in the sentencing of all crimes, including health care fraud. In the exercise of prosecutorial discretion by attorneys for the federal government, deterrence of further criminal conduct is viewed as one of these attorneys' basic responsibilities.⁹ In guiding government attorneys' utilization of prosecutorial discretion, the Department of Justice emphasizes the deterrent impact of prosecution writing:

[deterrence] should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.¹⁰

Health care fraud may be considered a relatively minor offense compared to a crime like murder, but it results in monetary loss, rise in insurance premiums, and depreciation in quality of care and resources.¹¹ Widespread health care fraud would wreak havoc on the medical system and the government alike. The Department of Justice has a vested interest in deterring the public from engaging in health care fraud, as it impacts everyone involved in the health insurance process.

Generally, health care fraud cases prosecuted by the Department of Justice involve millions upon millions of dollars. The numbers involved in cases published time and time again on the Department of Justice's webpage are often staggering, however, rarely do these cases make primetime news slots or the front page of the paper. That said, in 2019 and 2021 health care fraud was front and center on television news tickers across America. Instead of news anchors discussing astronomical monetary figures, the focus was centered on the people involved. These cases involved retired professional athletes, who played in the two largest sports

⁸ *Id.*

⁹ Justice Manual, The U.S. Dep't. of Justice, Principles of Federal Prosecution 9-27.110 – Purpose, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>.

¹⁰ Justice Manual, The U.S. Dep't. of Justice, Principles of Federal Prosecution 9-27.230 – Initiating and Declining Charges – Substantial Federal Interest. <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.110>.

¹¹ Drabiak, Katherine & Wolfson, Jay, *What Should Health Care Organizations Do to Reduce Billing and Fraud Abuse?* (AMA Journal of Ethics, Mar. 2020). <https://journalofethics.ama-assn.org/article/what-should-health-care-organizations-do-reduce-billing-fraud-and-abuse/2020-03>.

leagues by revenue and market share in America, defrauding their leagues' respective healthcare programs for comparably measly sums of cash in terms of health care fraud.¹² Given that part of the Department of Justice's aggressive approach to prosecuting health care fraud is incentivized by the perk of deterrence, it may shed some light onto the reasoning behind the Department of Justice's prosecution and investigation of these comparably minor health care fraud schemes that took place in American sports.

This paper discusses the potential incentives behind the Department of Justice prosecuting atypical health care fraud schemes that recently took place in America's marquee sports leagues, and describes how general deterrence can be a useful tool for law enforcement agencies to encourage the public not to pursue similar criminal endeavors. Part I details the background of health care fraud in the United States, describes the laws the government uses to prevent healthcare crimes, and explores more modern health care fraud cases. Part II describes the individual health care fraud schemes that took place in both the NFL and the NBA. Part III analyzes the impact that general deterrence may have played in the cases against the NFL and NBA players, compares and contrasts these schemes to more typical health care fraud schemes, and questions if, had the players involved not been famous, would the Department of Justice have taken up the cases? Part IV presents other instances of high profile individuals who were charged by the Department of Justice, and compares their outcomes to those of the NFL players charged in the NFL scheme. Part V concludes that it is likely that general deterrence is a significant incentive for the Department of Justice when prosecuting these high profile individuals cases, and that had these players not been in the public eye perhaps their outcomes would be different.

¹² Felix Ritcher, *Americans Love the NFL, But Change Is Looming*, STATISTA (Feb. 11 2022), <https://www.statista.com/chart/15869/favrotie-sports-league/>.

I. Health Care Fraud in the United States.

A. Healthcare Related Criminal Enforcement Tools.

Medicare and Medicaid were signed into law in 1965, when Lyndon B. Johnson signed amendments to the Social Security Act.¹³ In response to increasing reports of Medicare and Medicaid fraud, Congress outlawed health care fraud, adopting the Medicare-Medicaid Anti-Fraud Amendments of 1977.¹⁴ Today, health care fraud is a federal offense, and is not restricted to Medicare and Medicaid as it can extend to private insurers as well. Anything that falls under Congress's definition of a "health care benefit plan," is protected by the health care fraud statute.¹⁵

A health care benefit plan is defined under 18 U.S.C. § 24(b), which defines a plan as "any public or private plan or contract, affecting commerce, under which any medical benefit, item or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan."¹⁶ Notably, this definition of what constitutes a health care benefit plan is quite broad, so broad that it has been held to encompass even a state no-fault automobile insurance program.¹⁷ This broad interpretation of what qualifies as a health care benefit plan gives the Department of Justice some flexibility in enforcing the health care fraud statute.

The health care fraud statute falls under 18 U.S.C. § 1347(a). According to 18 U.S.C § 1347(a);

"Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice - (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned

¹³ *History: Medicare & Medicaid*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Dec. 1, 2021), <https://www.cms.gov/About-CMS/Agency-Information/History#:~:text=for%2050%20years-,On%20July%2030%2C%201965%2C%20President%20Lyndon%20B.,economic%20security%20of%20our%20nation>.

¹⁴ *MEDICARE-MEDICAID ANTI-FRAUD AND ABUSE AMENDMENTS OF 1977: Report of The Committee On Finance U.S. Senate on S. 143*, U.S. SENATE (Sep. 26, 1977), <https://www.finance.senate.gov/imo/media/doc/srpt95-453.pdf>.

¹⁵ 18 U.S.C. § 24(b).

¹⁶ *Id.*

¹⁷ *United States v. Lucien*, 347 F.3d 45, 48 (2d Cir. 2003).

by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.”¹⁸

The punishment for committing health care fraud becomes more severe if the fraud results in injury, and can result in life in prison if the violation results in the death of someone.¹⁹ The *mens rea* requirement for the statute falls under 18 U.S.C § 1347(b), which states “with respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.”²⁰ The simple act of defrauding a health care plan will trigger a violation of 18 U.S.C. § 1347(b).

In addition to 18 U.S.C § 1347, or health care fraud, the Department of Justice have additional healthcare related criminal enforcement laws and statutes at their disposal. Some of the more traditionally utilized laws and statutes include the Stark Law, the Anti-Kickback Statute, and the False Claims Act. One of the major differences between these alternative healthcare related laws and simple health care fraud under 18 U.S.C. §1347, is that health care fraud is not dependent on being involved in government programs or money.²¹

Any health care benefit program whether private or public, under the definition of 18 U.S.C §24(b), being defrauded will fall under 18 U.S.C § 1347(a).²² The Stark Law, by contrast, is only applicable if a physician makes a referral for a Medicare or Medicaid beneficiary to an entity to which they have a financial relationship with.²³ Similarly, both the Anti-Kickback Statute and False Claims Act only apply if the schemes involve money from a government program such as Medicaid.²⁴ The Stark Law, the Anti-Kickback Statute, and the False Claims Act are not applicable when private insurers are involved, which makes the health care fraud statute particularly beneficial to the Department of Justice in protecting private insurers.²⁵

¹⁸ 18 U.S.C. § 1347(a).

¹⁹ See 42 U.S.C § 1395nn.

²⁰ 18 U.S.C. § 1347(b).

²¹ See 42 U.S.C § 1395nn. See also 31 U.S.C. § 3729

²² 18 U.S.C. §24(b).

