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# **KNOCKOUT: CONCUSSED PLAYERS SENDING THE NFL DOWN FOR THE COUNT**

David Chaise

## **I. INTRODUCTION**

The purpose of this paper is to examine the current concussion litigation surrounding the National Football League (NFL) and its retired players. This article will focus on the legal claims that the retired players can assert, rather than the moral obligation that the NFL may have failed to provide. First, the retired players must establish that a duty existed for the NFL to protect its players against long-term health effects from head injuries suffered during NFL games, independent of the collective bargaining agreement. Secondly, the retired players wish to prove that the NFL concealed facts and scientific data from its players to continue their participation in professional football games. Further, the retired players assert that the NFL and its teams conspired to reject scientific findings that show long-term effects of concussions.

To begin, this paper briefly reviews medical evidence of long-term effects from brain injuries. Specifically, this article will chronicle the history and science of chronic traumatic encephalopathy (CTE). It will then provide a quick overview of the present individual actions.

After appreciating the scientific evidence, the article will focus on the litigation and the causes of action. In particular, the causes of actions most common among the retired players include negligence, negligent misrepresentation, fraud, fraudulent concealment, and conspiracy to defraud. Then, the relief sought, which includes medical monitoring, loss of consortium, and declaratory relief, will be scrutinized to consider whether such requested relief is appropriate.

Following the litigation discussion, the paper will shift to a more legislative discussion. Concussions and their long-term effects are not exclusive to football. Other sports leagues face

similar issues, and their responses will be presented. In addition, the article will discuss current legislation and possible future legislation related to preventing long-term effects from brain injuries.

This article continues with an analysis of solutions for preventing concussions and other sports related brain injuries. Through litigation, legislation, and advocacy, the paper seeks to find viable solutions for an expanding problem. However, a solution for past injuries is difficult to attain.

Lastly, the article explains the effects that would result if the retired players succeed in their litigation. This conclusion expresses a pessimistic outcome. Ultimately, it will evaluate the economic impact of successful litigation, and conclude that unlike other professional sports leagues, the NFL would cease to exist if the retirees win. Through years of denying the long-term effects of head injuries, the NFL had pinned itself into a corner of massive potential liability. The NFL may be able to implement procedures to protect its present and future players; however, similar to the former players, the NFL cannot fix its past. The current litigation will leave the NFL with a persistent headache that it may never be able to alleviate completely, and ultimately, might knockout the NFL from existence.

## II. SPORTS RELATED BRAIN INJURIES AND THEIR LONG-TERM EFFECTS

### *A. Brain Injury Terminology*

A concussion is a closed head injury<sup>1</sup> induced by traumatic biomechanical forces leading to “a complex pathophysiological process affecting the brain.”<sup>2</sup> In addition, a concussion “occur[s] when different levels of the brain tissue are compressed together, forced to slide and shear across each other, or are torn apart.”<sup>3</sup> Further, a concussion shortly impairs neurological functions that spontaneously resolve themselves, rather than affecting anatomical structure.<sup>4</sup>

Although a single concussion does not affect the anatomical brain structure, repetitive concussions have more serious effects than merely a short-lived neurological functional impairment. First, second-impact syndrome occurs when a person sustains a second concussion before the symptoms of his last concussion have ceased.<sup>5</sup> Almost all persons who experience second-impact syndrome become disabled, and the mortality rate is an alarming 50%.<sup>6</sup> Secondly, multiple concussions may cause long-term effects, such as Chronic Traumatic Encephalopathy (CTE). Common to athletes and others whom have suffered multiple concussions, CTE is a progressive degenerative disease of the brain.<sup>7</sup> Symptoms of CTE include concentration and memory problems, which may escalate to various forms of dementia, including Alzheimer's disease and Parkinson's disease.<sup>8</sup> Additionally, mental health issues, such as depression, may develop from CTE.<sup>9</sup>

#### *B. A History of Brain Injury in Sport*

Beginning in the 1920s, medical experts started to research the effects of brain injuries related to sports. In 1928, Dr. Harrison Martland, a pathologist and Essex County, New Jersey Chief Medical Examiner, discovered that former boxers exhibited similar symptoms to patients with brain damaging illnesses, including epidemic encephalitis, or the inflammation of the brain.<sup>10</sup> Although Martland's article on the "punch-drunk" boxer could not be substantiated at the time, other physicians followed his research. From the 1930s until 1973, medical experts proposed that punches caused the brain to bounce inside the skull, destroying tissue and leading to irreversible scar tissue.<sup>11</sup> However, some neurologists disagreed, finding that only 1 out of 3,800 knocked out boxers who later underwent an electroencephalography (EEG) test demonstrated significant brain-wave changes.<sup>12</sup> These neurologists concluded that a knockout punch produced temporary unconsciousness, but no long-term health effects.<sup>13</sup> However, once

technology improved, medical experts understood that an EEG could not test for structural changes in the brain.<sup>14</sup> In the 1980s, X-ray computed tomography (CT scans) and magnetic resonance imaging (MRI) would help support this understanding, and provide better exams for brain traumas.<sup>15</sup>

Notably, in 1973, British researchers published pathology reports of deceased boxers from 1900 to 1940. The posthumous examinations revealed that the boxers suffered severe brain injuries. Family members' descriptions of the boxers' lives and habits conveyed speech difficulties, memory loss, and tremors, which are commonly associated with Parkinsonism.<sup>16</sup> For example, Muhammad Ali's physician found that his Parkinsonism was due to 22 years of head injuries from boxing.<sup>17</sup> However, the 1973 study noted that preventing brain damage in living boxers remained difficult because it could not differentiate whether the damage resulted from an accumulation of blows or merely from a single fatal trauma.<sup>18</sup> After international attention arose from deaths in boxing, the American Medical Association called for a ban on boxing because of its dangers.<sup>19</sup>

### *C. Brain Injury Studies Relating to Football: A Chronology*

A major factor in the current NFL concussion litigation is when the NFL had the requisite knowledge to protect its players from CTE and other long-term effects related to brain trauma experienced on the football field. In 1997, the American Academy of Neurology (AAN) issued guidelines to prevent structural brain injuries, second impact syndrome, and cumulative brain injuries from repeated trauma.<sup>20</sup> The purpose of the guidelines was to help teams manage concussions that occurred during a practice or a game.<sup>21</sup> According to the AAN's recommendations, only a player who suffered a grade two or grade three concussion should not return to the game, and was required to wait at least one week before playing again; however, a

player who sustained a grade one concussion could return to the field that same day.<sup>22</sup> The AAN distinguished between a grade one and grade two concussion by specifying signs and symptoms, explaining that a player should not return if symptoms lasted more than fifteen minutes and he had not lost consciousness.<sup>23</sup> However, the Prague Concussion Guidelines, first issued in 2004 and updated in 2005, recommended that any player who sustained a concussion, even grade one, should not return to play that same day.<sup>24</sup>

Although the AAN and Prague Concussion Guidelines were promulgated based on prior medical knowledge in concussion treatment, independent studies specific to football began to develop. In 2002, Dr. Bennet Omalu, a forensic neuropathologist, studied the brain of Mike Webster, a former Pittsburgh Steeler and Hall of Fame center who died from a myocardial infarction.<sup>25</sup> Webster exhibited depression, diminished cognitive abilities, and signs of dementia in life, and a postmortem examination revealed that Webster suffered from CTE.<sup>26</sup> Additionally, in 2004, Dr. Omalu diagnosed Terry Long with CTE after finding “neurofibrillary tangles and neutrophil threads in all regions of [his] brain.”<sup>27</sup> Long, a former Steelers offensive lineman who committed suicide, had exhibited major depression.<sup>28</sup> Further, Dr. Omalu found neurofibrillary tangles and “a brain that resembled an 80-year-old man” in former Pittsburgh Steelers offensive lineman Justin Strzelczyk.<sup>29</sup> The thirty-six year old Strzelczyk was never documented with a concussion during his eight-year NFL career, but Dr. Omalu remains confident that Strzelczyk suffered repetitive head injuries.<sup>30</sup> In 2007, Dr. Omalu found “tau-positive neurofibrillary tangles” associated with Alzheimer’s and other types of dementia in the brain of Andre Waters. Waters, a former Philadelphia Eagles defensive back known for his hard hits, committed suicide at age forty-four in 2006.<sup>31</sup> In 2010, Dr. Omalu and Dr. Julian E. Bailes continued their research at the Brain Injury Research Institute, and diagnosed Chris Henry with CTE, who died either from

falling or jumping off of a moving truck.<sup>32</sup> Most alarmingly, Henry was an active player for the Cincinnati Bengals at the time of his death in 2009. The wide-receiver was never diagnosed with a concussion, and suffered many off-the-field issues.<sup>33</sup>

In 2005, the University of North Carolina at Chapel Hill (UNC) conducted a survey of 3,683 retired football players about their overall health.<sup>34</sup> Over 2,500 players returned the questionnaire, for a 70% response rate.<sup>35</sup> The average retired player was fifty-four years old and played professional football for approximately 6.6 years.<sup>36</sup> More than 1,500 players (60.8% of the respondents) reported that they had at least one concussion during their career, and half of those lost consciousness from a concussion. Additionally, almost 600 players (24%) suffered from at least three concussions.<sup>37</sup> Further, 266 retired players (17.6%) “perceived the[ir] injury to have had a permanent effect on their thinking and memory skills as they have gotten older,” showing “a relationship between diagnosed mild cognitive impairment and history of concussions.”<sup>38</sup> Therefore, the study concluded, “a history of recurrent concussions and probably subconcussive contacts to the head may be risk factors for the expression of late-life memory impairment, mild cognitive impairment and earlier expression of Alzheimer’s.”<sup>39</sup>

In addition, the UNC study showed that retired NFL players faced a 37% higher risk of Alzheimer’s than other males of the same age.<sup>40</sup> Of the 758 players who were over fifty years old, thirty-three retirees were already diagnosed with Alzheimer’s.<sup>41</sup> However, because the study was based on self-reported answers, the study could not independently verify the players’ medical problems with exact accuracy. Thus, the NFL’s Committee on Mild Traumatic Brain Injury rejected the study as unreliable.<sup>42</sup>

However, the NFL acted reluctantly to implement concussion safety measures, declaring many studies unreliable. In 2005, the NFL’s Committee on Mild Traumatic Brain Injury stated

that it did not believe players who sustained a concussion faced a significant risk of sustaining a second injury if they returned to play.<sup>43</sup> Additionally, in 2007, the Committee rejected guidelines from the AAN or the Prague Commission, stating that the recommendations were based on opinion, not science.<sup>44</sup>

In 1994, the NFL formed the Committee on Mild Traumatic Brain Injury (MTBI) “to initiate research and advise the NFL and NFL clubs on best practices for concussion prevention and management, as well as for avoidance or protection against other head, neck and spine injuries.”<sup>45</sup> Its successor is named the NFL Head, Neck and Spine Committee.<sup>46</sup> Dr. Elliot Pellman, a rheumatologist and paid physician and trainer for the New York Jets, chaired the MTBI Committee from 1994 until 2007.<sup>47</sup> The other chairmen were Dr. Ira Casson, a neurologist, and Dr. David Viano.<sup>48</sup>

As of 2007, the MTBI Committee repeatedly denied a link between concussions and long-term problems, such as dementia or depression through its own studies conducted from 1996 to 2001.<sup>49</sup> However, in 2009, the NFL commissioned a study involving 1,063 retired football players at the Institute for Social Research of the University Michigan.<sup>50</sup> The simple question asked was whether the player had “ever been diagnosed with dementia, Alzheimer’s disease or other memory-related disease.”<sup>51</sup> Two-percent (2%) of retired players between thirty and forty-nine responded positively, which is “19 times the rate for the same age group in the general population.”<sup>52</sup> Additionally, six percent (6%) of retired players above fifty responded affirmatively, which is five times higher than the general population.<sup>53</sup> Despite the study’s results, the study’s authors found that it did not prove a causal link between playing football and long-term mental functions because it failed to consider other risk factors, such as genetic predisposition.<sup>54</sup> Additionally, the NFL asserted that the study, which it funded, was unreliable.<sup>55</sup>

Thus, the Committee and the NFL concluded that more research was necessary to determine a causal link.

