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Athlete Injuries and Performance Enhancing Drug Violations: An Analysis Under Federal Health Privacy Law
Anthony W. Liberatore

Part I: Introduction

There are only four players in the history of Major League Baseball (MLB) to have both 3,000 hits and 500 home runs.¹ One of those players is Rafael Palmeiro. Having already reached the 500-homerun milestone in 2003,² on July 15, 2005, Palmeiro hit an RBI double off Seattle's Joel Pineiro for his 3,000th Major League hit.³ Many thought he had solidified his candidacy for baseball's Hall of Fame.⁴ Then, on August 1, 2005, Palmeiro became the highest-profile player, at the time, to be suspended for the league's performance-enhancing drug policy.⁵ Major League Baseball's simple press release read: "The Office of the Commissioner of Baseball today announced that Rafael Palmeiro of the Baltimore Orioles has been suspended for 10 days, effective today, for violation of Major League Baseball's Joint Drug Prevention and Treatment Program."⁶

Portland Trail Blazer's forward Darius Miles suffered a microfracture in his right knee in 2006 for which he underwent surgery.⁷ After a lengthy rehabilitation period, the Trail Blazers "first ruled him unfit to play and then sought an independent physician's examination of the

¹ Palmeiro Joins 3,000 Hit-500 HR Club, NBC Sports, July 16, 2005, <http://nbcports.msnbc.com/id/8575040/>.

² Jesse Sanchez, Palmeiro Slugs 500th Home Run, MLB.com, May 11, 2003, http://texas.rangers.mlb.com/news/article.jsp?ymd=20030511&content_id=289282&vkey=recap&fext=.jsp&c_id=tex.

³ Gary Washburn, Palmeiro Reaches 3,000-hit Plateau, MLB.com, July 15, 2005, http://mlb.mlb.com/news/article.jsp?ymd=20050714&content_id=1131415&vkey=news_bal&fext=.jsp&c_id=bal.

⁴ *Id.* ("Palmeiro may have stamped his ticket to Cooperstown by becoming the fourth player to amass 3,000 hits and 500 homers."); see also Jorge Arangure, Jr., Palmeiro, O's Make It a Special Night, The Washington Post, July 16, 2005, <http://www.washingtonpost.com/wpdyn/content/article/2005/07/15/AR2005071502272.html> ("But after Friday night, Palmeiro's place in history and in the Hall of Fame is undeniable.").

⁵ Palmeiro Suspended for Steroids, New York Times, Aug. 2, 2005, <http://www.nytimes.com/2005/08/01/sports/01ihtBASE.html?scp=1&sq=palmeiro%20steroids&st=cse>;

⁶ Press Release, Rafael Palmeiro Suspended 10 Days, MLB.com, Aug. 1, 2005, *available at* http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20050801&content_id=1153525&vkey=pr_mlb&fext=.jsp&c_id=mlb.

⁷ Dwight Jaynes, Blazers Could Come Under Scrutiny for Statements on Miles' Condition, The Portland Tribune, July 28, 2008, http://www.portlandtribune.com/sports/story.php?story_id=121693653261551200

knee. That physician ruled Miles' injury was career ending."⁸ The Blazers had incentive to hope that Miles' injury was career ending: first, his remaining salary would not count against the team's salary cap, and, second, insurance would indemnify the team for his remaining salary.⁹ A problem arose, however, when Blazers' General Manager Kevin Pritchard told an Oregonlive.com blog that "'Two doctors said Darius had the worst microfracture injury they had ever seen...They would never have him play basketball and the odds of having knew replacement surgery is high.'"¹⁰ Then, Pritchard made further comments regarding the severity of Miles' injury to the Portland Tribune.¹¹ At the time, it was undetermined if the Trail Blazer general manager's public comments would preclude Darius Miles from being able to sign with another NBA team.¹² While Miles was able to sign with the Memphis Grizzlies in 2009¹³ he played only in 34 regular season games, as a reserve, before being waived.¹⁴

In 2009 the National Football League (NFL) fined the New York Jets, their General Manager Mike Tannenbaum, and former Jets Head Coach Eric Mangini for failing to disclose Brett Favre's torn right biceps tendon, which he suffered at the end of the 2008 season.¹⁵ The

⁸ *Id.*

⁹ *Id.* ("Obviously, that situation creates an incentive for the Blazers to hope Miles never plays again. And perhaps an incentive for the team to be as negative as possible in describing Miles' chances of ever playing again – thereby discouraging other teams from taking a chance on him.").