²³ 42 U.S.C § 1395nn.

²⁴ See 31 U.S.C. § 3729; see also 42 U.S.C. § 1320a-7b.

²⁵ See 18 U.S.C §1347(a); see also 42 U.S.C. § 1395nn, 31 U.S.C. § 3729, & 42 U.S.C. § 1320a-7b.

Another somewhat unique feature of the health care fraud statute is that any person who purposefully defrauds a health care benefit program can be found guilty of health care fraud if their conduct conforms to the elements of the statute, as it is not just limited to health care professionals.²⁶ Any person can commit health care fraud, not just doctors or other healthcare providers.²⁷ This differs from statutes like the Stark Law, in which one of the requirements is that a medical professional, specifically a physician, makes an improper referral.²⁸ The fact that anyone who defrauds a healthcare benefit program can be prosecuted under the health care fraud statute makes it a powerful tool for the Department of Justice and government attorneys.

B. Modern Health Care Fraud

Health care fraud has been targeted by presidential administrations essentially since the advent of health insurance. In 1996 the government determined that tracking down health care fraud would be a top priority for the Department of Justice, and established the Health Care Fraud and Abuse Control program (“HCFAC”) through the Health Insurance Portability and Accountability Act (“HIPAA”).²⁹ The HCFAC program is designed to coordinate federal, state and local law enforcement activities with respect to health care fraud and abuse, and files a yearly report detailing statistics relating to health care fraud.³⁰

Recent presidential administrations have further increased the emphasis on stopping health care fraud. The Obama administration reported that it was able to recover \$7.90 for every dollar spent investigating health care fraud, recouped billions of dollars, and had the highest three-year average in the history of the federal Health Care Fraud and Abuse Control program.³¹ The Trump administration announced the largest fraud takedown in American history, charging

²⁶ 18 U.S.C. § 1347(b).

²⁷ *Id.*

²⁸ *See* 42 U.S.C § 1395nn.

²⁹ *Health Care Fraud and Abuse Control Program Report*, HHS OFFICE OF THE INSPECTOR GENERAL <https://oig.hhs.gov/reports-and-publications/hcfac/index.asp>.

³⁰ *Id.*

³¹ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, Departments of Justice and Health and Human Services Announce Record Breaking Recoveries Resulting from Joint Efforts to Combat Health Care Fraud (Feb. 11, 2013), <https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-announce-record-breaking-recoveries>.

601 people with more than \$2 billion in medical fraud.³² Now, under the Biden administration, the Department of Justice is aggressively honing in on Covid-19 related health care fraud.³³ Health care fraud, if left unchecked, could be incredibly costly for the government and the public, which explains the emphasis from the government under various administrations to disrupt and prosecute these schemes.

Cases are becoming increasingly complex involving health care fraud. To help combat these complexities, in addition to United States Attorney's offices across the country, the Department of Justice established a unit consisting of 80 prosecutors to focus solely on health care fraud matters known as the Health Care Fraud Unit or "HCF Unit."³⁴ The HCF Unit collaborates with other governmental agencies, like the FBI and OIG, to efficiently investigate and prosecute health care schemes.³⁵ In 2021, the HCF Unit charged more than 138 defendants with health care fraud, in which there were more than \$1.4 billion in alleged losses.³⁶

Some of the more noteworthy health care fraud schemes prosecuted by the Department of Justice in 2021 involved telemedicine, sober living homes, and the CARES ACT Provider Relief Fund.³⁷ The largest health care fraud cases of 2021 involved Telemedicine companies paying doctors to order unnecessary medical equipment, medications, and medical tests for patients.³⁸ The pharmacies, equipment companies, and testing labs then purchased the orders from the

³² Press Release, The U.S. Dep't. of Justice Off. of Pub. Affairs, Attorney General Sessions Delivers Remarks Announcing National Health Care Fraud and Opioid Takedown (Jun. 28, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-announcing-national-health-care-fraud-and>.

³³ Julian Andre, Curtis Burton, Brigid McCarthy, *DOJ Demonstrates Commitment to COVID-19 Related Healthcare Enforcement With New Criminal Charges*, THE NATIONAL LAW REVIEW, VOLUME XIII, NUMBER 124 (May 4, 2022), <https://www.natlawreview.com/article/doj-demonstrates-commitment-to-covid-19-related-healthcare-enforcement-new-criminal>.

³⁴ *Health Care Fraud Unit*, THE U.S. DEP'T. OF JUSTICE (Aug. 6 2021), <https://www.justice.gov/criminal-fraud/health-care-fraud-unit>.

³⁵ *Id.*

³⁶ National Health Care Fraud Enforcement Action, THE U.S. DEP'T. OF JUSTICE (Sep. 20, 2021), <https://www.justice.gov/criminal-fraud/2021-national-health-care-fraud-enforcement-action>.

³⁷ *Health Care Fraud and Abuse Report for Fiscal Year 2020*, THE DEP'T OF HEALTH AND HUMAN SERVICES AND THE DEP'T OF JUSTICE (2021). <https://oig.hhs.gov/publications/docs/hcfac/FY2020-hcfac.pdf>.

³⁸ Press Release, The U.S. Dep't. of Justice U.S. Att'ys Off. Dist. of N.J., Four People Indicted in International Telemedicine Health Care Fraud Kickback Scheme (Dec. 10, 2021), <https://www.justice.gov/usao-nj/pr/four-people-indicted-international-telemedicine-health-care-fraud-kickback-scheme>.

telemedicine company in exchange for bribes, totaling \$1.1 billion in fraudulent claims to insurers.³⁹

With every new wrinkle in the healthcare system, there will be people who devise schemes to make money by defrauding health care benefit plans. This was evident in 2021, as COVID-19 presented a new challenge to the Department of Justice. In May of 2021, for example, the Department of Justice charged 14 defendants in seven federal districts for participating in various health care fraud schemes exploiting the COVID-19 pandemic.⁴⁰ These schemes ran up a total of over \$143 million dollars in false billings.⁴¹ These fraudsters exploited a national pandemic to the tune of millions. During a time when medical providers were seen as heroes to the public, there were still individuals who used seized at the opportunity to commit fraud. The most common scheme involved medical providers offering COVID-19 tests to Medicare beneficiaries at senior living facilities and other testing sites to induce beneficiaries to provide blood or saliva samples.⁴² The medical providers then misused information and samples to submit claims to Medicare for unnecessary and far more expensive tests, like cancer and allergy tests.⁴³ In some cases, beneficiaries never even received the status of their COVID test, which presents an additional issue to public health.⁴⁴ Cases like these demonstrate the complex challenges that the Department of Justice is faced with concerning health care fraud, as there truly is no “one size fits all” scheme.

³⁹ *Health Care Fraud Unit*, THE U.S. DEP’T OF JUSTICE, (Aug. 6 2021), <https://www.justice.gov/criminal-fraud/health-care-fraud-unit>.