Following the release of the NFL sponsored study, in the fall of 2009, the United States House Judiciary Committee held a hearing, which included Congressmen, NFL executives, NFL players, NFL doctors, and NFL retirees to discuss the alarming discrepancy between the rate of former NFL players suffering memory-related disorders and that of the general population. Despite outrage from the Judiciary Committee Members, NFL Commissioner Roger Goodell refused to accept “a direct link between playing football and brain disorders.”<sup>56</sup>

However, after Congress, and thus the public, began to take notice of the concussion issue, Commissioner Goodell issued a memorandum to all thirty-two teams that stated a player should not return to play if he sustained a concussion and exhibited serious symptoms, “such as the inability to remember assignments, and persistent dizziness or headaches.”<sup>57</sup> In addition, the NFL announced that not only would it “support research by its most vocal critics, but also conceded publicly for the first time that concussions can have lasting consequences.”<sup>58</sup> Further, the NFL MTBI’s co-chairmen, Dr. Ira Casson and Dr. David Viano, resigned.<sup>59</sup> They were replaced by Dr. H. Hunt Batjer and Dr. Richard G. Ellenbogen, who have both revealed their support that repeated head injuries cause long-term effects though with unknown frequency.<sup>60</sup> Further, the NFL has given independence to Dr. Batjer, Chairman of the Department of Neurology at Northwestern University Feinberg School of Medicine, and Dr. Ellenbogen, Chairman of the Department of Neurological Surgery at the University of Washington, in appointing other members to the Head, Neck and Spine Committee.<sup>61</sup> Recently, the Committee’s independence was displayed with a memorandum reasserting the “Sideline Concussion Assessment Protocol,” establishing the “Madden Rule” that warrants a medical escort for any

player diagnosed on the sideline with a concussion, and firmly stating “When in Doubt Leave Them Out.”<sup>62</sup>

### III. THE LITIGATION: RETIRED PLAYERS v. NFL

As of April 24, 2012, sixty-five separate suits have been filed, with over 1,500 plaintiffs involved.<sup>63</sup> The plaintiffs include retired players, as well as, family members of deceased retired players. The complaints filed vary in regards to form: as a class action; a mass tort lawsuit; or as individual plaintiffs. For example, in *Easterling v. Nat’l Football League*, the complaint proposes seven distinct classes for players of different eras, where one plaintiff represents each class.<sup>64</sup> Under the Federal Rules of Civil Procedure, a class action permits the representative plaintiffs to represent other unnamed plaintiffs.<sup>65</sup> However, a court must first certify the class adhering to certain guidelines.<sup>66</sup> In contrast, mass tort litigation joins together several plaintiffs’ claims into one single action.<sup>67</sup> Lastly, a few former players filed as single plaintiffs.<sup>68</sup> However, in common with the plaintiffs are the claims, which include negligence, negligent misrepresentation, fraud, fraudulent concealment, and conspiracy to defraud. Additionally, the plaintiffs request medical monitoring, allege loss of consortium, and seek declaratory relief. As a threshold matter, the plaintiffs must first demonstrate that federal law does not preempt their state law claims.

#### A. *Federal Preemption of Labor Agreements: Section 301 of the Labor Management Relations Act (LMRA)*

Before analyzing the plaintiffs’ legal claims, it is important to understand Section 301 of LMRA. The statute states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the

parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>69</sup>

The Supreme Court has reasoned that federal preemption of labor contracts is necessary in order to resolve labor-contract disputes, including interpretation of contractual phrases and terms, uniformly and predictably.<sup>70</sup> Additionally, section 301 preemption “is so powerful as to displace entirely any state cause of action” for violation of a collective bargaining agreement.<sup>71</sup> Further, section 301 preempts not only contract claims, but also tort claims relating to a collective bargaining agreement.<sup>72</sup>

Despite federal preemption of labor contract and tort claims, according to the Sixth Circuit, a state-law tort claim may be sufficiently “independent” to survive section 301 preemption.<sup>73</sup> First, the court must determine whether the plaintiff’s claim was created by the collective bargaining agreement or by state law.<sup>74</sup> If the collective bargaining agreement created the right, then the section 301 preempts the plaintiff’s claim.<sup>75</sup> However, if the collective bargaining agreement did not create the right, then the court examines whether proving the state law tort claim requires an interpretation of the collective bargaining agreement.<sup>76</sup> The claim will be independent only if the state law claim does not substantially depend on analyzing the terms of the collective bargaining agreement.<sup>77</sup>

In addition, membership in the bargaining unit does not alter the analysis of whether section 301 preempts state law claims. Despite retired players’ absence from the bargaining unit, the NFLPA and the NFL can choose to negotiate benefits for retirees.<sup>78</sup> Thus, although the NFLPA does not have a continued obligation to bargain on behalf of the retirees, under section 301, the retirees can enforce provisions in the CBA that provide them with retirement benefits.<sup>79</sup>

## 1. Cases Where Preemption Was Found

The preeminent case for section 301 preemption is *United Steel Workers of America, AFL-CIO-CLC v. Rawson*.<sup>80</sup> In *Rawson*, surviving family members of ninety-one miners who died in a fire brought a wrongful death suit for breach of contract, negligent inspection, and fraud under Idaho state law.<sup>81</sup> The Supreme Court of the United States held that the duty to inspect the mine arose out of the collective bargaining agreement; therefore, section 301 preempted the survivors' claims.<sup>82</sup>

In the instant case, the NFL claims that section 301 completely preempts the plaintiffs' claims.<sup>83</sup> The NFL relies on *Stringer v. Nat'l Football League*.<sup>84</sup> In *Stringer*, former Minnesota Vikings offensive linemen Corey Stringer died after consecutive days suffering heat stroke during summer training camp.<sup>85</sup> Stringer's widow filed a negligence claim against the NFL for failing to minimize the risk of heat stroke, to establish regulations, and to monitor heat-related illness.<sup>86</sup> The Southern District of Ohio found that although Stringer's negligence claim did not arise directly from the CBA, the claim was preempted because it was substantially dependent upon analyzing the CBA's provisions imposing duties for medical treatment of its players.<sup>87</sup> Despite the NFL's "Hot Weather Guidelines" contained in the NFL's 1991 Game Operations Manual, which was effective at the time of Stringer's death, the *Stringer* court found that the CBA did not incorporate the Manual; thus, it excluded an express or implied provision imposing a duty on the NFL from protecting players from heat-related illness.<sup>88</sup> Nevertheless, the widow's claim was "inextricably intertwined and substantially dependent" upon an analysis of CBA provisions when read with the Game Manual.<sup>89</sup> For example, the court found that the CBA's requirement for "full-time head trainers and assistant trainers be certified by the National Athletic Trainers Association" may have increased the significance of the NFL's Hot Weather

Guidelines if the trainers' association had not instructed its members about heat training.<sup>90</sup> In addition, the CBA required the team physician to warn a player with a physical condition that would be "significantly aggravated by continued performance."<sup>91</sup> Because the court found the physician's medical training would comprehend that continued performance would aggravate heat-related illness, the CBA's contractual provision was inextricably intertwined with the widow's wrongful death claim.<sup>92</sup>

Additionally, the Northern District of New York held that section 301 preempted former Indianapolis Colts tight-end Timothy Sherwin's claims for breach of contract, negligence, medical malpractice, fraud, negligent misrepresentation, and negligent and intentional infliction of emotional distress.<sup>93</sup> Sherwin alleged that the Colts failed to provide adequate care, and that the team intentionally withheld information regarding his neck injury.<sup>94</sup> Specifically, Sherwin continued to practice despite numbness and tingling because the physicians refused to discuss his injury with him.<sup>95</sup> After being traded, Sherwin's new team discovered he had a herniated disc in his spine that required surgery.<sup>96</sup> The Northern District of New York highlighted two provisions of the CBA, which had expired, but the parties continued to abide by its terms.<sup>97</sup> First, the *Sherwin* court noted that when

Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary [...].<sup>98</sup>

Secondly, the Northern District of New York found that the CBA contained a clause for player injuries:

If a Club physician advises a coach or other club representative of a player's physical condition which could adversely affect the player's performance or health, the physician will also advise the player [...].<sup>99</sup>

Thus, the court concluded that Sherwin's causes of actions were "substantially dependent" upon analyzing the CBA; therefore, the claims were causes of action under section 301 that were subject to arbitration.<sup>100</sup>

Further, in *Givens v. Tennessee Football, Inc.*, former Titans wide receiver David Givens claimed that the team exhibited the state law torts of "outrageous conduct," negligent infliction of emotional or physical injury, and breach of contract because it withheld information regarding his knee injury.<sup>101</sup> Similar to *Sherwin* discussed above, the Middle District of Tennessee concluded that because the CBA's clause requiring a physician to advise a player of his condition when the physician advises the team, his claims were not sufficiently independent from the CBA's terms.<sup>102</sup> Thus, the court dismissed Givens's suit because section 301 preempted his claims.

## **2. Cases That Were Not Preempted**

Although §301 preempted Stringer's wrongful death claim against NFL, the District Court for the Southern District of Ohio held that a state law claim existed against the NFL, Riddell, and NFL Properties, which licensed the Riddell equipment, for defective design.<sup>103</sup> Stringer's widow claimed that the helmet and shoulder pads prevented "evaporation and heat dissipation."<sup>104</sup> The *Stringer* court found that although the CBA created a "Joint Committee on Player Safety and Welfare" to discuss aspects of playing equipment, the NFL was not a member of the committee and did not need to adopt the committee's recommendations.<sup>105</sup> Thus, because the CBA did not impose a duty on either the NFL or NFL Properties to ensure that the equipment protected from risk of heat-related illness, the duty must have arose from common law.<sup>106</sup>

Additionally, when a referee negligently threw a penalty flag, striking and seriously injuring Cleveland Brown offensive tackle Orlando Brown's eye, the Southern District of New

York found that a court would not need to interpret any terms of the CBA to adjudicate Brown's negligence claims.<sup>107</sup> The court reasoned that because the NFL owed a duty to the general public to "use due care in throwing small weighted objects," the negligence could have harmed even an innocent bystander, which established a duty independent of the CBA."<sup>108</sup>

Further, the Ninth Circuit Court of Appeals held that former San Diego cornerback John Hendy's claims for negligent hiring and negligent and intentional withholding of medical information against the team and its physician were not preempted under section 301.<sup>109</sup> Although the CBA required each team to hire a board certified orthopedic surgeon, Hendy, who was dismissed from the Chargers after reinjuring his knee, did not allege that the team failed to hire an orthopedic surgeon.<sup>110</sup> Rather, the player's claim was grounded in California's duty of care when hiring, which was independent of any duty in the CBA.<sup>111</sup> In addition, the CBA included provisions that required the physician to inform the player of his medical condition when the physician advised the team of the player's condition, as well as, giving the player the right to review his medical records twice per year.<sup>112</sup> Despite these provisions in the CBA, the Ninth Circuit found that intentional and negligent withholding of medical information was not preempted because state law imposed an independent duty of informed consent.<sup>113</sup> Further, similar to *Brown*, which determined that the player's status was irrelevant to determine the referee's duty, the *Hendy* court acknowledged that the claim did not depend on Hendy's status as a player under the Players Association, but instead, "[t]he identical claim could be asserted by anyone Dr. Losse treated in connection with his employment."<sup>114</sup>

### **3. The Practical Effect of Preempting State Law Causes of Action Under Section 301**

Practically, preempting state law causes of actions has a profound effect on the administration of a legal case. Although LMRA section 301, quoted above, compels sole federal

jurisdiction of disputes under a collective bargaining agreement, Congress intended to encourage parties to agree to arbitration.<sup>115</sup> As stated in LMRA section 203(d), “Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing [CBA].”<sup>116</sup> Therefore, if a court finds that section 301 preempts a claim, and the parties had agreed to include a provision for grievance arbitration, only the agreed upon forum can be used to interpret the CBA.<sup>117</sup>

Here, the CBA at issue contains an arbitration provision that directs

any dispute...arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the [arbitration] procedure set forth in this Article except wherever another method of dispute resolution is set forth elsewhere in this Agreement, and except wherever the Settlement Agreement provides that the Special Master, Impartial Arbitrator, the Federal District Court or the Accountants shall resolve a dispute.<sup>118</sup>

Thus, if a district court finds section 301 preemption, the claims will be arbitrated rather than litigated in court.

#### **4. Applying LMRA Section 301 Preemption to NFL Concussion Litigation**

The above cases establish an effective framework to apply section 301 to the current NFL Concussion Litigation. A District Court would likely find that the retired players’ claims are substantially dependent on interpreting the CBA, and thus, section 301 would preempt state law causes of action. For the players to avoid section 301 preemption, they must state a claim that does not rely upon the CBA or an interpretation of the CBA’s language. Even if the language is not expressly stated in the CBA, the CBA will preempt the claim if it is inextricably intertwined.

Thus, the players' and their families' claims depend on defective equipment, a general duty to others, negligent hiring, or intentional withholding of medical information.