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* ("...if he does not sign with another team, there is an expectation that Miles could file a grievance with the league and also file a suit against the Blazers for attempting to restrict the player's ability to find a job.")

¹³ Grizzlies Insist Miles Will Help Team, ESPN.com, Jan. 10, 2009, <http://sports.espn.go.com/nba/news/story?id=3822911> ("Miles, who was the third overall pick by the Los Angeles Clippers in the 2000 draft, signed a six-year, \$48 million deal with Portland in 2004. The Blazers waived Miles at the end of the 2007-08 season after an independent doctor determined he hadn't recovered from microfracture surgery on his right knee in November 2006."). Miles also signed with the Boston Celtics during the 2008 offseason. Miles, Thought to Have Career-Ending Injury, Signs With Celtics, ESPN.com, Aug. 22, 2008, <http://sports.espn.go.com/nba/news/story?id=3549061>. But, he was waived by the team before the conclusion of the NBA training camp, never appearing a regular season game. Celtics Sever Ties to Darius Miles, USA Today, Oct. 20, 2008, http://www.usatoday.com/sports/basketball/nba/celtics/2008-10-20-miles_N.htm.

¹⁴ Tim Povtak, Darius Miles Itching for NBA Return, AOLNews, July 21, 2010, <http://www.aolnews.com/2010/07/21/darius-milles-itching-for-nba-return/>.

¹⁵ Jets, Eric Mangini Are Fined \$125,000 For Brett Favre Injury Reporting, Los Angeles Times, Sept. 17, 2009, <http://articles.latimes.com/2009/sep/17/sports/sp-nfl-report17>.

NFL required Favre to be placed on the injury report, but he was not.¹⁶ The NFL instituted the injury report in the 1940s, requiring mandatory disclosure of all injuries in order to “ ‘ensure that there are no hidden injuries, or clubs hiding that players might not be available, and then that player ends up not being able to play and nobody knew it.’ ”¹⁷

Albert Pujols is one of the preeminent players throughout all of baseball and, as a result, received a substantial payday during the 2011-2012 offseason, when he signed a 10-year, \$254 million contract with the Los Angeles Angels.¹⁸ But, Pujols’ big payday was not always a sure thing; even as recently as June of the 2011 season, when he suffered a fracture of his left forearm.¹⁹ It was estimated in June that this injury, which only kept the slugger out of the lineup for several weeks, “could translate into \$30 million to \$50 million in lost salary if the injury is career-altering.”²⁰ Further, at the time, “[i]n negotiations, the club [Pujols’ current team, the St. Louis Cardinals] will likely be concerned about whether Pujols’ injury could be recurring.”²¹

Other than being highly successful and accomplished professional athletes, what do Rafael Palmeiro, Darius Miles, Brett Favre, and Albert Pujols have in common? The answer: all four illustrate why professional athletes’ health privacy is important. All four have had their private health information spread throughout the public forum, potentially to their detriment.

There is no question that injuries occur with great regularity and are thus a major part of American professional sports organizations.²² Teams rely on healthy players to win games, and,

¹⁶*Id.*

¹⁷ Mike Reiss, NFL: How Hurt Is He? The Lists Don’t Tell, New York Times, Nov. 8, 2006, <http://www.nytimes.com/2006/11/09/sports/09iht-nfl.3461396.html>.

¹⁸ Albert Pujols, Angels Agree to Deal, ESPN.com, Dec. 9, 2011, http://espn.go.com/los-angeles/mlb/story/_/id/7330066/st-louis-cardinals-albert-pujols-join-los-angeles-angels.

¹⁹ Kelsey Volkmann, How Will Pujols’ Injury Affect Contract Negotiations?, St. Louis Business Journal, June 21, 2011, <http://www.bizjournals.com/stlouis/news/2011/06/21/webster-prof-pujols-could-lose-50m.html>.