⁴⁰ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, DOJ Announces Coordinates Law Enforcement Action to Combat Health Care Fraud, (May 26, 2021), <https://www.justice.gov/opa/pr/doj-announces-coordinated-law-enforcement-action-combat-health-care-fraud-related-covid-19>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

II. Healthcare Fraud in the National Football League and National Basketball Association.

Professional sports in America place athletes in a unique circumstance regarding health care and insurance. Often, Americans purchase health insurance through their employer.⁴⁵ Players in the NFL and NBA have comparably shorter careers than the average working American.⁴⁶ These players have a small window of time to make a living, and in this small window sustain a significant amount of damage to their bodies.⁴⁷ After these players' careers come to an end, they have a large gap in time between being covered by health insurance if they do not have insurance between when they finish their professional athletic careers and when they qualify for Medicare at age 65.⁴⁸ To remedy this unique issue, the NBA and the NFL both individually established health care benefit programs for retired players to cover them and their families until they are old enough to qualify for Medicare.⁴⁹

Two of the more notable health care fraud cases in recent history involved these major sporting leagues and their private health care benefit programs. The National Basketball League (“NBA”) and National Football League (“NFL”) had taken action and invested in their retired players' health. Both leagues developed health care benefit programs to offer players a private, league-run, healthcare plan for when these athletes' careers come to an end.⁵⁰ These two leagues also recently erupted in controversy when news broke that retired players, in both the NFL and NBA in separate instances, were defrauding these respective leagues' health care benefit plans that were created to benefit the players. In total, 15 retired players from the NFL and 18 from the NBA were charged by the Department of Justice with health care fraud among other charges.

⁴⁵ *Health Insurance Coverage in the United States*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/library/publications/2021/demo/p60-274.html>.

⁴⁶ Judy Martel, *Pro Athletes: How to Navigate Short Careers, Long Retirements*, FORBES, (Jul. 15, 2015), <https://www.forbes.com/sites/rbcwealthmanagement/2015/07/17/pro-athletes-how-to-navigate-short-careers-long-retirements/?sh=7f2426806980>.

⁴⁷ *Id.*

⁴⁸ Nicole F. Roberts, *NBA Enters Health Insurance in Unprecedented Way*, FORBES (Jul. 28, 2016), <https://www.forbes.com/sites/nicolefisher/2016/07/28/1482/?sh=24abd39b7e77>.

⁴⁹ *Id.* See also NFL Player Benefits Office, *Gene Upshaw NFL Player Health Reimbursement Account Plan*, NFLPA, <https://nflpaweb.blob.core.windows.net/website/Departments/Benefits/HRASPD-12.pdf>.

⁵⁰ *Id.* See also Nicole F. Roberts *supra* note 47.

A. Healthcare Fraud in the National Basketball Association.

In 2016, the National Basketball Association Players Union made history by being the first North American professional sports organization to provide funding for a health insurance plan for retired players.⁵¹ The plan would provide funding for all NBA players who play three or more years in the league.⁵² These benefits increased the longer the players played in the league. This plan, run by private insurer United Healthcare, includes set rates for family members covered and co-pays and deductibles for players until they are old enough for Medicare.⁵³ This groundbreaking plan was the first to cover players and their families during the gap until they qualify for Medicare.⁵⁴ Such a commitment from the NBA and the NBA Players Association demonstrated the priority set by the NBA to promote retired players' health, safety, and well-being.⁵⁵ Importantly, this plan also falls under the definition of "health care benefit program" under 18 U.S.C § 24(b).⁵⁶

The longer a player plays, the more coverage the NBA provides them. The plan gives players that played between three and six years, but are not eligible for Medicare, a health insurance plan that includes medical, hospital, and prescription drug coverage with "modest" out-of-pocket costs for deductibles and copays.⁵⁷ Players with more than seven years of play would be offered the same coverage as those with between three and six years, but with even lower out of pocket costs.⁵⁸ When players have more than 10 years of play in the NBA, their families get the same coverage as those players with more than seven years of play.⁵⁹ Further, retired players who played between three and nine years in the NBA, but are also eligible for Medicare, would be offered a \$0 deductible and \$0 co-pay plan along with low cost prescription drug plan; players with 10 year careers get this same coverage, but for themselves and their

⁵¹ Nicole F. Roberts, *supra* note 46.

⁵² Nicole F. Roberts, *NBA Enters Health Insurance in Unprecedented Way*, FORBES (Jul. 28, 2016), <https://www.forbes.com/sites/nicolefisher/2016/07/28/1482/?sh=24abd39b7e77>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 18 U.S.C. § 24(b).

⁵⁷ Nicole F. Roberts *supra* note 49.

⁵⁸ *Id.*

⁵⁹ *Id.*

spouses.⁶⁰ This plan only benefits NBA athletes and their families, and is a valuable asset to retired players seeking medical assistance.

Beginning in 2017, NBA athlete Terrence Williams orchestrated a scheme to defraud the NBA player benefit plan.⁶¹ Williams allegedly submitted and induced others into submitting fraudulent claims to the NBA benefit plan seeking reimbursement for chiropractic services.⁶² Williams allegedly then forged invoices from chiropractic offices and submitted them to the Administrative Manager of the benefit plan.⁶³ After defrauding the benefit plan on his own behalf, Williams then began to recruit other NBA players so that they could do the same. In exchange for Williams providing these other players fraudulent invoices, the other players would give kickbacks to Williams.⁶⁴ These fraudulent invoices would come from fake chiropractic services, dental services, and wellness services created by Williams and his co-conspirators.⁶⁵

In furtherance of the scheme, Williams would allegedly forge letters posing as a physician regarding some of the invoices submitted by other NBA players, writing to the plan Administrator that these services were medical necessities for these players.⁶⁶ These letters were clearly not sent from a physician as they contained grammatical errors, were not on professional letterhead, and even misspelled one retired athlete's name.⁶⁷ As a result, the Administrator for the benefit plan told the players that the letters of medical necessity needed to be on official letterhead.⁶⁸ Williams then forged new letters, and submitted them back to the Administrator, even adding new injuries that were not present in the initial letters.⁶⁹

Williams, along with 18 other defendants, all NBA players and one spouse, were charged in the Southern District of New York for conspiracy to commit health care fraud and wire

⁶⁰ *Id.*

⁶¹ Press Release, The U.S. Dep't. of Justice U.S. Att'y. Off. S. Dist. of N.Y., *United States of America v. Terrence Williams et al. indictment*, ¶ 1, (Oct. 7, 2021), <https://www.justice.gov/usao-sdny/press-release/file/1440076/download>.

⁶² *Id.* at ¶ 2.

⁶³ *Id.* at ¶ 17.

⁶⁴ *Id.* at ¶ 18.

⁶⁵ *Id.* at ¶ 19.

⁶⁶ *Id.* at ¶ 23.

⁶⁷ *Id.* at ¶ 24.