Most importantly, the CBAs have changed over time, but every CBA has addressed player health and safety. Addressing medical care, the 1969 NFL bylaws provided an ambulance available to both teams,<sup>119</sup> the bylaws in 1980 stated that the Club's medical staff determined the recovery time for players' injuries,<sup>120</sup> the 1993 CBA provided that an injured player who promptly reported injury would receive medical care as the Club physician deemed necessary,<sup>121</sup> and the CBAs provided for certified orthopedic surgeons<sup>122</sup> and trainers.<sup>123</sup> Additionally, beginning from the 1982 CBA, players had the express right to obtain a second medical opinion paid for by the Club.<sup>124</sup> Further, player safety provisions had been in place since 1970, where the CBA established a Joint Committee on Player Safety and Welfare to discuss equipment, surfaces, facilities, rules, and player-coach relationships<sup>125</sup> Additionally, the CBAs empowered the Commissioner to refer playing rule changes affecting player safety to the committee.<sup>126</sup> Under the 1982 CBA, the NFLPA could investigate and request an arbitration hearing related to adopting playing rule changes that would adversely affect player safety.<sup>127</sup> In addition, the CBAs have provided for various benefits, including injury grievances,<sup>128</sup> termination pay,<sup>129</sup> workers' compensation,<sup>130</sup> severance pay,<sup>131</sup> supplemental disability benefits,<sup>132</sup> providing hearings before a benefits arbitrator,<sup>133</sup> injury protection benefits,<sup>134</sup> and the newly established "88 Plan" that provides medical benefits to former players with dementia.<sup>135</sup>

Here, the retired players allege that the NFL has "consistently adopted and exercised a duty to protect the health and safety of its players by implementing rules, policies, and regulations," thus confirming its duty to protect players from risk.<sup>136</sup> Thus, while attempting to stress that the NFL breached this duty by various failures in protection, the plaintiffs undermine

their argument to avoid arbitration. Because the retired players admit that the CBA, bylaws, and other rules establish a duty, an interpretation of the CBAs would be necessary. Therefore, section 301 should preempt claims that involve establishing duty, such as negligence and negligent misrepresentation, which will be discussed in section III(B)(1) and (2). Similarly, the fraud and fraudulent concealment claims, as analyzed in section III(B)(3) and (4), require a duty for the NFL to disclose truthful information. Thus, LMRA section 301 would almost certainly preempt these claims, as well, placing them in the sole discretion of an arbitrator as agreed to in the CBA.

### *B. State Law Causes of Action*

Most likely, the section 301 will preempt state law causes of action; thus, the retired players would have to settle their claims in arbitration. However, if the court does not find preemption, it will have to decide upon the state law causes of action. Although players have filed concussion lawsuits in many jurisdictions, the U.S. Judicial Panel on Multidistrict Litigation granted the NFL's motion to consolidate the cases.<sup>137</sup> Thus, the litigation will generally concentrate in the Eastern District of Pennsylvania.<sup>138</sup> In the alternative to trial, an arbitrator would be required to consider many elements present in the causes of action analyzed below.

#### **1. Negligence**

To state a cause of action for negligence, a plaintiff must establish:

(1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged duty.<sup>139</sup>

Here, the NFL players assert that the NFL had a duty of reasonable care: to protect players on the field; to educate players, trainers, physicians, and coaches about CTE and

concussion injury; to direct strict “return-to-play” guidelines to prevent CTE; to promote a “whistleblower” system where teammates would bring to the attention of the coaching staff of another player’s concussion; to design rules to eliminate concussion risk during games and practices, to promote research to find a cure for CTE and other long-term concussive effects; and to provide guidance to local sports organizations.<sup>140</sup> Additionally, the retired players claim that the NFL breached its duties by failing to perform the following: to institute “acclimation requirements or procedures;” to regulate and monitor practices, games, equipment and medical care “so as to minimize the long term risks associated with concussive brain injuries suffered by the NFL players;” to require composing brain injury histories for each NFL player; to accurately diagnose and record concussions in order to adequately and timely treat players; to “establish league-wide guidelines, policies, and procedures regarding the identification and treatment of concussive brain injury;” to develop medical criteria for players who can return to play; to license and approve the best equipment available to reduce concussion risks; and to provide complete information to NFL athletic trainers about concussion prevention, symptoms, and treatment.<sup>141</sup> Further, the 1970 and CBA provided that the Commissioner would resolve all grievances under the CBA,<sup>142</sup> and the CBAs from 1982 until 2006 provided for arbitration as the forum for resolving disputes under the CBA, the NFL Player Contract, or the NFL Constitution and Bylaws.<sup>143</sup>

The past collective bargaining agreements contained numerous provisions dealing with player health and safety. The NFL’s Memo to Dismiss the Complaint conveys examples from the CBAs regarding medical care provisions, player safety provisions, and grievance procedures.<sup>144</sup> In addition, although the 1982 CBA expired in 1987, and a new CBA was not reached until 1993, players and teams still operated under the 1982 CBA.<sup>145</sup> As noted in section III(A)(1), the 1982

CBA continued to govern disputes between the parties; therefore, the retirees could not avoid labor preemption based on an interval between CBAs. Thus, labor law would likely preempt the negligence claim.

Although many plaintiffs are involved in class action lawsuits against the NFL, a court would likely find a class action lawsuit inappropriate because each retired player's injuries originated from different events. In addition, the players suffer from various levels of pain. Thus, on the merits, the NFL would assert different defenses for different plaintiffs. First, the retirees' negligence claim would have to verify that the NFL owed various duties to protect its players. This should be an easy element for the plaintiffs to prove because of the natural duties that flow from an employer-employee relationship.

Secondly, the former players and their spouses would have to establish breaches of the NFL's various duties. A court or arbitrator would be required to determine the available technology at the time each plaintiff played, as well as, the CBA that controlled each individual's career. For example, medical technology used to diagnose brain trauma includes the CT scanner and the MRI, which were both merely in the developmental stages during the mid-1970s and were not widely used until the 1980s.<sup>146</sup> Thus, players who played prior to 1980 would face adversity in finding that the NFL breached a duty to them.

In addition, the retirees would be required to establish that the NFL's breach of its various duties proximately caused their present injuries, including CTE. The NFL would offer a strong defense for this issue. Presumably, each player plaintiff has a unique injury history that includes not only an individual's professional career, but also his amateur career in high school, middle school, and as far back as elementary school. For example, current Pittsburgh Steelers safety Troy Polamalu, who is not party in the NFL Concussion Litigation, sustained two

concussions in high school, three in college, and three in the NFL.<sup>147</sup> Thus, a majority of a football player's concussions may have derived from pre-NFL games. Additionally, concussion histories, especially for players who played prior to the concussion awareness era, would likely exclude a number of undiagnosed concussions. Ironically, although technology improvements and concussion awareness are usually viewed beneficially, the later players' claims may be weakened as a result. Therefore, for earlier players, the NFL could assert that it did not know of concussions' effects, and for later players, the NFL could use societal advancements to deny responsibility for players entering the professional ranks with concussions.

Further, the NFL could argue that it was not its own negligence that proximately caused players' injuries, but rather illegal actions outside the scope of the CBA, which may qualify as intentional torts.<sup>148</sup> Recently, the NFL discovered that at least one team created a "bounty" system among its players and coaches to offer bonuses to players that injured specified opposing players.<sup>149</sup> Incentivizing players with extra compensation has precedent. In 1989, the NFL inquired into an alleged bounty system involving the Philadelphia Eagles.<sup>150</sup> Although the NFL ultimately concluded that no evidence existed, the prospect of illegal bounty systems could be a potential obstacle for recovery. Possibly, however, the bounty programs could enable the retirees to raise a state law claim of negligent supervision for the NFL's failure to monitor its member Clubs.

Lastly, the players will need to show that they have sustained concrete injuries. Assuming each plaintiff has symptoms of an injury, such as memory loss or loss of motor functions, this element of their negligence claim should be unproblematic. In fact, the players should rely heavily on this element. Many of the plaintiffs were once childhood heroes, but are presently heartbreaking casualties of a game that they treasured. A jury or an arbitrator will exhibit

sympathy for these former perceived courageous warriors. For example, on April 19, 2012, former Atlanta Falcons safety Ray Easterling, the initial plaintiff in the NFL Concussion Litigation, committed suicide after years of depression, insomnia, and dementia.<sup>151</sup> In addition, the element of a proven injury may be relevant for retirement benefits under the CBA. Mike Webster, the Hall of Fame Pittsburgh Steelers center examined posthumously by Dr. Cantu,<sup>152</sup> filed for unemployment benefits in 1999 to compensate for brain damage resulting from football head injuries.<sup>153</sup> The Retirement Board granted Webster benefits, but only as a “Football Degenerative.”<sup>154</sup> However, the court found that the Retirement Board ignored unanimous medical evidence that diagnosed Webster with permanent mental disability occurring before his retirement.<sup>155</sup> Thus, Webster was entitled to the more lucrative benefits under the “Active Football” plan, rather than the “Football Degenerative” plan.<sup>156</sup> Because each plaintiff experienced different injuries that are presently exhibited by diverse symptoms, a court or arbitrator must scrutinize each retired player’s injuries separately. Ultimately, although the players might not succeed, they could demonstrate that they were permanently mentally disabled at the time of their retirement, thus entitling them to greater retirement benefits.

Furthermore, although the retired players may not be able to avoid section 301 preemption against the NFL, their claims against the equipment makers, most notably Riddell, would likely attain judicial review. Similar to *Stringer*, where the court found that the defective equipment claim was not a subject of the CBA, discussed in section III(A)(1), a court may permit a trial discussing the equipment. However, it would be difficult for a court on the merits to find that the helmets did not adequately protect the players from concussions and their effects. Most helmet manufacturers have developed equipment with standard technology, voluntarily complying with the National Operating Committee on Standards for Athletic Equipment

(NOCSAE), a nonprofit corporation.<sup>157</sup> It is currently impossible to guarantee that a helmet could prevent every concussion.<sup>158</sup> However, researchers at Virginia Tech have promulgated helmet rankings in its “National Impact Database.”<sup>159</sup> Although the NFL does not mandate a particular type of helmet, which could either harm or aid the players’ chances of recovery, the most commonly worn helmet received a very low concussion prevention rating.<sup>160</sup> The highest rated helmets can lower the risk of a concussion by one-third.<sup>161</sup> On one hand, the players have access to these studies, but continue to choose a poor concussion prevention quality helmet. On the other hand, when the litigation is heard on the merits, the arbitrator or court might find that the CBA contained enough provisions for the NFL to mandate the safest helmet.

## **2. Negligent Misrepresentation**

Negligent misrepresentation provides another state-law cause of action. A plaintiff may establish negligent misrepresentation by showing, (1) the defendant negligently supplied false information to foreseeable persons, whether known or unknown; (2) a foreseeable person reasonably relied upon that false information; and (3) the person’s reliance proximately resulted in economic injury.<sup>162</sup> Additionally, because an element of negligent misrepresentation entails proof that defendant NFL negligently supplied plaintiffs with false information about concussions, the cause of action encompasses a claim of negligence. Therefore, negligent misrepresentation requires the retired players to first show that the NFL owed them a duty of care.<sup>163</sup>

Here, the former players and their families allege that the NFL provided the players with misleading information regarding the long-term risks associated with returning to the playing field. The misleading information was formed through the MTBI Committee, public statements, and publications, as well as, criticisms of scientific studies, including its own commissioned

study at the University of Michigan.<sup>164</sup> Additionally, the plaintiffs claim that the NFL misrepresented and concealed facts with the intent that the players would rely on it.<sup>165</sup>

However, proving reliance will be challenging because of football's macho-man culture.<sup>166</sup> In 2008, then-Arizona Cardinals wide-receiver Anquan Boldin suffered a Grade III concussion after New York Jets safety Eric Smith inflicted a helmet-to-helmet hit, which required jaw reconstruction with seven titanium plates and screws.<sup>167</sup> Boldin only missed two games. Two-years later, Mike Tirico, Jon Gruden, a former Super Bowl winning football coach, and Ron Jaworski, a former NFL quarterback, announced the New York Jets v. Baltimore Ravens "Monday Night Football" game. On air, the commentators had the following exchange:

Gruden: The last time Boldin played here...He took one of the great hits of all time, and here he is. He looks like it never happened.

Jaworski: He took that hit, and he played a couple weeks later. It was one of the most incredible recoveries you'll ever want to see. You think of a tough guy, that's an NFL tough guy, Anquan Boldin.

Tirico: It was a very scary scene...but [Smith] and Boldin spoke right after and Boldin told him, "Keep playing that way. That was a freak accident."<sup>168</sup>

Although this game occurred in 2010, when long-term effects from concussions were widely known, the announcers, including a former coach and player, focused on Boldin's "toughness," Smith's (illegal) "great hit," and Boldin's encouragement to "keep playing that way." However, the announcers neglected to discuss the possibility of long-term neurological damage.<sup>169</sup> Further, present day players, such as Detroit Lions center Dominic Raiola, know that "when you sign up for this job, you know what you are getting into." Raiola added, "I know I'm going to have my day when something is going to happen...Memory loss is going to come. I am ready for it. It's worth it; totally worth it. This is the best job in the world and I wouldn't trade it for anything."<sup>170</sup> Although other players may not share Raiola's view,<sup>171</sup> it creates some doubt as to whether a

player's actual knowledge of the effects would have changed his decision to play in the NFL. Thus, the foreseeable plaintiffs, the former NFL players, would have to demonstrate that they would have strayed from the tough persona portrayed by other former and current players, coaches, and media. Otherwise, it would not be the misrepresentation that proximately resulted in their injuries, but rather believed machismo.

### 3. Fraud

Fraud is a common law claim, specific to each state, but all states require similar elements. In *Jurevicius v. Cleveland Browns Football Company*, the Northern District of Ohio stated that a plaintiff must assert:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon representation or concealment, and
- (f) a resulting injury proximately caused by the reliance<sup>172</sup>

In *Jurevicius*, the plaintiff was a Cleveland Browns wide receiver who contracted a staphylococcus ("staph") infection at the Browns' Training Facility.<sup>173</sup> Jurevicius claimed that the Browns owned and operated the facility, misrepresented safety precautions to prevent staph infection, and the team failed to advise him of the team's inadequate procedures.<sup>174</sup> The court found that the NFL's duty did not arise from or require interpretation of the CBA because the failure of duty to warn about risk of infection stemmed from a common law duty imposed by "any professional to any person acting in justifiable reliance on that professional."<sup>175</sup> In addition, the Northern District of Ohio explained that when a confidential relationship exists, such as one between doctor and patient, a constructive fraud claim may arise for "a breach of a legal or

equitable duty, which, irrespective of moral guilt of the fraud feisor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.”<sup>176</sup> However, because the CBA imposed a duty on the Browns’ physician to advise the player if the physician advises the team about the player’s condition, as well as if a “condition could be significantly aggravated by continued performance,” but was unclear whether it imposed a duty for the physician to warn the player about the training camp’s conditions, the court held that section 301 preempted the constructive fraud cause of action since a determination of the CBA would be required.<sup>177</sup>

In the instant case, an analysis of the CBA would be required to determine whether the section 301 would preempt the fraud claim of action. Although fraud requires a duty that would likely preempt the claims, the players would likely fail on the merits. The retirees rely upon the MBTI’s creation in 1994 and continual rejection of connecting long-term neurological effects with multiple concussions until 2010.<sup>178</sup> They assert that the Committee’s research, published papers, public statements, and rejection of outside studies, as discussed in section II(C), amounted to not only misrepresentations of concussions’ effect, but also knowingly false statements. According to the plaintiffs, the NFL’s goal was to induce players to continue to play for the NFL’s profit at the expense of the players’ health. Thus, the retirees seek to establish an argument reminiscent of cigarette manufacturers that created Tobacco Industry Research Committee, which suppressed and falsified information on the harm and addictiveness of cigarettes.<sup>179</sup>

However, the players will face the most difficulty in proving reliance. The players may have relied upon the NFL’s MBTI Committee, but their total reliance on the NFL’s research might not have been reasonable. For example, the players could have relied upon the available

studies on boxing, discussed in section II(B), to find that former boxers experienced speech difficulties, memory loss, and tremors, as well as, severe neurological damage that was revealed during posthumous examinations of boxers, a study conducted as early as 1973. Additionally, while the NFL permitted players to return to play after sustaining a concussion, independent guidelines advised against the practice beginning in 1997. Further, since 1983, the CBAs have provided players with the opportunity to seek a second medical opinion.<sup>180</sup> In addition, during the 2000s, the players had access to the same information than the NFL. A player who continued to play after 2002 would struggle to claim fraud because of Dr. Omalu and Dr. Bailes postmortem reports of former players, as well as, the 2005 UNC research and the NFL's commissioned study in 2009. These studies indicate a very strong correlation, if not a causation, that multiple concussions from football playing lead to long-term neurological effects, such as CTE.

Lastly, the NFL players' litigation differs from the Big Tobacco situation. The retirees collectively bargained for their rights as employees; however, the cigarette consumers were mere purchasers of a purposefully deceptive product. Furthermore, unlike the misled smokers in the mid-twentieth century, the players can obtain extraordinary access to scientific information through the Internet and other media sources.

#### **4. Fraudulent Concealment**

The elements of fraudulent concealment include (1) defendant concealed a material fact; (2) the defendant knew the fact would be material to the plaintiffs; (3) the defendant had a duty to disclose the material fact; (4) the defendant intended to mislead the plaintiffs; (5) the plaintiffs justifiably relied upon the defendant's provided information; and (6) the plaintiffs were injured as a result of the defendant's concealment.<sup>181</sup>

Here, the retired players allege that the NFL concealed scientific facts that showed long-term harm from concussions.<sup>182</sup> Additionally, the retirees assert that the NFL's concealment, in the form of utilizing the MBTI Committee and advising its member teams on injuries, gave rise to a duty that the NFL should be liable for injury.<sup>183</sup> Further, the plaintiffs claim that the NFL's concealment proximately caused harm to the players and their families.<sup>184</sup>

Similar to the analysis for fraud in section III(B)(4), the fraudulent concealment will likely result in arbitration. Whereas fraud relies more upon a misrepresentation, fraudulent concealment focuses more on the aspect of hiding information. Thus, unless the retired plaintiffs could prove that the NFL had performed research, the NFL's study led to unfavorable results, and the NFL concealed the study, a court or arbitrator should find the same holdings for both the retired players' action for fraud and fraudulent concealment. Although the NFL rejected its own commissioned University of Michigan study, it did not conceal the results, but merely declared that the study was unreliable.

### **5. Civil Conspiracy to Defraud**

To prove conspiracy to defraud, the plaintiffs must show that two or more people agreed to perform an unlawful act.<sup>185</sup> A fact, "such as meetings, conferences, telephone calls or joint signatures on relevant forms," or facts inferring "conspiratorial conduct" must be pled for an action based on conspiracy to defraud.<sup>186</sup> Additionally, some states require malice as an essential element of conspiracy, where the purpose of the conspiracy was to injure the plaintiffs.<sup>187</sup> Further, jurisdictions typically preface liability under civil conspiracy to defraud on the performance of an underlying intentional tort.<sup>188</sup>

Here, the retired players and their spouses allege that the NFL deliberately conspired with its teams and independent contractors to reject a causal connection between concussions and

long-term mental health symptoms.<sup>189</sup> The stated goal was to persuade players to return to football regardless of trauma that could result.<sup>190</sup> The retirees stated that the other objectives included “prevent[ing] persons bargaining on behalf of players to have sufficient knowledge to demand “that policies, procedures, and conditions be included in the [CBAs]”<sup>191</sup> and “to deprive players of their right to seek damages for concussion-related injuries in court by using the [CBAs] as a purported future bar to any civil court action by players.”<sup>192</sup> Common among the plaintiffs’ claims is that the NFL used the MBTI Committee to cover up and refute other scientific data from unbiased sources.<sup>193</sup>

If a court prefaces the retirees’ civil conspiracy to defraud claim upon an underlying tort, then the claim would most likely be dismissed because of LMRA preemption. Notwithstanding this threshold matter, civil conspiracy to defraud will be difficult to support. First, the plaintiffs merely allege a conspiracy without offering factual support to show a joint agreement between the NFL and its teams, such as meetings, documents, or conferences.<sup>194</sup> However, team owner meetings do exist; thus, it is possible that discovery of meeting minutes could produce a concealed conspiracy. Additionally, if a district court requires malice, then retirees will have to prove that the purpose of the conspiracy was to injure them. It may be difficult to prove that the NFL had a purpose to injure its own players. More likely, assuming that the NFL and its member Clubs concealed data showing long-term effects from head injuries, did so in order to profit from aggressive plays. The NFL could argue that it would never have the intention to injure players because keeping players on the field is more competitive, which yields to greater profits. Thus, the NFL and Clubs’ profit-seeking goal remained, and injured players were a byproduct of this intention. In spite of this, the retired players would generally have to prove an underlying tort, which section 301 would likely preempt. Therefore, a court would not issue a decision based on

civil conspiracy to defraud until an arbitrator found negligence, negligent misrepresentation, fraud, or fraudulent concealment.

## **6. Negligent Hiring, Retention, and Supervision**

On April 16, 2012, four former players and their spouses filed another NFL concussion lawsuit in a Georgia state court.<sup>195</sup> For the first time, retired players alleged the action of negligent hiring, retention, and supervision.<sup>196</sup> The retirees alleged that the NFL's hiring, retention, and supervision of the MBTI Committee members fell short of its duty of reasonable care to hire medically qualified and unbiased physician committee members.<sup>197</sup> For the former players to succeed in their negligent hiring claim, they must prove the elements of a negligence action, which includes an existence of duty, breach of that duty, and an injury proximately caused by the breach.<sup>198</sup> However, the plaintiffs would once again face the issue of section 301 preemption because negligent hiring is a state law claim.<sup>199</sup> In *Hendy*, discussed previously in section III(A)(2), the Ninth Circuit found that the CBA had no impact on the negligent hiring claim. *Hendy* did not assert that the team failed to hire a board-certified physician, which was a duty contained in the CBA; rather, *Hendy* alleged that the team failed to use due care when it hired and retained the physician, claiming the doctor did not have the requisite knowledge and skill to treat the plaintiff's condition.<sup>200</sup>

Here, the retired players will likely overcome the LMRA barrier on their negligent hiring state law claim because of the claim's similarity to *Hendy*. However, the current litigation presents an even better situation to overcome preemption. The retirees do not allege that the teams failed to hire board-certified physicians; rather, they assert the league itself did not find appropriate members for its MBTI Committee. In fact, the CBAs do not expressly cover the

MBTI Committee. Thus, the negligent hiring claim will possibly defeat preemption if the MBTI Committee is not inextricably intertwined with the CBAs.

On the merits, the retired players have a chance to succeed on this claim. First, the plaintiffs will attempt to question the credentials of the former MBTI chairmen. Dr. Casson, practices neurology, and was named a *U.S. News Top Doctor*.<sup>201</sup> However, Dr. Pellman practices and teaches rheumatology and orthopedics, which are fields that normally analyze joints and bone structure.<sup>202</sup> In addition, Dr. Viano researches biomechanics and impact injuries.<sup>203</sup> A court could possibly find that the NFL, an organization with abundance in wealth, influence, and prestige, failed to hire the most qualified experts to issue reports about the destruction of brain tissue. For comparison, the current chairmen of the NFL Head, Neck and Spine Committee are both heads of medical school neurology departments.<sup>204</sup>

Additionally, a court could find that Dr. Pellman's role as both the MBTI Committee co-chairman and the New York Jets physician, discussed in section II(C), presented a conflict of interest detrimental to the NFL's players. For example, on November 2, 2003, the Jets played the New York Giants. After Jets' wide-receiver Wayne Chrebet fell unconscious in the third-quarter, Dr. Pellman had the following exchange with Chrebet in the fourth quarter:

Pellman: There's going to be some controversy about you going back to play...This is very important for you, this is very important for your career...Are you Okay?

Chrebet: I'm fine.<sup>205</sup>

Ten days after the game, the Jets and Pellman placed Chrebet on injured reserve, diagnosing him with postconcussion syndrome.<sup>206</sup> Chrebet said, "It was stupid, trying to get back out there. That's just me trying to convince them and myself that everything is all right."<sup>207</sup> However, Pellman maintained that permitting Chrebet to return was based on his scientific evaluation, and

his prognosis would not have been different retrospectively.<sup>208</sup> After sustaining another concussion in 2005, the sixth concussion in his NFL career, the Jets placed Chrebet on injured reserve, and Chrebet retired after the season.<sup>209</sup> Currently, the former wide-receiver still experiences headaches, other concussive effects, and concern for his long-term health.<sup>210</sup> Therefore, a court could find that Pellman, when evaluating players during games and analyzing concussions' long-term effects, was presented with a conflict of interest. He might have overlooked his duty of loyalty to the player in order to prove his findings correct. Alternatively, Pellman's decisions on the field, and personal connections to NFL players, might have influenced his research.

### **7. Medical Monitoring**

Although medical monitoring is a damages claim, it is also a form of relief. The jurisdictions that recognize the claim of medical monitoring require a plaintiff to show that he was

(1) exposed at greater than background levels; (2) to a proven hazardous substance; (3) caused by the defendant's tortious conduct; (4) the plaintiff faces an elevated risk of contracting a serious latent disease as a proximate result of the exposure; (5) a monitoring procedure exists that makes early detection possible; (6) the monitoring program is different than the program normally prescribed in the absence of exposure; and (7) the monitoring program is reasonably necessary according to contemporary scientific principles.<sup>211</sup>

Additionally, only thirteen states, as well as the District of Columbia and Guam, permit a medical monitoring claim in the absence of a present physical injury.<sup>212</sup>

Here, the retired players allege that “[a]s a result of the NFL's misconduct” they have been “exposed to a greater than normal risk of brain injury following a return to contact play too soon after suffering an initial concussion, thereby subjecting them to a proven increased risk of developing the adverse symptoms and conditions [of further adverse neurological

symptoms].”<sup>213</sup> The plaintiffs request “baseline exams and diagnostic exams which will assist in diagnosing the adverse health effects associated with concussions.”<sup>214</sup> However, as the NFL notes, the medical monitoring claim will likely fail because a concussion is not a “proven hazardous substance.”<sup>215</sup> Courts have reserved medical monitoring claims to persons exposed to toxic and industrial chemicals that invaded their bodies.<sup>216</sup>

## **7. Loss of Consortium**

Loss of consortium compensates an uninjured spouse for the loss of “love, companionship, affection, society, sexual relations, solace,” and support or services.<sup>217</sup> However, an uninjured spouse’s loss of consortium claim derives from the injured spouse’s underlying tort claims.<sup>218</sup> When an injured party cannot recover damages because claims arose under section 301 of LMRA, the spouse may not recover.<sup>219</sup> Therefore, in *Sherwin*, discussed in section III(A)(1), the court stayed the loss of consortium claim pending the result of arbitration.