⁶⁸ *Id.*

⁶⁹ *Id.*

fraud.⁷⁰ Williams was also charged with aggravated identity theft in connection with the scheme.⁷¹ In total, the players submitted nearly \$4 million dollars in false claims to the NBA benefit plan.⁷² The plan paid out around \$2 million dollars to the retired players.⁷³ The scheme was busted by the FBI and NYPD Health Care Fraud Task Force, which is a collaborative unit composed of members from the FBI, NYPD, and other law enforcement entities.⁷⁴ FBI field offices across the country also assisted in the case.⁷⁵

Williams, a first round NBA Draft pick in 2009, was not the only prominent NBA player allegedly involved in this scheme, as other big named players were charged in conjunction with the scheme. Household names, like NBA finals champions Glen “Big Baby” Davis and Tony Allen, also had prominent roles in the scheme. Many of the players involved in the scheme were first round draft picks in the NBA.⁷⁶

Williams himself is alleged to have received approximately \$230,000 in kickbacks in connection with the health care fraud scheme.⁷⁷ Other players also allegedly received payments as a result of the scheme to the tune of anywhere from five to six figure payouts.⁷⁸ Interestingly, these players combined to make \$343 million dollars from their time in the NBA, not counting any endorsements or income playing for other professional leagues.⁷⁹

⁷⁰ Press Release, The U.S. Dep’t. of Justice U.S. Atty. Off. S. Dist. of N.Y., 19 Charged with Defrauding the National Basketball Association Players’ Health And Welfare Benefit Plan, (Oct. 7, 2021), <https://www.justice.gov/usao-sdny/pr/19-defendants-charged-defrauding-national-basketball-association-players-health-and-welfare-benefit-plan>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Larry Neumeister & Tim Reynolds, *18 ex-NBA players charged in \$4M health care fraud scheme*, THE ASSOCIATED PRESS, (Oct. 7, 2021), <https://www.nba.com/news/18-ex-nba-players-charged-in-4m-health-care-fraud-scheme>.

⁷⁷ *Id.*

⁷⁸ Press Release, The U.S. Dep’t. of Justice U.S. Atty. Off. S. Dist. of N.Y., 19 Charged with Defrauding the National Basketball Association Players’ Health And Welfare Benefit Plan, (Oct. 7, 2021), <https://www.justice.gov/usao-sdny/pr/19-defendants-charged-defrauding-national-basketball-association-players-health-and-welfare-benefit-plan>.

⁷⁹ Larry Neumeister & Time Reynolds, *supra* note 73.

B. Healthcare Fraud Scheme in the National Football League

Named after former NFLPA Executive Director and fervent athlete advocate Gene Upshaw, the NFL adopted the “Gene Upshaw NFL Player Health Reimbursement Account Plan,” an HRA plan specifically for retired NFL players.⁸⁰ This plan, adopted as a result of a collective bargaining agreement between the NFL and the NFL Players Association, helps retired NFL players with out-of-pocket medical expenses when they depart from the league.⁸¹ Players could get up to \$350,000 in tax-free reimbursements under the plan, which also provided coverage for player’s families if eligible.⁸²

Similar to the NBA Health Care Benefit Plan, the Gene Upshaw NFL Player Health Reimbursement Account Plan (or “NFL Plan”) requires players to have met certain career tenure requirements.⁸³ Players must essentially play in the NFL for three “credit seasons,” which means the player was on the roster of a team for at least three games that season.⁸⁴ The more “credit seasons” a player has, the more credit the player has toward their health care account to expense.⁸⁵ If the player meets these requirements, they could be reimbursed the actual amount of their or their families medical care expenses up to \$350,000.⁸⁶ Furthermore, the players were not taxed on these reimbursements.⁸⁷ The discretion regarding whether to pay claims under the NFL Plan was left to the “Benefits Administrator.”⁸⁸ This plan also falls under the definition of a “health care benefit program” pursuant to 18 U.S.C 24(b).⁸⁹ The NFL Plan was ultimately administered by private health insurance company Cigna, and funded solely through payments made by NFL teams strictly for the player beneficiaries of the plan.⁹⁰

⁸⁰ *Gene Upshaw NFL Player Health Reimbursement Account Plan*, NFLPA NFL PLAYER BENEFITS OFFICE <https://nflpaweb.blob.core.windows.net/website/Departments/Benefits/HRASPD-12.pdf>.

⁸¹ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, McCune et al Superseding Indictment ¶ 1 (Jul. 24, 2020), <https://www.justice.gov/opa/press-release/file/1297711/download>.

⁸² *Id.* at ¶ 10.

⁸³ *Id.* at ¶ 2.

⁸⁴ *Id.*

⁸⁵ *Id.* at ¶ 8.

⁸⁶ *Id.* at ¶ 10.

⁸⁷ *Id.* at ¶ 11.

⁸⁸ *Id.* at ¶ 15.

⁸⁹ *Id.* at ¶ 4.

⁹⁰ *Id.* at ¶ 11.

The health care fraud scheme that took place in the NFL (“NFL Scheme”) was orchestrated by Robert McCune.⁹¹ McCune was an NFL journeyman who spent his four years in the NFL on four separate teams, earning him four credit seasons according to the benefit plan.⁹² McCune, along with a few other former players, recruited retired players into the scheme by offering to submit false and fraudulent claims to the NFL Plan in exchange for kickbacks.⁹³ In total, 14 NFL players were involved in the scheme, with the most notable being All-Pro running back Clinton Portis.⁹⁴

McCune and his fellow orchestrators would charge anywhere from a few thousand dollars to more than \$10,000 dollars in false claims submitted to the NFL Plan.⁹⁵ McCune and others would solicit personal information from other players including their Cigna identification number and social security number to complete Reimbursement Request Forms to the NFL Plan.⁹⁶ Players like Clinton Portis would provide this information to McCune or another co-conspirator.⁹⁷ The claims would then be submitted for odd and expensive medical equipment like hyperbaric oxygen chambers, ultrasound machines used for women's health examinations, and electromagnetic therapy devices designed for horses.⁹⁸ The players never received any of these treatments, and all of the sales forms and prescriptions were forged.⁹⁹ After claims were submitted to the NFL Plan, McCune would call the number provided by the Reimbursement Request form and impersonate certain other players to check in on the fraudulent claims.¹⁰⁰

Cigna, as the administrator of the plan, paid many of the false claims submitted by McCune and other players.¹⁰¹ Cigna relied on many of the forged forms and Reimbursement Relief Forms provided by players.¹⁰² McCune and his co-conspirators submitted a total of \$2.8

⁹¹ *Id* at ¶ 44.

⁹² See Steve Almasy & Christina Carrega, *Clinton Portis and two other former NFL players plead guilty in multimillion-dollar health care fraud scheme*, CNN (Sep. 8, 2021), <https://www.cnn.com/2021/09/07/us/former-nfl-players-health-care-fraud-guilty-pleas/index.html>.

⁹³ *Supra* note 78 at ¶ 44.

⁹⁴ *Id.*

⁹⁵ *Id* at ¶ 44.

⁹⁶ *Id* at ¶ 45.

⁹⁷ *Id* at ¶ 46.

⁹⁸ *Id* at ¶ 48.

⁹⁹ *Id* at ¶ 40.

¹⁰⁰ *Id* at ¶ 52.

¹⁰¹ *Id* at ¶ 53.