In the present NFL Concussion Litigation, many spouses have claimed loss of consortium, or deprivation of services, resulting from the NFL’s negligence.<sup>220</sup> Additionally, the spouses state that they will be required to pay for medical and household care for the treatment of their husbands.<sup>221</sup> However, these claims are derivative of the underlying negligence, negligent misrepresentation, fraud, and fraudulent concealment claims. Therefore, similar to *Sherwin*, the spouses will not be able to recover in court, but rather must await the results of arbitration proceedings.

## **8. Declaratory Relief**

The Federal Declaratory Judgment Act permits, but does not require,<sup>222</sup> a court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”<sup>223</sup> Additionally, once the court grants the

rights of the interested party, the declaration takes the effect of a final judgment.<sup>224</sup> However, declaratory judgment should be avoided when public issues are presented without critical scrutiny of facts,<sup>225</sup> including using caution where the ruling sought would reach far beyond the particular case.<sup>226</sup> Further, where a state's public policy favored arbitration, the court stayed declaratory judgment until the arbitration proceeding, as required by the contract between the two parties, was conducted.<sup>227</sup>

Here, the retired players ask the court to declare that the NFL knew or reasonably should have known about the effects of repeated traumatic brain injuries, including CTE, Alzheimer's, and Parkinson's disease.<sup>228</sup> Additionally, the plaintiffs seek declaratory judgments that the NFL had a duty to advise the retirees about the medical risks, the NFL willfully and intentionally concealed medical risks, and the NFL recklessly endangered the plaintiffs by misleading them about the risks.<sup>229</sup> However, a court will decide cautiously whether to grant declaratory relief because the relief sought centers on issues that are material facts to the present litigation. Additionally, declaratory relief would affect not only the NFL Concussion Litigation, but also any litigation in which the employees are subject to injuries where only some evidence existed at the time of their employment. Finally, the CBA favors arbitration. Thus, a court would likely refuse to grant the requested declaratory relief, finding the issues more appropriate for arbitration, or to be decided by a jury if LMRA section 301 does not preempt the claims.

#### IV. COMPARING THE NFL TO OTHER SPORTS

Concussion risks are not unique to the NFL. Injury and risk are inherent in contact sports. Thus, many sports leagues have developed concussion prevention and awareness policies. Boxing, college sports, hockey, and rugby provide several examples of regulations.

The World Boxing Council's Rules and Regulations bars boxers from participating in sparring sessions for 45 days and no less than 30 days after concussive trauma. Additionally, concussed boxers are prohibited from competing in a boxing match until 75 days have passed from a concussion. Furthermore, the WBC expands concussive trauma from any act, whether the concussion occurred by knockout (KO) or another event.<sup>230</sup>

In addition, the National Collegiate Athletic Association (NCAA) has created various measures to aid its member colleges in concussion awareness, prevention, and management. First, the NCAA, in a partnership with the Centers for Disease Control and Prevention, supplies each member college with posters and fact sheets about concussions. Secondly, the "NCAA Sports Medicine Handbook – Guideline on Concussions in Athlete" provides recommendations to colleges about forming practices to prevent and handle head injuries. Further, the NCAA requires each member college to issue a "Concussion Management Plan."<sup>231</sup>

Although the National Hockey League (NHL) is often criticized for violence, since 1997, the NHL has mandated baseline neuropsychological testing.<sup>232</sup> In addition to further tests for players suspected of sustaining a concussion, the teams must notify the league of all concussions and an informal "seven-day rule" exists, where players with serious concussions must sit out at least one week.<sup>233\*</sup> However, NHL teams have begun to understand the importance of sitting out concussed players, and have adopted informal team policies. For example, the Pittsburgh Penguins' star Sidney Crosby sustained a concussion on January 5, 2011, but did not return to play until the following season on November 21, 2011.<sup>234</sup>

Finally, the International Rugby Board issues strict concussion policies. Rugby players must sit out three weeks after sustaining a concussion. However, they may receive medical approval for an earlier return.<sup>235</sup>

## V. SOLUTIONS FOR THE FUTURE

As discussed above, the NFL has begun to acknowledge the long-term effects of multiple concussions. More importantly, however, the NFL has implemented policies to treat concussions and dangerous plays more seriously. Beginning in 2010, the NFL assessed fines for helmet-to-helmet collisions,<sup>236</sup> and currently suspends players for these vicious hits.<sup>237</sup> Additionally, the NFL has taken steps to remove helmet-to-helmet hits from its website and other media.<sup>238</sup> Further, as of 2012, the NFL places kickoffs at the opposing 35 yard-line instead of the 30 yard-line, yielding more touchbacks and less kick returns. As a result, the new rule reduced concussions during kickoffs by forty percent (40%) from the year before.<sup>239</sup> However, the “National Impact Database” for helmet ratings has been available since May 2011, discussed in section III(B)(1). Because of this independent study, until the NFL mandates the use of the most effective helmets for concussion prevention, the NFL fails to properly protect its current players. This may lead to a prospective wave of future litigation.

Additionally, a fact often overlooked is that football injuries affect considerably more non-professional players, such as high-school athletes, than NFL players. State legislatures have enacted in thirty-five states, and pending in thirteen states, legislation that would help prevent concussions in youth athletes.<sup>240</sup> Thus, in all but two states, concussion awareness is recognized as fundamentally important.<sup>241</sup> For example, New Jersey requires the department of education to implement athletic head injury safety training to school coaches and trainers, provide educational fact sheets, and form written school district policies.<sup>242</sup> In addition, players suspected of head injuries are not permitted to return to play until an independent physician diagnoses and clears the athlete to return to the field.<sup>243</sup>

As forty-eight states have shown, legislation could assist in concussion prevention and treatment. Although Congress is reluctant to involve itself in professional sports, it has interjected its authority when an extensive public policy issue arises, such as enacting the Anabolic Steroid Control Act of 2004.<sup>244</sup> Thus, in addition to the 2009 Congressional hearing on concussions, congressional members have proposed the Concussion Treatment and Care Tools Act of 2010<sup>245</sup> and the Protecting Student Athletes from Concussions Act of 2011.<sup>246</sup> Neither of these bills succeeded nor explicitly referred to the NFL. However, pursuant to Congress' interstate commerce power, a federal law providing concussion prevention procedures for professional football should be successfully upheld if enacted.

Ultimately, athletes', fans', and the media's perception of the gravity involved in concussions' effects limits any policy proposed by the NFL, youth football leagues, state legislatures, or congressional policies. Recently, the NFL encountered a "bounty" program, possibly the greatest sports scandal since baseball's steroid era.<sup>247</sup> After an investigation, the NFL revealed that the New Orleans Saints' players and coaching staff organized a "bounty" program initiated in 2009, which allegedly distributed up to \$50,000 for hits that would knockout certain opposing players from games.<sup>248</sup> The NFL upheld its punishments, including an indefinite ban against the former defensive coordinator, a one-season suspension against the current Saints' head coach, an eight-game ban against the Saints' general manager, and a six-game ban against another assistant coach, as well as, a \$500,000 fine and revocation of second-round draft picks against the team.<sup>249</sup> The NFL is still investigating the 22 to 27 players involved, who not only complied, but also "embraced" the bounty system.<sup>250</sup> However, the most disturbing aspect of the scandal may be that as over one thousand former players seek compensation for their long-term suffering, modern day players seem to ignore their predecessors' plight.

## VI. CONCLUSION

As the long-term effects of playing football continue to confront the American public's attention, and litigation swells in the District Courts, the players' hopes for compensation remain uncertain. The retirees' claims must not only trump federal labor law, but also must prove that a tangible causation existed between the NFL's breach of duty and their long-term injuries. Both "Bountygate" and quotes from former and current players portray that the players' attitudes toward long-term injury remain unaffected. Notwithstanding the available information on concussions, players seem to understand and accept the risks involved in playing football. Thus, reliance upon the MBTI Committee will be difficult to prove.

However, if the retired players manage to win at trial, or at least overcome section 301, the NFL might cease to exist. The NFL realizes revenue of approximately \$10 billion per year.<sup>251</sup> However, no entity is too big to fail. Although there are currently over 1,500 retiree-plaintiffs, ten-thousand former NFL players exist.<sup>252</sup> If every former player, including those not involved in the current litigation, receives \$1 million, then that would total the NFL's one-year revenue. However, if a jury were to return a judgment for the retirees, it would presumably be much greater than merely \$1 million per plaintiff. Additionally, if concussion prevalence does not subside, insurance carriers may begin to charge monstrous premiums, or refuse to carry NFL Clubs completely. For example, ten-percent of NHL players experience concussions, prompting insurance carriers to closely monitor the industry.<sup>253</sup>

In addition to the NFL experiencing economic loss, football may also find itself as a public villain. As former ravaged players file tort claims, their young fans may share their horrific fate. Ninety-thousand (90,000) concussions occur in precollegiate football players per year.<sup>254</sup> In 2009, Boston University's Center for the Study of Traumatic Encephalopathy

discovered CTE in an 18-year-old high school football player who suffered multiple concussions.<sup>255</sup> The post-mortem examination of the 18 year-old's brain revealed the earliest evidence of CTE ever recorded.<sup>256</sup> Thus, liability suits could arise against high schools and colleges, as well. As a result, high schools and colleges may abolish their football programs to avoid liability. This could lead to fewer premier athletes entering the NFL, as well as, a gradual decline in league talent.

Finally, as studies continue to link CTE to head injuries suffered from football, the public may lobby for football's abolition. Similar to boxing, the American Medical Association may momentarily demand for a ban on football. Further, it may only be a matter of time before legislatures change their tone from preventing concussions to eliminating football entirely. Thus, although the retired players may not succeed in their causes of action, they have brought the dangers of football into the public's attention. Therefore, either through litigation or legislation, the NFL should strap on its helmet because it may shortly be knocked-out.

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<sup>1</sup> Marie-France Wilson, *Young Athletes At Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 243 (2011) (citing Scott D. Bender et al., *Historical Perspectives*, TRAUMATIC BRAIN INJURY IN SPORTS: AN INTERNATIONAL NEUROPSYCHOLOGICAL PERSPECTIVE 3, 7 (Mark R. Lovell et al., eds., 2004)).

<sup>2</sup> Wilson, *Young Athletes at Risk*, 243 (citing Paul McCrory et al., *Consensus Statement on Concussion in Sport 3<sup>rd</sup> International Conference on Concussion in Sport Held in Zurich, November 2008*, 19 CLIN. J. SPORTS MED. 185 (2009)).

<sup>3</sup> Wilson, *Young Athletes At Risk*, 243-44 (citing Rimma Danov, *Pediatric Head Injuries*, FOUNDATIONS OF SPORT-RELATED BRAIN INJURIES 291, 298-99 (Semyon Slobounov & Wayne J. Sebastianelli eds., 2006)).

<sup>4</sup> Wilson, *Young Athletes At Risk*, at 244 (citing McCrory, at 186).

<sup>5</sup> Wilson, *Young Athletes At Risk*, at 244 (citing Bender, at 11).

<sup>6</sup> Wilson, *Young Athletes At Risk*, at 244 (citing GARY S. SOLOMON ET AL., THE HEADS-UP ON SPORT CONCUSSION 16 (2006)).

<sup>7</sup> Wilson, *Young Athletes At Risk*, at 245 (citing Ann C McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY 709, 709-10 (2009)).

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<sup>8</sup> Wilson, *Young Athletes At Risk*, at 245 (citing McKee, *Chronic Traumatic Encephalopathy in Athletes*, at 710).

<sup>9</sup> Wilson, *Young Athletes At Risk*, at 245, note 27 (citing Solomon, *The Heads-Up on Spot Concussion*, at 101).

<sup>10</sup> JEFFREY T. SAMMONS, BEYOND THE RING: THE ROLE OF BOXING IN AMERICAN SOCIETY 247-48 (1990); Harrison S. Martland, *Punch Drunk*, 91(15) J. AM. MED. ASSOC. 1103-1107 (1928).

<sup>11</sup> Sammons, BEYOND THE RING, at 248 (citing J. A. N. Corsellis, C. J. Bruton, and Dorothy Freeman-Browne, *The Aftermath of Boxing*, 3 PSYCHOLOGICAL MEDICINE 270-303 (1973)).

<sup>12</sup> Sammons, BEYOND THE RING, at 248.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.; Brief History of CT - Imaginis Corp., <http://www.imaginis.com/ct-scan/brief-history-of-ct>, (last visited Apr. 24, 2012). Although the CT scan and MRI were invented in 1972 and 1977 respectively, they were not widely used or available until at least 1980.

<sup>16</sup> Id. at 248-49 (citing J. A. Corsellis, C. J. Bruton and D. Freeman-Browne, *The Aftermath of Boxing*, 3 PSYCHOLOGICAL MEDICINE, 270-303 (1973)).

<sup>17</sup> *Doctor Says Ali's Brain Injuries Due to Boxing*, ASSOCIATED PRESS, July 16, 1987, available at [http://articles.latimes.com/1987-07-16/sports/sp-4337\\_1\\_muhammad-ali](http://articles.latimes.com/1987-07-16/sports/sp-4337_1_muhammad-ali) (last visited Apr. 25, 2012)

<sup>18</sup> Sammons, BEYOND THE RING, at 249 (citing Corsellis, *The Aftermath of Boxing*, at 270-303). The study found that the boxers had greater degenerative and damaged nerve cells than non-boxers. Additionally, three-fourths of boxers had openings in their membranous partition, or septum, as opposed to only 0.3% in non-boxers.