¹⁰² *Id.*

million in total in just over a year.¹⁰³ In total, the players collected approximately \$2.5 million for the false claims submitted.¹⁰⁴ The profits from the scheme were distributed amongst the players and their co-conspirators, and McCune and his fellow organizers profited additionally from kickbacks.¹⁰⁵ Eventually, Cigna detected claims that raised red flags, like a \$52,532 dollar claim for a cryotherapy sauna.¹⁰⁶ The FBI and Department of Justice investigated and charged the players with conspiracy to commit wire fraud and health care fraud under 18 U.S.C § 1349.¹⁰⁷ Six players were charged with health care fraud under 18 U.S.C § 1347 as well.¹⁰⁸ McCune was further charged with aggravated identity theft.¹⁰⁹

Clinton Portis, arguably the most famous of the conspirators, received \$99,264 dollars during his two month involvement with the scheme.¹¹⁰ At one point in his career, Portis was the highest paid running back in NFL history, earning more than \$43 million dollars.¹¹¹ Portis was an All-Pro running back primarily with the Washington Redskins, and had a very successful career on the field.¹¹² Portis pleaded guilty to health care fraud and was sentenced to six months in prison coupled with six months of home confinement.¹¹³ The Department of Justice sought a sentence at the higher end of the recommended sentencing guidelines due to the nature of the offense.¹¹⁴ Other factors that supposedly were included in the sentencing determination were the

¹⁰³ *Id* at ¶ 41.

¹⁰⁴ *Id* at ¶ 55.

¹⁰⁵ *Id* at ¶ 56.

¹⁰⁶ *Id*

¹⁰⁷ *Id* at ¶ 58.

¹⁰⁸ Press Release, The U.S. Dep't. of Justice Off. of Pub. Affairs, Six Former NFL Players Charged in Superseding Indictment Alleging Nationwide Fraud on Health Care Benefit Program for Retired NFL Players (Jul. 24, 2020), <https://www.justice.gov/opa/pr/six-former-nfl-players-charged-superseding-indictment-alleging-nationwide-fraud-health-care>.

¹⁰⁹ *Id*.

¹¹⁰ John Keim, *Clinton Portis sentenced to 6 months in prison, 6 months' home confinement for role in scheme to defraud health care benefit program*, ESPN (Jan. 6, 2022), https://www.espn.com/nfl/story/_/id/33005964/clinton-portis-sentenced-6-months-prison-6-months-home-confinement-role-scheme-defraud-healthcare-benefit-program.

¹¹¹ Scooby Acson, *How Clinton Portis racked up \$5 million in debt during his NFL career*, SPORTS ILLUSTRATED (Jun. 28, 2017), <https://www.si.com/nfl/2017/06/28/clinton-portis-debt-chapter-11-bankruptcy>.

¹¹² *Id*.

¹¹³ Peter Hayes, *Ex-NFL Player Clinton Portis Sentenced to Six Months in Prison*, BLOOMBERG LAW (Jan. 7, 2022), <https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-nfl-player-clinton-portis-sentenced-to-six-months-in-prison>.

¹¹⁴ *Id*.

fact that Portis did not repay the money until shortly before sentencing, and that he denied guilt up until he faced a retrial following a hung jury.¹¹⁵

Joe Horn, another notable player involved in the scheme, obtained \$149,775.¹¹⁶ After repaying the money back to the plan, Horn was sentenced to three years of probation and 200 hours of community service.¹¹⁷ Tamarick Vanover, who was an accomplished kick returner in the NFL and was involved in the scheme, was sentenced to a year and one day in prison for his part in the role.¹¹⁸ Finally, Robert McCune was sentenced to 5 years in prison as the ringleader of the operation.¹¹⁹ Prosecutors sought the high end of the sentencing guidelines ranging from 70 to 87 months. Citing the severity of the crimes and the need to deter others, the Judge sentenced McCune to 60 months, while noting that “the court doesn’t need to protect the public from this defendant.”¹²⁰ In total, 15 players pleaded guilty to health care fraud or conspiracy to commit health care fraud.¹²¹

III. Deterrence Theory and its Application in Professional Sports.

Both the NFL and NBA schemes present a unique health care fraud scenario for investigative agencies like the Department of Justice and FBI. These schemes did not involve Medicare or Medicaid, as the health benefit plans offered by the league were run through private insurers. In a more typical health care fraud case, Medicare or Medicaid are the primary entity being defrauded. Further, these cases involving retired athletes were for comparatively miniscule

¹¹⁵ *Id.*

¹¹⁶ Jacob Bogage, *Former Saints player Joe Horn pleads guilty in NFL health care fraud case*, THE WASHINGTON POST (Dec. 21, 2019), <https://www.washingtonpost.com/sports/2019/12/21/former-saints-player-joe-horn-pleads-guilty-nfl-health-care-fraud-case/>.

¹¹⁷ *Id.*

¹¹⁸ Peter Hayes, *Ex-NFL Receiver to One Year in Health Care Fraud Case*, BLOOMBERG LAW (Jan. 21, 2022), <https://news.bloomberglaw.com/daily-labor-report/ex-nfl-receiver-sentenced-to-one-year-in-health-care-fraud-case>

¹¹⁹ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs Former NFL Player Sentenced to Prison for Nationwide Health Care Fraud Scheme (Feb. 9, 2022), <https://www.justice.gov/opa/pr/former-nfl-player-sentenced-prison-nationwide-health-care-fraud-scheme>

¹²⁰ Tim Sullivan, *Ex-U of L Football player Robert McCune sentenced to 5 years in NFL health care fraud case*, LOUISVILLE COURIER JOURNAL (Feb. 9, 2022), <https://www.courier-journal.com/story/sports/college/louisville/2022/02/09/robert-mccune-sentenced-5-years-nfl-health-care-fraud-case/6722442001/>.

¹²¹ Press Release, The U.S. Dep’t. of Justice Off. Of Pub. Affairs, *supra* note 118.

sums of money. The NFL players received approximately \$2.5 million dollars in false or fraudulent claims.¹²² These \$2.5 million dollars in fraudulent claims are also spread out over more than a dozen retired players.¹²³ According to health care fraud statistics from 2020, the median loss for health care fraud offenses was \$1,282,585 dollars.¹²⁴ However, 30.6% of health care fraud cases involved losses greater than \$3,500,000.¹²⁵ This data would suggest that in terms of monetary damage, both the NFL and NBA schemes fall into a rather meager range in terms of dollar amounts involved in health care fraud cases.

Another striking difference between the schemes that took place in the leagues and a typical health care fraud case is who the perpetrators were. In the NBA and NFL, it was retired athletes defrauding their own league. A typical health care fraud case usually involves a medical provider, or some sort of medical professional or entity.¹²⁶ There are plenty of cases of health care fraud in which a private insurer is being ripped off, but it is less common that it is being done by someone totally outside of the medical profession. In these cases, it was private individuals as retired athletes who were submitting the fraudulent claims. There were no doctors helping in the commission of the crime, and any involvement of a “medical professional” was done fraudulently by players using the names and identities of doctors found online.¹²⁷

The Department of Justice prosecuting these atypical cases likely is less about protecting the integrity of these billion dollar sports leagues’ private health care plans and more about sending a message to the public. According to data provided by the United States Sentencing Commission, as of Fiscal Year 2020 health care fraud has decreased by 36.2% over a five year

¹²² Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, Six Former NFL Players Charged in Superseding Indictment Alleging Nationwide Fraud on Health Care Benefit Program for Retired NFL Players <https://www.justice.gov/opa/pr/six-former-nfl-players-charged-superseding-indictment-alleging-nationwide-fraud-health-care>.

¹²³ *Id.*

¹²⁴ *Quick Facts: Health Care Fraud Offenses*, U.S. SENTENCING COMM’N (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Health_Care_Fraud_FY18.pdf.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, Six Former NFL Players Charged in Superseding Indictment Alleging Nationwide Fraud on Health Care Benefit Program for Retired NFL Players (Jul. 24, 2020), <https://www.justice.gov/opa/pr/six-former-nfl-players-charged-superseding-indictment-alleging-nationwide-fraud-health-care>.

period.¹²⁸ Clinton Portis, who amassed just \$99,264 dollars from his role in the health care fraud scheme that took place in the NFL, was sentenced to essentially a year of confinement. Portis’s monetary involvement in the scheme is well within the lower percentile of health care fraud schemes in terms of monetary impact, yet the Department of Justice in his case sought a sentence at the high end of the sentencing guidelines. Given Portis’s minimal role in the scheme, it is likely that the theory of general deterrence had some effect on his prosecution. It is likely that Portis and his co-conspirators serve as a strong example of general deterrence for the Department of Justice to further reduce health care fraud in the United States.

A. Deterrence Theories

“General deterrence,” is defined as “the act of instilling fear of severe punishment in the general public, so as to prevent them from committing crimes in the future.”¹²⁹ General deterrence serves to demonstrate to potential offenders what the punishment for certain actions would be. Because of this, general deterrence is a basis of setting criminal punishments or awarding punitive damages in tort cases.¹³⁰ In most states, general deterrence is even a proper sentencing factor, as deterrence is considered one of the traditional aims of punishment in the criminal justice system.¹³¹ General deterrence is even more appropriate in white collar crimes, as these crimes are often more calculated than crimes of sudden passion or opportunity.¹³² General deterrence is also the basis for legal clichés such as “crime doesn’t pay” or “sending a message.”¹³³

General deterrence differs from “specific deterrence,” which is the idea that perpetrators who are caught and punished for a crime will not engage in that criminal activity in the future.¹³⁴

¹²⁸ *Quick Facts: Health Care Fraud Offenses*, U.S. SENTENCING COMM’N (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Health_Care_Fraud_FY18.pdf.

¹²⁹ Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, FEDERAL PROBATION, VOL. 80, NUM. 3 (Dec. 2016), https://www.uscourts.gov/sites/default/files/80_3_4_0.pdf.

¹³⁰ Stephen Michael Sheppard, *General Deterrence*, *The Wolters Kluwer Bouvier Law Dictionary*, Desk Edition, 2012.

¹³¹ *Gallo v. State*, 272 So. 3d 418, 418 (Fla. Dist. Ct. App. 2019).

¹³² *United States v. Howard*, 29 Fla. L. Weekly Fed. C 874 (11th Cir. 2022).

¹³³ Stephen Michael Sheppard, *General Deterrence*, *The Wolters Kluwer Bouvier Law Dictionary*, Desk Edition, 2012.

¹³⁴ Stephen Michael Sheppard, *Specific Deterrence (Personal Deterrence)*, *The Wolters Kluwer Bouvier Law Dictionary*, Desk Edition, 2012.

Specific deterrence aims to prevent repeat offenders by handing down punishments of sufficient severity to ensure that the criminal will not repeat the crime.¹³⁵ According to The Bouvier Law Dictionary, specific deterrence is an even more important goal of criminal justice than general deterrence, as “general deterrence is only possible after specific deterrence has been achieved.”¹³⁶

The severity of a punishment was long thought to be the key factor in general deterrence.¹³⁷ However, according to research provided by the Department of Justice, the certainty of being caught for a crime is a more powerful as a deterrent than the punishment, or length of the sentencing, that would result from being caught for the crime.¹³⁸ Certainty is defined in the research as “the likelihood of being caught and punished for the commission of a crime.”¹³⁹ This research suggests that for purposes of general deterrence, certainty is more significant of a deterring factor to the general public than even draconian punishment.¹⁴⁰

In the cases of health care fraud exposed in the NBA and NFL, it is likely that general deterrence rather than specific was a key factor in the prosecution of these athletes. Specific deterrence is more concerned with deterring career criminals, which these athletes are not.¹⁴¹ They are generally looked up to in society as being at the top of their profession. These players committed a type of white collar crime, that involved a calculated scheme aimed at defrauding these sports leagues’ health care benefit plans. This is the exact type of crime that general deterrence is aimed at preventing, and having professional athletes as the perpetrators gives the government a metaphorical megaphone to “send a message” to the general public: if you commit health care fraud, you will be caught, and you will be punished.

B. General Deterrence in Professional Sports.

A simple Google search for news of “health care fraud” returns an interesting mix of results. Aside from local news outlets discussing a local physician who was caught up in a

¹³⁵ *Id.*

¹³⁶ Stephen Michael Sheppard, *Specific Deterrence (Personal Deterrence)*, *The Wolters Kluwer Bouvier Law Dictionary*, Desk Edition, 2012.

¹³⁷ *National Institute of Justice Five Things About Deterrence*, U.S. DEP’T OF JUSTICE (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Stephen Michael Sheppard *supra* note 134.

falsified billing scheme for millions, the vast majority of search results for health care fraud are press releases straight from the Department of Justice. Altering the search to: “health care fraud CNN,” returns headlines such as: “Hundreds arrested for \$900 million worth of health care fraud” and “More than 400 charged in health care fraud schemes.” Importantly, one of the top results of the over 14 million returned by Google reads: “Clinton Portis and two other former NFL players plead guilty in multimillion-dollar healthcare fraud scheme.”¹⁴² Similarly, if you change the mainstream news outlet in the Google search to “Fox” rather than “CNN,” again the top of the results page reads: “18 ex-NBA players charged in 4M health care fraud scheme.”¹⁴³ These players garner significantly more attention than a random doctor in Florida who may have made millions more dollars than these athletes did by submitting fraudulent claims to Medicare.

It is not particularly shocking that stories about professional athletes make the front page before a story about a random doctor running a healthcare fraud scheme in small town America. These scams in the NBA and NFL involve household names that are recognizable to sports fans across the country. Names like all-pro running back Clinton Portis and NBA finals champion Glen “Big Baby” Davis. Not only are the scams run by professional athletes, but they are scamming billion dollar titans in the sports industry. Even people who have no idea who Clinton Portis or Glen Davis are would be familiar with the NFL shield or the NBA logo. These players violating a federal law brings nationwide attention to health care fraud, which in turn can help serve as a useful general deterrent for the federal government.

Press releases published by the Department of Justice that announced the charges brought against the NBA players for their involvement in defrauding the league openly allude to their deterrent impact. FBI Assistant Director Michael J Driscoll is quoted in the press release, saying “Today we’ve charged 18 former NBA players ... for their alleged participation in a health care fraud scheme that resulted in nearly \$2 million in losses.”¹⁴⁴ Driscoll further stated; “The health

¹⁴² Steve Almasy & Christina Carrea, *Clinton Portis and two other former NFL players plead guilty in multimillion-dollar health care fraud scheme*, CNN (Sep. 8, 2021), <https://www.cnn.com/2021/09/07/us/former-nfl-players-health-care-fraud-guilty-pleas/index.html>.