<sup>19</sup> Sammons, BEYOND THE RING, at 249 (citing George D. Lundberg, *Boxing Should Be Banned in Civilized Countries*, 249(2) J. AM. MED. ASSOC. 250 (1983).

<sup>20</sup> Am. Acad. Of Neurology, *Practice Parameter Management of Concussion in Sports*, 48 NEUROLOGY 581, 582 (1997).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Kristina M. Gerardi, *Tackles that Rattle the Brain*, 18 SPORTS LAW J. 181, 196 (2011) (citing Stephanie Cajigal, *Heads Clash on Management of Football Concussions*, NEUROLOGY TODAY, Apr. 17, 2007); International Conference on Concussion in Sport.

<sup>25</sup> Gerardi, *Tackles that Rattle*, at 199 (citing Cajigal, *Heads Clash*); Jhnette Howard, *Chris Henry Data Sound Football Alarm: Is it Possible That Football is as Dangerous to the Brain as Boxing? The Results Say Yes*, ESPN.COM, June 29, 2010, <http://sports.espn.go.com/espn/commentary/news/story?page=hoiward/100629> (last visited Apr. 24, 2012).

<sup>26</sup> Gerardi, *Tackles that Rattle*, at 199 (citing Cajigal, *Heads Clash*); Greg Garber, *A Tormented Soul*, ESPN.COM, January 24, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972285>.

<sup>27</sup> Gerardi, *Tackles that Rattle*, at 199 (citing Cajigal, *Heads Clash*);

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

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<sup>32</sup> Howard, *Chris Henry Data*.

<sup>33</sup> Id.

<sup>34</sup> Gerardi, *Tackles that Rattle*, at 197 (citing David Williamson, *New Study at UNC Shows Concussions Promote Dementias in Retired Professional Football Players*, UNC NEWS SERVICES, Oct. 11, 2005, available at <http://scienceblog.com/community/older/2005/11/200510197.shtml> (last visited Apr. 25, 2012)).

<sup>35</sup> Gerardi, *Tackles that Rattle*, at 197 (citing Williamson, *New Study at UNC Shows Concussions Promote Dementias*).

<sup>36</sup> Gerardi, *Tackles that Rattle*, at 197.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id. at 198.

<sup>42</sup> Id. at 198 (citing Cajigal, *Heads Clash*).

<sup>43</sup> Gerardi, *Tackles that Rattle*, at 196 (citing Cajigal, *Heads Clash*).

<sup>44</sup> Gerardi, *Tackles that Rattle*, at 195 (citing Cajigal, *Heads Clash*).

<sup>45</sup> Health Committees – NFL Health and Safety,

<http://nflhealthandsafety.com/commitment/committees/> (last visited Apr. 25, 2012)

<sup>46</sup> Id.

<sup>47</sup> Complaint, *Allen v. NFL* (E. D. Pa. 2012) (No. 2:12-cv-01281-AB).

<sup>48</sup> Id.

<sup>49</sup> Gerardi, *Tackles that Rattle*, at 204-205; Cajigal, *Heads Clash*; Alan Schwarz, *N.F.L. Data Reinforces Dementia Links*, N.Y. TIMES, Oct. 24, 2009, at D1, available at [http://www.nytimes.com/2009/10/24/sports/football/24dementia.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/10/24/sports/football/24dementia.html?_r=1&pagewanted=print) (last visited Apr. 25, 2012).

<sup>50</sup> Gerardi, *Tackles that Rattle*, at 205 (citing *Ex-NFL Players Report Higher Rates of Dementia*, 3NEWS, Oct. 1, 2009, <http://www.3news.co.nz/Ex-NFL-players-report-higher-rates-of-dementia/tabid/755/articleID/123595/Default.aspx> (last visited Apr. 25, 2012); Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 30, 2009, at A1, available at <http://www.nytimes.com/2009/09/30/sports/football/30dementia.html?pagewanted=all> (last visited Apr. 25, 2012)).

<sup>51</sup> Gerardi, *Tackles that Rattle*, at 205 (citing Jamie Talan, *NFL Conducts Its Own survey on Dementia: Reports More Memory Problems in Retired Football Players*, NEUROLOGY TODAY, Dec. 17, 2009, at 13, 13, available at [http://journals.lww.com/neurotodayonline/Fulltext/2009/12170/NFL\\_Conducts\\_Its\\_Own\\_Survey\\_on\\_Dementia\\_\\_Reports.1.aspx](http://journals.lww.com/neurotodayonline/Fulltext/2009/12170/NFL_Conducts_Its_Own_Survey_on_Dementia__Reports.1.aspx) (last visited Apr. 25, 2012))

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Gerardi, *Tackles that Rattle*, at 205-06 (citing *Ex-NFL Players*).

<sup>55</sup> Gerardi, *Tackles that Rattle*, at 205-06 (citing Schwarz, *N.F.L. Data Reinforces Dementia Links*).

<sup>56</sup> Gerardi, *Tackles that Rattle*, at 211-12 (citing Alexander C. Hart, *NFL Head Injuries a Hot Topic in Congress*, L.A. TIMES, Oct. 29, 2009, <http://articles.latimes.com/2009/oct/29/sports/sp-football-congress29> (last visited Apr. 25, 2012)).

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<sup>57</sup> Gerardi, *Tackles that Rattle*, at 213-14 (citing Jim Mandelaro, *Concussions Reach into All Levels of Sports*, *Demo. & Chron.*, Dec. 27, 2009, <http://www.rocnw.com/article/local-news/2009912270359> (last visited Apr. 25, 2012)).

<sup>58</sup> Gerardi, *Tackles that Rattle*, at 213-14 (citing Schwarz, *N.F.L Data Reinforces Dementia Links*)

<sup>59</sup> *Id.*

<sup>60</sup> Alan Schwarz, *Concussion Committee Breaks with Predecessor*, *N.Y. TIMES*, June 2, 2010, at B12, available at <http://www.nytimes.com/2010/06/02/sports/football/02concussion.html> (last visited Apr. 25, 2012).

<sup>61</sup> *Id.*

<sup>62</sup> Memo – NFL Concussion Guidelines, 2011, [http://www.google.com/url?sa=t&rct=j&q=2011 sideline concussion nfl memo&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Fnlhealthandsafety.files.wordpress.com%2F2011%2F06%2Fnl-hns-memo-2011v2.pdf&ei=UNCXT5nwBIjx6QGht7THBg&usq=AFQjCNG1AusH3G0ceEn4r-8uF1h9cRlrjQ](http://www.google.com/url?sa=t&rct=j&q=2011%20sideline%20concussion%20nfl%20memo&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Fnlhealthandsafety.files.wordpress.com%2F2011%2F06%2Fnl-hns-memo-2011v2.pdf&ei=UNCXT5nwBIjx6QGht7THBg&usq=AFQjCNG1AusH3G0ceEn4r-8uF1h9cRlrjQ) (last visited Apr. 25, 2012).

<sup>63</sup> NFLCONCUSSIONLITIGATION.COM, <http://nflconcussionlitigation.com/> (last visited Apr. 24, 2012).

<sup>64</sup> Complaint at ¶¶31-35, *Easterling v. Nat'l Football League, Inc.*, (E.D. Pa. Oct. 5, 2011) (No. 11-cv-05209-AB).

<sup>65</sup> Fed. R. Civ. P. 23.

<sup>66</sup> Fed R. Civ. P. 23(a). For certification, the plaintiffs must show Numerosity, Commonality, Typicality, and Adequacy of Representation. Additionally class action must be maintainable. Fed. R. Civ. P. 23(b)(3). *See* Complaint at ¶¶31-35, *Easterling* (No. 11-cv-05209-AB).

<sup>67</sup> Fed. R. Civ. P. 20(a). *See* Complaint, *Rypien v. Nat'l Football League* (E.D. Pa. Mar. 23, 2012) (No. 2:12-cv-01496-AB).

<sup>68</sup> E.g. Complaint, *Lewis v. Nat'l Football League*, (N.D. Ga. Dec. 21, 2011) (No. 11-CV-04451), 2011 WL 6442263.

<sup>69</sup> 29 U.S.C. § 185(a).

<sup>70</sup> *Stringer*, 474 F. Supp. 2d at 899-900 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)).

<sup>71</sup> *Stringer*, 474 F. Supp. 2d at 900 (citing *Franchise Tax Bd. V. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)).

<sup>72</sup> *Stringer*, 474 F. Supp. 2d at 900 (citing *Allis-Chalmers*, 471 U.S. at 217; *Livadas v Bradshaw*, 512 U.S. 107, 122-24 (1994); *Smolarek v. Chrysler Corp.* 879 F. 2d 1326, 1329 (6th Cir. 1989)).

<sup>73</sup> *Stringer*, 474 F. Supp. 2d at 900.

<sup>74</sup> *Stringer*, 474 F. Supp. 2d at 900 (citing *DeCoe v. Gen'l Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994)).

<sup>75</sup> *Id.* (citing *Terwilliger v. Greyhound Lines, Inc.*, 882 F. 2d 1033, 1037 (6th Cir. 1989), cert. denied, 495 U.S. 946 (1990)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (citing *DeCoe*, 32 F. 2d at 216; *Fox v. Parker Hannifin Corp.* 914 F. 2d 795, 800 (6th Cir. 1990)).

<sup>78</sup> *Atwater*, 626 F.3d at 1185 (citing *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 n. 11 (1971)).

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<sup>79</sup> Retired players are also seeking relief against the National Football League Players Association, contending that it insufficiently bargained for the retired players in the 2011 CBA. Daniel Kaplan, *Retirees Accuse NFLPA of Illegal Bargaining*, 14 SPORTSBUSINESS DAILY 32, February 27, 2012, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/27.aspx> (last visited Apr. 25, 2012).

<sup>80</sup> *United Steel Workers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990).

<sup>81</sup> *United Steel Workers*, 495 U.S. at 364.

<sup>82</sup> *United Steel Workers*, 495 U.S. at 371

<sup>83</sup> Memorandum of Law in Support of The National Football League's Motion to Dismiss the Amended Complaint, *Easterling v. Nat'l Football League* (E.D. Pa. 2011) (No. 11-CV-05209-AB).

<sup>84</sup> *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 911

<sup>88</sup> *Id.* at 907

<sup>89</sup> *Id.* at 909

<sup>90</sup> *Id.* at 910 (citing CBA, Art. XLIV § 2)

<sup>91</sup> *Stringer*, 474 F. Supp. 2d at 910-911 (citing CBA, Art. XLIV, § 1).

<sup>92</sup> *Stringer*, 474 F. Supp. 2d at 911

<sup>93</sup> *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172 (N.D.N.Y. 1990).

<sup>94</sup> *Id.* at 1174

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1174 (citing *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 252-254 (1977) (holding that when parties continue to abide by expired collective bargaining agreement's arbitration terms, the duty to arbitrate continues despite the agreement's expiration)).

<sup>98</sup> *Sherwin*, 752 F. Supp. at 1174 (citing CBA, ¶9).

<sup>99</sup> *Sherwin*, 752 F. Supp. at 1174 (citing CBA, Art. XXXI, §1).

<sup>100</sup> *Sherwin*, 752 F. Supp. at 1179.

<sup>101</sup> *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985, 988 (M.D. Tenn. 2010).

<sup>102</sup> *Id.* at 991.

<sup>103</sup> *Stringer*, 474 F. Supp. 2d at 915.

<sup>104</sup> *Id.* at 899.

<sup>105</sup> *Id.* at 912.

<sup>106</sup> *Id.*

<sup>107</sup> *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 379-82 (S.D.N.Y. 2002).

<sup>108</sup> *Id.* at 382.

<sup>109</sup> *Hendy v. Losse*, 1991 U.S. App. LEXIS 2141 (9th Cir. 1991).