¹⁴³ Larry Neumeister & Tim Reynolds, *18 ex-NBA players charged in \$4M health care fraud scheme*, ASSOCIATED PRESS (Oct 7, 2021), <https://www.nba.com/news/18-ex-nba-players-charged-in-4m-health-care-fraud-scheme>.

¹⁴⁴ Press Release, The U.S. Dep’t. of Justice Off. of Pub. Affairs, *19 Defendants Charged with Defrauding The National Basketball Association Players’ Health And Welfare Benefit Plan* (Oct. 7, 2021), <https://www.justice.gov/usao-sdny/pr/19-defendants-charged-defrauding-national-basketball-association-players-health-and>.

care industry losses tens of billions of dollars a year to fraud... cases like this demonstrate our continued focus in uncovering health care fraud scams.”¹⁴⁵ In making these statements, Driscoll clearly understands the broader significance of this case. The alleged \$2 million involved in the case means little in the grand scheme of health care fraud in America, as it is almost nothing compared to the “tens of billions of dollars” lost every year. The significance of prosecuting this case by the FBI and the DOJ, is to serve notice to the public that health care fraud is a serious crime, and that even professional athletes will be prosecuted for committing it. This is a perfect example of general deterrence.

According to Sandra Moser, a former chief of the Department of Justice fraud section, deterrence is a major focus of the DOJ regarding health care fraud.¹⁴⁶ Attorneys who specialize in health care fraud admit that the government typically pursues cases that involve government money, and large sums of it.¹⁴⁷ Moser believes prosecuting these cases benefits the DOJ in alternative ways. In talking to the Washington Post, Moser explained the underlying deterrent impact of these cases stating the Department was “busting a scheme that might not break records for dollars lost but will be featured on tonight’s episode of ‘SportsCenter.’”¹⁴⁸

Another former higher up at the Department of Justice, John Kelly, said the government will take these types of cases if there is a bigger message to be sent.¹⁴⁹ Kelly says that prosecuting these cases demonstrates that health care fraud is not restricted to Medicare, as health care fraud can happen across all types of health care plans.¹⁵⁰ Health care litigator Nicholas Jurkowitz told the Washington Post, referring to the NFL scheme; “Perhaps with other people, they would have tried to resolve this quicker before filing charges... but there’s something sensational about the names here, and I think that’s a big driving force.”¹⁵¹

It is undeniable that had these schemes been implemented by the average Joe, they would not have garnered the amount of attention from the government that they did. Private health care

¹⁴⁵ *Id.*

¹⁴⁶ Rick Maese, *Why were feds investigating NFL players’ health care fraud? Perhaps for the publicity.*, THE WASHINGTON POST (Dec. 13, 2019), <https://www.washingtonpost.com/sports/2019/12/13/why-were-feds-investigating-nfl-players-health-care-fraud-perhaps-publicity/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

plans defrauded out of a few million dollars that have little to no impact on the public typically do not garner much attention whatsoever, even from the federal government. NBA finalists and NFL all-pro's defrauding their leagues' benefit plans through simple schemes, in contrast, will garner the attention of a much broader audience than even a complex scheme involving hundreds of millions of dollars of health care fraud.

IV. General Deterrence in Other High Profile Cases

This idea of deterrence being a motive for the DOJ when prosecuting high profile individuals is not restricted to health care fraud, nor is it a novel concept. Cases involving high profile athletes and celebrities often dominate the news cycle when they break. Even for seemingly minor crimes, crimes involving celebrities provide a useful general deterrence tool for law enforcement agencies, as they demonstrate that no one is above the law and show the public they will be caught if they attempt to follow suit.

Martha Stewart was sent to prison for five months for insider trading.¹⁵² Lori Laughlin, who was a star on the massively popular "Full House," was involved in a high profile college admissions scandal and spent two months in prison and was fined \$150,000 as a result.¹⁵³ Mike "The Situation" Sorrentino spent eight months in prison for tax evasion, and his fellow New Jersey native Lauren Hill spent a total of six months in confinement for the same crime.¹⁵⁴ These celebrities make headlines when they simply go out to a restaurant. The media coverage is

¹⁵² Constance L. Hayes, *Martha Stewart's Sentence: The Overview; 5 Months in Jail, and Stewart Vows, 'I'll Be Back,'* THE N.Y. TIMES (Jul. 17, 2004), <http://www.nytimes.com/2004/07/17/business/martha-stewart-s-sentence-overview-5-months-jail-stewart-vows-ll-be-back.html>.

¹⁵³ Press Release, The United States Department of Justice U.S. Attorney's Office District of Massachusetts, California Couple in College Admission Case Agrees to Plead Guilty (May 21, 2021), <https://www.justice.gov/usao-ma/pr/california-couple-college-admissions-case-agrees-plead-guilty>.

¹⁵⁴ Press Release, The U.S. Dep't. of Justice Off. of Pub. Affairs, Michael the Situation Sorrentino, Marc Sorrentino Sentenced to Federal Prison on Tax Charges (Oct. 5, 2018), <https://www.justice.gov/opa/pr/michael-situation-sorrentino-marc-sorrentino-sentenced-federal-prison-tax-charges>;
; Press Release, The U.S. Dep't. of Justice Off. of Pub. Affairs, Singer And Actress Lauren Hill Sentenced To Prison For Failing To File Tax Returns For More Than \$2.3 Million In Income (May 6, 2013), <https://www.justice.gov/usao-nj/pr/singer-and-actress-lauren-hill-sentenced-prison-failing-file-tax-returns-more-23-million>.

exponentially greater when these public figures are caught committing a federal crime. Celebrities going to jail for committing crime resonates much more with the general public than someone they have no association with.

Pete Rose is another prime example of the idea of sports stars being made into an example by the government for deterrence. Many to this day believe that Pete Rose belongs in the Major League Baseball Hall of Fame for his 4,256 hits.¹⁵⁵ Rose was a baseball legend, whose reputation was tarnished by his involvement in gambling on the Cincinnati Reds, whom he was managing at the time.¹⁵⁶ As a result of his gambling, Rose was banned for life from Major League Baseball, but for this offense he avoided prosecution.¹⁵⁷ In 1990 however, Rose pleaded guilty for filing false income tax returns.¹⁵⁸ The prosecutor of the case said “[today is] a sad day for those young Americans to whom Pete Rose was an idol.”¹⁵⁹ Rose spent 5 months in jail for withholding \$354,968 in income, mostly gained from autograph appearances and, ironically, gambling.¹⁶⁰

Pete Rose’s circumstances provide a wonderful example of prosecutors filling charges that may have a significant general deterrence impact. Rose was alleged to have bet tens of thousands of dollars on his own team.¹⁶¹ His role as a professional athlete is unique in the sense that professional athletes make up a miniscule percentage of the general population. The average Joe is not going to find themselves in a position to illegally gamble on a game in which they may have some influence. However, everyone pays income taxes. Rose was prosecuted and sent to prison for withholding income taxes from the government. In the prosecutor’s own words, the guilty verdict was a “sad day for those young Americans” who were fans of Rose. These fans,

¹⁵⁵ Cody Swartz, *Does Pete Rose Deserve the Hall of Fame?*, BLEACHER REPORT (Jan. 25, 2009), <https://bleacherreport.com/articles/115261-does-pete-rose-deserve-the-hall-of-fame>.