<sup>110</sup> *Hendy*, 1991 U.S. App. LEXIS 2141, \*5

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at \*7 (citing CBA, Art. XXXI, XXXII)

<sup>113</sup> *Id.* at \*7-8

<sup>114</sup> *Id.* at \*6

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- <sup>115</sup> Jennifer Ann Heiner, Comment, *Concussions in the National Football League: Jani v. Bert bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL's 2007 Concussion Management Guidelines* 21 SETON HALL J. SPORTS & ENT. L. 467, 475 (2008) (citing *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962)).
- <sup>116</sup> Heiner, *Concussion in the National Football League*, at 475 (citing 29 U.S.C. 173(d) (2006)).
- <sup>117</sup> *Id.*
- <sup>118</sup> Motion to Dismiss at 12, *Easterling*, (No. 11-CV-05209-AB) (citing CBA Art. IX § 1; 2006 CBA Art. IX § 1, *see also* 1977 CBA Art. VII § 1; 1982 CBA Art. VII § 1).
- <sup>119</sup> Motion to Dismiss at 8, *Easterling*, (No. 11-CV-05209-AB) (citing 1969 NFL and American Football League Constitution and Bylaws Art. XIX § 19.5).
- <sup>120</sup> Motion to Dismiss at 8, *Easterling*, (No. 11-cv-05209-AB) (citing 1980 Supp. to NFL Constitution and Bylaws Art. XVII).
- <sup>121</sup> Motion to Dismiss at 8, *Easterling* (No. 11-cv-05209-AB) (citing 1993 CBA Appx. C § 9; 2006 CBA Appx. C § 9).
- <sup>122</sup> Motion to Dismiss at 8, *Easterling* (No. 11-cv-05209-AB) (citing 1982 CBA Art. XXXI § 1; 1993 CBA Art. XLIV § 1; 2006 CBA Art. XLIV § 1).
- <sup>123</sup> Motion to Dismiss at 20, *Easterling*, (No. 11-cv-05209-AB) (citing 1982 CBA Art. XXXI § 2; 1993 CBA Art. XLIV § 2; 2006 CBA Art. XLIV § 2).
- <sup>124</sup> Motion to Dismiss at 21, *Easterling*, (No. 11-cv-05209-AB) (citing 1982 CBA Art. XXXI § 3; 1993 CBA Art. XLIV § 3; 2006 CBA Art. XLIV § 3).
- <sup>125</sup> Motion to Dismiss at 10, *Easterling*, (No. 11-cv-05209-AB) (citing 1982 CBA Art. XI; 1993 Art. XII § 1(a); 2006 CBA Art. XIII § 1(a); *see also* 1970 CBA Art. V; 1977 CBA Art. XI).
- <sup>126</sup> Motion to Dismiss at 10, *Easterling*, (No. 11-cv-05209-AB) (citing 1977 CBA Art. XI § 8).
- <sup>127</sup> Motion to Dismiss at 10, *Easterling*, (No. 11-cv-05209-AB) (citing 1982 CBA Art. XI § 9; 1993 CBA Art. XIII § 1(c); 2006 CBA Art. XIII § 1(c)).
- <sup>128</sup> Motion to Dismiss at 10, *Easterling*, (No. 11-cv-05209-AB) (citing 1970 CBA Art. XI; 1977 CBA Art. IX; 1982 CBA Art. IX; 1993 CBA Art. X; 2006 CBA Art. X).
- <sup>129</sup> Motion to Dismiss at 10, *Easterling*, (No. 11-cv-05209-AB) (citing 1970 CBA Art. IV § 12; 1977 CBA Art. XXXII; 1982 CBA Art. XXXV; 1993 CBA Art. XXIII; 2006 CBA Art. XXIII).
- <sup>130</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 1970 CBA Art. XV § 7; 1977 CBA Art. XXXIII; 1982 CBA Art. XXXVI; 1993 CBA Art. LIV; 2006 CBA Art. LIV).
- <sup>131</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 1982 CBA Art. XXIV; 1993 CBA Art. L; 2006 CBA Art. L.).
- <sup>132</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 1993 CBA Art. LI; 2006 CBA Art. LI).
- <sup>133</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 1993 CBA Art. LII; 2006 CBA Art. LII).
- <sup>134</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 1977 CBA Art. X; 1982 CBA Art. X; 1993 CBA Art. XII § 1; 2006 CBA Art. XII § 1).
- <sup>135</sup> Motion to Dismiss at 11, *Easterling*, (No. 11-cv-05209-AB) (citing 2006 CBA Art. XLVIII-D).
- <sup>136</sup> Complaint at ¶¶306-307, *Richards*, (No. 12-cv-01623-AB).

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- <sup>137</sup> Zack Needles, *NFL Concussion Suits Consolidated in Eastern District*, THE LEGAL INTELLIGENCER, February 1, 2012, available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202540814651> (last visited Apr. 25, 2012).
- <sup>138</sup> *Id.*; *See In re: Nat'l Football League Players' Concussion Injury Litigation* (Jan. 31, 2012) (Case MDL No. 2323).
- <sup>139</sup> *Atwater v. Nat'l Football League*, 626 F.3d 1170, 1179 (11th Cir. 2010) (citing *Dixie Grp., Inc. v. Shaw Indus. Grp., Inc.*, 303 Ga. App. 459 (Ga. Ct. App. 2010) (quoting *Bradley Ctr., Inc. v. Wessner*, 250 Ga. 199 (Ga. 1982)).
- <sup>140</sup> Complaint at ¶¶52-3, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>141</sup> Complaint at ¶¶66-7, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>142</sup> Motion to Dismiss at 12, *Easterling*, (No. 11-cv-05209-AB) (citing 1970 CBA Art. X).
- <sup>143</sup> Motion to Dismiss at 12, *Easterling*, (No. 11-cv-05209-AB) (citing 1977 CBA Art. VII § 1; 1982 CBA Art. VII § 1; 1993 CBA Art. IX § 1; 2006 CBA Art. IX § 1).
- <sup>144</sup> *See* § III(A)(4); Motion to Dismiss at 7-9, *Easterling*, (No. 11-cv-05209-AB).
- <sup>145</sup> *See* Endnote 95.
- <sup>146</sup> *See* Endnote 15; Brief History of CT - Imaginis Corp., <http://www.imaginis.com/ct-scan/brief-history-of-ct> (last visited Apr. 24, 2012).
- <sup>147</sup> Scott Brown, *Steelers Safety Polamalu Knows Concussions*, PITT. TRIB.-REV., Nov. 30, 2011, [http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s\\_769646.html](http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_769646.html) (last visited Apr. 24, 2012).
- <sup>148</sup> *See Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979) (holding tort claim arising from hit on the back of plaintiff's head while laying on the field was actionable despite taking place during sporting event); *see also* Jeffrey A. Citron and Mark Abelman, *Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. Rev. 193 (2003).
- <sup>149</sup> *Full NFL Statement into 'Bounty' Program Run by New Orleans Saints*, THE TIMES-PICTAYUNE, March 2, 2012, [http://www.nola.com/saints/index.ssf/2012/03/full\\_nfl\\_statement\\_into\\_bounty.html](http://www.nola.com/saints/index.ssf/2012/03/full_nfl_statement_into_bounty.html) (last visited Apr. 25, 2012).
- <sup>150</sup> Mike Tanier, *In '89, Idea of Bounties Seemed Funny to Many*, N.Y. TIMES, Apr. 11, 2012, at B11, available at <http://www.nytimes.com/2012/04/12/sports/football/when-the-nfls-culture-of-violence-seemed-funny.html> (last visited Apr. 24, 2012).
- <sup>151</sup> The Associated Press, *Ray Easterling, Of Atlanta's Grits Blitz, Dies at 62*, N.Y. TIMES, Apr. 22, 2012, at A22, available at [http://www.nytimes.com/2012/04/22/sports/football/ray-easterling-of-atlantas-grits-blitz-dies-at-62.html?\\_r=1](http://www.nytimes.com/2012/04/22/sports/football/ray-easterling-of-atlantas-grits-blitz-dies-at-62.html?_r=1) (last visited Apr. 24, 2012).
- <sup>152</sup> *See* § II(C)
- <sup>153</sup> *Jani v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 209 Fed. Appx. 305, 308 (4th Cir. 2006).
- <sup>154</sup> *Id.* at 312.
- <sup>155</sup> *Id.* at 317.
- <sup>156</sup> *Id.*
- <sup>157</sup> *NFL, Manufacturers: No Helmet Can Fully Eliminate Concussions*, ASSOCIATED PRESS, Nov. 12, 2010, <http://www.nfl.com/news/story/09000d5d81c0f5d5/article/nfl-manufacturers-no-helmet-can-fully-eliminate-concussions> (last visited Apr. 25, 2012).
- <sup>158</sup> *Id.*

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<sup>159</sup> Virginia Tech-Wake Forest University School of Biomedical Engineering and Sciences – National Impact Database, <http://www.sbes.vt.edu/nid.php> (last visited Apr. 25, 2012).

<sup>160</sup> Gregg Easterbrook, *Virginia Tech Helmet Research Crucial*, ESPN.COM, July 19, 2011. [http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719\\_virginia\\_tech\\_helmet\\_study&sportCat=nfl](http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719_virginia_tech_helmet_study&sportCat=nfl) (last visited Apr. 25, 2012).

<sup>161</sup> Easterbrook, *Virginia Tech Helmet Research* (citing *Examining Concussion Rates and Return to Play in High School Football Players Wearing Newer Helmet*, 58 NEUROSURGERY 275-286 (2006)).

<sup>162</sup> *Atwater*, 626 F.3d at 1182 (citing *Futch v. Lowndes Cnty.*, 297 Ga. App. 308, 312 (Ga. Ct. App. 2009); *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 297 Ga. 424, 479 (Ga. 1997)).

<sup>163</sup> *Id.*

<sup>164</sup> Complaint at ¶¶266, 269, *Allen*, (No. 2:12-cv-01281-AB).

<sup>165</sup> Complaint at ¶272, *Allen*, (No. 2:12-cv-01281-AB).

<sup>166</sup> Gregg Easterbrook, *Concussions Are the Most Significant Problem Facing the Sport of Football*, ESPN.com, Sept. 21, 2010, [http://sports.espn.go.com/espn/page2/story?page=easterbrook/100921\\_tuesday\\_morning\\_quarterback&sportCat=nfl](http://sports.espn.go.com/espn/page2/story?page=easterbrook/100921_tuesday_morning_quarterback&sportCat=nfl) (last visited Apr. 25, 2012). Easterbrook is a writer and brother of Frank Easterbrook, Chief Judge of the Seventh Circuit. During the football season, Easterbrook writes a weekly column for ESPN.com. He has been at the forefront of concussion awareness and prevention, and devotes many articles to the issue.

<sup>167</sup> *Id.* Smith, who also suffered a Grade III concussion on the play, was fined and suspended for one game.

<sup>168</sup> *Id.* Tirico did mention that the play almost caused Cardinals quarterback Kurt Warner, who threw the pass to Boldin, to retire because he was frightened.

<sup>169</sup> *Id.*

<sup>170</sup> Chris McCosky, *Lions Center Dominic Raiola: Football-Related Memory Loss 'Totally Worth It,'* THE DETROIT NEWS, April 17, 2012, <http://www.detroitnews.com/article/20120417/SPORTS0101/204170401/Lions-center-Dominic-Raiola-football-related-memory-loss-totally-worth->  
<http://thebiglead.com/index.php/2012/04/16/breaking-down-the-nfl-head-injury-litigation-situation/> (last visited Apr. 24, 2012).

<sup>171</sup> *Id.*

<sup>172</sup> *Jurevicius v. Cleveland Browns Football Company, LLC*, 2010 U.S. Dist. LEXIS 144096, at \*38-39 (N.D. Ohio 2010) (citing *Cohen v. Lamko, Inc.*, 10 Ohio St. 3d 167 (Ohio 1984)).

<sup>173</sup> *Jurevicius*, 2010 U.S. Dist. LEXIS 144096, at \*3.

<sup>174</sup> *Jurevicius*, 2010 U.S. Dist. LEXIS 144096, at \*4.

<sup>175</sup> *Jurevicius*, 2010 U.S. Dist. LEXIS 144096, at \*35, 38-9.

<sup>176</sup> *Jurevicius*, 2010 U.S. Dist. LEXIS 144096, at \*39 (citing *Cohen v. Estate of Cohen*, 23 Ohio St. 3d 90 (Ohio 1986); *L & N Partnership v. Lakeside forest Assn.*, 183 Ohio App. 3d 125 (Ohio App. Dist. Ct. 2009)).

<sup>177</sup> *Jurevicius*, 2010 U.S. Dist. LEXIS 144096, at \*40.

<sup>178</sup> Complaint at ¶288, *Richards*, (No. 12-cv-01623-AB).