¹⁵⁶ See Evan Caminker & Erwin Chemerinsky, *Pete Rose Has Done His Time*, THE N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/opinion/pete-rose-baseball.html>.

¹⁵⁷ Clare Smith, *Rose Sentenced to 5 Months For Filing False Tax Returns*, THE N.Y. TIMES (Jul. 20, 1990), <https://www.nytimes.com/1990/07/20/sports/rose-sentenced-to-5-months-for-filing-false-tax-returns.html>.

¹⁵⁸ *Id.*

¹⁵⁹ Joe Kay, *Pete Rose Pleads Guilty to Felony Tax Charges*, ASSOCIATED PRESS (Apr. 20, 1990), <https://apnews.com/article/9f8dbe220a027af9897ba46e72c97be4>.

¹⁶⁰ *Id.*

¹⁶¹ Clare Smith, *supra* note 155.

who at this point knew of Rose's tarnished image for gambling on his own team, will forever associate his prison sentencing with tax evasion.

Pete Rose's circumstances were similar to those of Clinton Portis and the NFL players who defrauded the NFL's health care benefit plan. Rose and Portis were both Hall of Fame caliber talents, known across the country for their skill and success on the field. Both Rose and Portis spent time in jail for their actions following their playing days. Rose failed to report income of \$354,968, of which he was depriving the government of somewhere in the ballpark of \$100,000 at the time.¹⁶² Clinton Portis in his part of the NFL scheme, earned somewhere around \$100,000 dollars himself.¹⁶³ These numbers are not in the top percentile of health care fraud or tax evasion cases. According to the United States Sentencing Commissions Fiscal Year 2017 report, 19.8% of tax offenses involved tax losses of \$100,000 or less.¹⁶⁴ While what Rose failed to report in 1989 is certainly likely worth more today, he by no means was on the high end in monetary terms of tax evasion cases, just as Portis was not with his health care fraud gains.

The concept of "general deterrence," is beautifully illustrated in the cases of Pete Rose, Clinton Portis, Mike "The Situation" Sorrentino, Martha Stewart, and other celebrities who have done jail time for white collar crimes. These public figures and personalities are committing crimes that are generally not so malicious and reap tons of media coverage at the same time. A suburban family that pays to forge their daughters SAT score for college has little impact on the public. When the star of Full House does it, and spends time in jail for it, those suburban families would likely think twice about committing what seems like a comparably minor crime. The same goes for the local sporting goods store owner who may be rethinking not reporting some income to the IRS, as he sees his idol Pete Rose go to jail for doing just that. These cases do raise the question, however, if these celebrities and athletes did not have such a public persona, would they have spent time in jail, or even have been prosecuted by the federal government?

¹⁶² Joe Kay, *Pete Rose Pleads Guilty to Felony Tax Charges*, ASSOCIATED PRESS (Apr. 20, 1990). <https://apnews.com/article/9f8dbe220a027af9897ba46e72c97be4>.

¹⁶³ John Keim, *Clinton Portis sentenced to 6 months in prison, 6 months' home confinement for role in scheme to defraud health care benefit program*, ESPN (Jan. 6, 2022), https://www.espn.com/nfl/story/_/id/33005964/clinton-portis-sentenced-6-months-prison-6-months-home-confinement-role-scheme-defraud-healthcare-benefit-program.

¹⁶⁴ *Quick Facts: Health Care Fraud Offenses*, U.S. SENTENCING COMM'N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY17.pdf.

One final modern consideration concerning general deterrence in application would be the Will Smith debacle that took place recently at the 9th Academy Awards. On national television, movie superstar Will Smith slapped comedian Chris Rock over a joke Rock made at Smith's wife's expense.¹⁶⁵ In front of virtually the entire world, Smith committed what a court would consider to be battery.¹⁶⁶ Smith has not been charged with battery, and legal experts argue that bringing charges against Smith would serve little purpose.¹⁶⁷ As one former California prosecutor puts it: "public opinion will take care of punishing Will Smith."¹⁶⁸ However, if prosecutors were to bring charges against Smith, I would argue that it would be one of the more significant instances of general deterrence in recent history. Interestingly, Dave Chappelle, who is another standup comic, was physically attacked while on stage just a few weeks after the Smith incident.¹⁶⁹ Perhaps if Will Smith was in fact charged and punished for battery, the deterring impact of that punishment may have reduced the likelihood that another standup comedian would be assaulted just weeks later.

V. Conclusion

Health care fraud occurs in many shapes and forms. Schemes defrauding public programs like Medicare and Medicaid, while more common, still share similar characteristics to schemes that defraud private insurers. These schemes hurt everyone involved in the healthcare system, so it makes sense that the Department of Justice is increasingly cracking down on health care fraud. While schemes involving private insurers do not directly impact the government, the Department of Justice still has an interest in demonstrating to the public that they take health care fraud

¹⁶⁵ Nicole Sperling & Matt Steven, *Will Smith Resigns From Academy After Slapping Chris Rock at Oscars*, THE N.Y. TIMES (Apr. 8, 2022), <https://www.nytimes.com/2022/04/01/movies/oscars-will-smith-slap.html>.

¹⁶⁶ Rachel Swan, *Is Will Smith's Oscars slap considered assault or battery under California law?*, THE S.F. CHRONICLE (Mar. 29, 2022), <https://www.sfchronicle.com/california/article/Is-Will-Smith-s-Oscars-slap-considered-assault-17034340.php>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Julius Young, *Dave Chappelle's attack a result of Will Smith smacking Chris Rock at 2022 Oscars, comedy club owners claim*, FOX NEWS (May 5, 2022) <https://www.foxnews.com/entertainment/dave-chappelle-attack-will-smith-smacking-chris-rock-2022-oscars-comedy-club>.

seriously, and that if you partake in it you will be caught and punished. The schemes that took place in the NFL and NBA, while not involving government money, serve as the perfect opportunity for the Department of Justice to demonstrate to the public that health care fraud will be punished, no matter who is involved.

Celebrities and athletes have a unique role in society being in the public eye. In one regard, this burden presents them with the opportunity to live a life that very few others get the chance to, with opportunities and lifestyles that very few get the fortune to experience. On the other hand, the publicity they garner can serve as a catalyst for their poor judgment, as their every mistake is scrutinized by the world. These people provide the United States law enforcement agencies with the unique criminal prevention tool of general deterrence when they do make mistakes, lapses in judgment, or have misguided moments of character. These celebrities, even for committing non-violent or seemingly minor crimes, still face repercussions for their actions. Whether it is fair or not, the Department of Justice has an added incentive to prosecute celebrities. In a world where it may seem as though celebrities are somehow untouchable compared to the general public, the Department of Justice sends a message with these high profile prosecutions, that no one is above the law.