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- <sup>179</sup> John Culhane, *Concussions and Cigarettes*, SLATE, July 26, 2011, [http://www.slate.com/articles/sports/sports\\_nut/2011/07/concussions\\_and\\_cigarettes.html](http://www.slate.com/articles/sports/sports_nut/2011/07/concussions_and_cigarettes.html) (last visited Apr. 25, 2012)
- <sup>180</sup> See III(A)(4); Motion to Dismiss at 8, *Easterling* (No. 11-cv-05209-AB) (citing 1982 CBA Art. XXXI § 3; 1993 CBA Art. XLIV § 3; 2006 CBA Art. XLIV § 3).
- <sup>181</sup> Motion to Dismiss at 31-32, *Easterling*, (No. 11-cv-05209-AB) (citing *Gaines v. Krawczyk*, 354 F. Supp. 2d 573, 585 (W.D. Pa. 2004); *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 582 (2d Cir. 2005); 37 C.J.S. Fraud § 29 (2011)).
- <sup>182</sup> Complaint at ¶254, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>183</sup> Complaint at ¶255, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>184</sup> Complaint at ¶256, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>185</sup> Motion to Dismiss at 35, *Easterling*, (No. 11-cv-05209-AB) (citing *Grose v. Procter & Gamble Paper Prods.*, 866 A.2d 437, 440 (Pa. Super. Ct. 2005); *Kottler v. Deutsche bank AG*, 607 F. Supp. 2d 447, 463 (S.D.N.Y. 2009); see also 15A C.J.S. Conspiracy § 9 (2011)).
- <sup>186</sup> Motion to Dismiss at 35, *Easterling*, (No. 11-cv-05209-AB) (citing *Thompson v. Ross*, No. 10-CV-479, 2010 WL 3896533, at \*7 (W.D. Pa. Sept. 30, 2010); *Medtech Prods. Inc. v. Ranir, LLC*, 596 F. Supp. 2d 778, 794-95 (S.D.N.Y. 2008)).
- <sup>187</sup> Motion to Dismiss at 36, *Easterling*, (No. 11-cv-05209-AB) (citing *Grose*, 866 A.2d at 440, 441; *Wegman v. Dairylea Co-op., Inc.*, 50 A.D.2d 108, 114 (N.Y. App. Div. 1975); 15A C.J.S. Conspiracy § 15 (2011); But see *Zefarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 559 (E.D. Pa. 2010); *Operative Plasterers' & Cement Masons' Int'l Ass'n v. Metro. N.Y. Dry Wall Contractors Ass'n, Inc.*, 543 F. Supp. 301, 313 (D.C.N.Y. 1982)).
- <sup>188</sup> Motion to Dismiss at 37, *Easterling*, (No. 11-cv-05209-AB) (citing 16 Am. Jur. 2D Conspiracy § 64 (2011); *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 660 (Pa. Super. Ct. 2000); *Altman v. Fortune Brands, Inc.*, 268 A.D. 2d 231, 232 (N.Y. App. Div. 2000)).
- <sup>189</sup> Complaint at ¶236, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>190</sup> Complaint at ¶237, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>191</sup> Complaint at ¶276, *Richards*, (No. 12-cv-01623-AB).
- <sup>192</sup> Complaint at ¶277, *Richards*, (No. 12-cv-01623-AB).
- <sup>193</sup> Complaint at ¶238-9, *Allen*, (No. 2:12-cv-01281-AB).
- <sup>194</sup> Motion to Dismiss at 36, *Easterling*, (No. 11-cv-05209-AB).
- <sup>195</sup> Complaint, *Guyton v. NFL*, (Fulton County Ct., Ga. April 16, 2012). This Complaint was also the first to allude to the Saints' "Bountygate."
- <sup>196</sup> Paul Anderson, "Kill The Head and the Body Will Die," NFLCONCUSSIONLITIGATION.COM, <http://nflconcuSSIONlitigation.com/?p=482> (last visited Apr. 25, 2012). In general, Anderson presents a great blog with periodic updates on the litigation.
- <sup>197</sup> Complaint at ¶¶111-118, *Guyton*,
- <sup>198</sup> *Hendy*, 1991 U.S. App. LEXIS 2141, \*4 (citing *United States Liab. Ins. Co. v. Haidingerhayes, Inc.*, 1 Cal. 3d 586 (Cal. 1970))
- <sup>199</sup> *Id.* (citing *Atlas Assurance Co. v. McCombs Corp.*, 146 Cal. App. 3d 135 (Cal. App. Ct. 1983); *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332 (Cal. App. Ct. 1982))
- <sup>200</sup> *Hendy*, 1991 U.S. App. LEXIS 2141, \*4, 5.
- <sup>201</sup> Ira Casson, MD – Neurologist – US News Top Doctors, <http://health.usnews.com/top-doctors/ira-casson-neurologist-81CC000832> (last visited Apr. 25, 2012); Mount Sinai School of Medicine - Elliot Pellman, <http://www.mssm.edu/profiles/elliott-pellman> (last visited Apr. 25,

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2012); World Congress on Neck Pain, Speaker Biography: David C. Viano PhD, MD.  
[http://www.neckpaincongress.org/nav.cfm?page=ps\\_speakerbio&menu=3&submenu=2&ID=90](http://www.neckpaincongress.org/nav.cfm?page=ps_speakerbio&menu=3&submenu=2&ID=90)  
(last visited Apr. 25, 2012)

<sup>202</sup> Biography - Elliot Pellman – Mount Sinai School of Medicine,  
<http://www.mssm.edu/profiles/elliott-pellman> (last visited Apr. 25, 2012)

<sup>203</sup> World Congress on Neck Pain, Speaker Biography - David C. Viano PhD, MD,  
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<sup>204</sup> See § II(C).

<sup>205</sup> Peter Keating, *Doctor Yes: Elliot Pellman, The NFL's Top Medical Adviser, Claims It's Okay for Players with Concussions to Get Back in the Game. Time for a Second Opinion*, ESPN THE MAGAZINE, Oct. 28, 2006, available at <http://sports.espn.go.com/nfl/news/story?id=2636795>  
(last visited Apr. 25, 2012).

<sup>206</sup> Id.

<sup>207</sup> Id.

<sup>208</sup> Id.

<sup>209</sup> Id.

<sup>210</sup> William C. Rhoden, *Two Ex-Jets Have Moved On, But Concussion Effects Linger*, N.Y. TIMES, Nov. 21, 2011, at D5, available at  
<http://www.nytimes.com/2011/11/21/sports/football/concussion-effects-linger-for-two-ex-jets.html?pagewanted=all> (last visited Apr. 25, 2012).

<sup>211</sup> Motion to Dismiss at 37-8, *Easterling*, (citing *Caronia*, 2011 WL 338425, at \*7 (E.D.N.Y. Jan. 13, 2011).

<sup>212</sup> Scott Aberson, *Note: Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1114-1115 (2006).

<sup>213</sup> Complaint at ¶132, *Wooden v. Nat'l Football League* (S.D. Fla. Jan. 24, 2012) (No. 1:12-cv-20269-JEM)

<sup>214</sup> Id. at ¶135

<sup>215</sup> Motion to Dismiss at 38, *Easterling*,

<sup>216</sup> Id. (citing *Remson v. Verizon*...

<sup>217</sup> *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 405 (Ca. 1974).

<sup>218</sup> *Johnson v. Anheuser Busch, Inc.*, 876 F. 2d 620, 625 (8th Cir. 1979).

<sup>219</sup> Id.

<sup>220</sup> Complaint at ¶318, *Richards v. NFL, et al* (E.D. Pa. April 2, 2012) (No. 12-cv-01623-AB).

<sup>221</sup> Id. at ¶318(b).

<sup>222</sup> *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111 (1962).

<sup>223</sup> 28 U.S.C. § 2201(a) (2012).

<sup>224</sup> Id.

<sup>225</sup> *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426 (1948).

<sup>226</sup> *PSC v. Wycoff Co.*, 344 U.S. 237 (1952).

<sup>227</sup> *Farm Family Mut. Ins. Co. v. Blevins*, 572 F. Supp. 397, 401 (D. Del. 1983).

<sup>228</sup> Complaint at ¶ 263(a), *Richards*, (No. 12-cv-01623-AB)

<sup>229</sup> Complaint at ¶¶263(b), (c), (d), *Richards*, (No. 12-cv-01623-AB)

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<sup>230</sup> Complaint at ¶225, *Allen*, (No. 2:12-cv-01281-AB); World Boxing Council Rules and Regulations (Rule 4.2.14)

<sup>231</sup> Complaint at ¶229, *Allen*, (No. 2:12-cv-01281-AB) (citing NCAA –Concussion Management Plan,

[http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Personal+Welfare/Health+and+Safety/Concussion](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Personal+Welfare/Health+and+Safety/Concussion) (last visited Apr. 25, 2012)).

<sup>232</sup> Keating, *Doctor Yes*.

<sup>233</sup> *Id.*

<sup>234</sup> Matt Brooks, *Sidney Crosby to Return for Penguins Against Islanders*, THE WASHINGTON POST, Nov. 21, 2011, [http://www.washingtonpost.com/blogs/early-lead/post/sidney-crosby-to-return-for-penguins-against-islanders/2011/11/21/gIQAUNPdiN\\_blog.html](http://www.washingtonpost.com/blogs/early-lead/post/sidney-crosby-to-return-for-penguins-against-islanders/2011/11/21/gIQAUNPdiN_blog.html) (last visited Apr. 25, 2012).

<sup>235</sup> Keating, *Doctor Yes*.

<sup>236</sup> Judy Battista, *N.F.L. Fines Players for Hits to Head*, N.Y. TIMES, Oct. 19, 2010, at B15, available at <http://www.nytimes.com/2010/10/20/sports/football/20hits.html> (last visited Apr. 25, 2012).

<sup>237</sup> *James Harrison Suspended 1 Game*, ESPN.COM, Dec. 14, 2011, [http://espn.go.com/nfl/story/\\_id/7348112/pittsburgh-steelers-james-harrison-banned-1-game-hit-cleveland-browns-colt-mccoy](http://espn.go.com/nfl/story/_id/7348112/pittsburgh-steelers-james-harrison-banned-1-game-hit-cleveland-browns-colt-mccoy) (last visited Apr. 25, 2012)

<sup>238</sup> Katie Thomas, *N.F.L.'s Policy on Helmet-to-Helmet Hits Makes Highlights Distasteful*, N.Y. TIMES, October 21, 2010, at B11, available at <http://www.nytimes.com/2010/10/22/sports/football/22hits.html> (last visited Apr. 25, 2012).

<sup>239</sup> Associated Press. *NFL: Concussions Down on Kickoffs*, ESPN.COM, March 26, 2012, [http://espn.go.com/nfl/story/\\_id/7740025/rich-mckay-says-nfl-kickoff-tweak-reduced-concussions](http://espn.go.com/nfl/story/_id/7740025/rich-mckay-says-nfl-kickoff-tweak-reduced-concussions) (last visited Apr. 25, 2012).

<sup>240</sup> Traumatic Brain Injury Legislation - National Conference of State Legislatures, <http://www.ncsl.org/issues-research/health/traumatic-brain-injury-legislation.aspx> (last visited Apr. 25, 2012).

<sup>241</sup> *Id.*

<sup>242</sup> N.J. STAT. ANN. § 18A:40-41.3 (West 2010).

<sup>243</sup> *Id.*

<sup>244</sup> Anabolic Steroid Control Act, 21 U.S.C. §§802-11 (2007).

<sup>245</sup> Concussion Treatment and Care Tools Act, H.R. 1347, 111th Cong. (2010).

<sup>246</sup> Protecting Student Athletes from Concussions Act, H.R. 469, 112th Cong. (2011).

<sup>247</sup> *Full NFL Statement into 'Bounty' Program Run by New Orleans Saints*, THE TIMES-PICAYUNE, March 2, 2012,

[http://www.nola.com/saints/index.ssf/2012/03/full\\_nfl\\_statement\\_into\\_bounty.html](http://www.nola.com/saints/index.ssf/2012/03/full_nfl_statement_into_bounty.html) (last visited Apr. 25, 2012).

<sup>248</sup> *Id.*

<sup>249</sup> *NFL Bans Saints' Payton a Year for 'Bounties'; Williams Out, Too*. NFL.COM, March 21, 2012, [http://www.nfl.com/news/story/09000d5d827c0dd9/article/nfl-suspends-saints-coach-payton-for-one-year-without-pay?module=HP11\\_breaking\\_news](http://www.nfl.com/news/story/09000d5d827c0dd9/article/nfl-suspends-saints-coach-payton-for-one-year-without-pay?module=HP11_breaking_news) (last visited Apr. 25, 2012).

<sup>250</sup> *Report: Saints Players Not Off Hook*, ESPN.COM, Apr. 24, 2012, [http://espn.go.com/nfl/story/\\_id/7850486/roger-goodell-says-evidence-shows-saints-players-](http://espn.go.com/nfl/story/_id/7850486/roger-goodell-says-evidence-shows-saints-players-)

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embraced-bounty-system-according-report (last visited Apr. 25, 2012) (quoting NFL Commissioner Roger Goodell).

<sup>251</sup> Tyler Cowen and Kevin Grier, *What Would the End of Football Look Like: An Economic Perspective on CTE and the Concussion Crisis*, GRANTLAND, Feb. 9, 2012, [http://www.grantland.com/story/\\_/id/7559458/cte-concussion-crisis-economic-look-end-football](http://www.grantland.com/story/_/id/7559458/cte-concussion-crisis-economic-look-end-football) (last visited Apr. 25, 2012).

<sup>252</sup> Gregg Doyel, *Current NFL Stars Forgetting About Past Heroes is Disgraceful*, CBSSPORTS.COM, Sept. 15, 2011, <http://www.cbssports.com/nfl/story/15584944/current-nfl-stars-forgetting-about-past-heroes-is-disgraceful/rss> (last visited Apr. 25, 2012).

<sup>253</sup> *NHL Concussions Put Player Insurance in Question*, CBC SPORTS, Jan. 31, 2012, <http://www.cbc.ca/sports/hockey/nhl/story/2012/01/31/sp-insurance-nhl-concussions.html> (last visited Apr. 25 2012).

<sup>254</sup> Cowen and Grier, *What Would the End of Football Look Like*.

<sup>255</sup> 18 Year Old High School Football Player – Center for the Study of Traumatic Encephalopathy, <http://www.bu.edu/cste/case-studies/18-year-old/> (last visited Apr. 25, 2012).

<sup>256</sup> *Id.*