²⁰*Id.*

²¹*Id.*

²² For example, one study found that from 2002 through 2008 an average of 438.9 MLB players were placed on the disabled list and that there was a 37% increase in injuries between 2005 and 2008. Matthew Posner, et al.,

in turn, remain profitable enterprises. They also rely on player health information when negotiating trades and entering into contract negotiations. Athletes themselves rely on their own health not only for on-field success, but also for leverage in future contract negotiations. Moreover, injuries are a constant source of intrigue and entertainment for many fans. While many casual fans glance at injury reports to assess their team's chance of winning a game, injuries can pose even larger consequences for gamblers betting substantial sums of money on games. The stakes in injury-disclosure are high; yet, the stakes in health privacy are higher.

It has been argued that

professional athletes are celebrities working in a segment of the entertainment industry. Unfortunately, when they suffer injuries, this is part of the entertainment. The occurrence of injuries to public figures is seen to be public information, and hence in this sense no one "owns" the information...Publicly no sporting administrator will ever condone violence or injuries in sport, yet a quick survey of spectator sports shows a high correlation between popularity and potential for injury.²³

But privacy is something we all expect in our daily lives.²⁴ Just because professional athletes work in a segment of the entertainment industry does not mean they should not be afforded the same level of privacy that you and I expect. In the case of professional athletes like Rafael Palmeiro, Darius Miles, Brett Favre, and Albert Pujols, this expectation of privacy *should* extend to sports injuries and performance-enhancing drug violations. While professional athletes' privacy, and the privacy of celebrities in general, is frequently commented on, much of this discussion does not focus on athletes' health privacy. Professional athletes must be cognizant of

Epidemiology of Major League Baseball Injuries, 39 American Journal of Sports Medicine 1676, Aug. 39, 2001. Moreover, a recent National Football League Players Association study has determined that brain-trauma incidents are 0.25 per team, per game while regular season injuries overall are 2.7 per team, per game. Tim Wendel, The NFL Lockout's Health-Care Data, Revealed, Esquire, Jan. 27, 2011, <http://www.esquire.com/the-side/feature/nfl-lockout-2011>.

²³ J Orchard, Who Owns the Information?, 36 British Journal of Sports Medicine 16-18, 2002, *available at* <http://www.injuryupdate.com.au/BJSMinfoedit.pdf>.

²⁴ For a detailed account of privacy and a framework for understanding privacy problems, *see* Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477 (2006).

their federal health privacy rights. Armed with this knowledge, they would likely be able to reasonably limit the disclosure of their personal health information to that which relates to their ability to engage in sport activity. Further, athletes would likely be able to employ federal health privacy protections as an ameliorative means. That is, they can use these privacy rights to extract concessions from the owners in important areas of the Collective Bargaining Agreement negotiations, such as minimum salary, pension, or ongoing health insurance access requirements. Conversely, professional sports organizations should thoroughly and systematically obtain written authorizations from all athletes outlining what disclosures are permitted and to whom they are permitted.

This comment will examine sports injuries and performance-enhancing drug violations in professional sports through the lens of federal health privacy rights. First, Part II, provides a comprehensive overview of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), with a particular focus on the relevant Privacy Rule provisions and regulations. Then, Part III examines whether professional sports teams are HIPAA covered entities? After concluding that professional sports teams should in fact be HIPAA covered entities, Part IV, through the lenses of Major League Baseball and the National Basketball Association (NBA), examines how professional sports leagues currently handle health privacy. This section looks at Collective Bargaining Agreements, Uniform Player Contracts, authorizations as employed by MLB, and Performance-Enhancing Drug Program policies. Part V explores how injuries and drug violations are typically disclosed to the public, while Part VI concludes this comment concludes with several recommendations. First, all professional sports leagues should comply with HIPAA Privacy Rule requirements by adopting a uniform authorization template. MLB currently employs an authorization for the use and disclosure of player health information, which

could serve as a useful model for professional leagues in developing a HIPAA-compliant authorization. Second, professional athletes should be aware of their federal health privacy rights, thus enabling those rights to be asserted in future CBA negotiations.

Part II: A Primer on HIPAA

A. A Brief Statutory Overview

The Health Insurance Portability and Accountability Act of 1996²⁵ (HIPAA) was originally enacted in an effort to implement efficient standards for the electronic transfer of health care information and to reduce health care costs.²⁶ Though not originally enacted to protect the privacy of health information, privacy has nevertheless become one of the predominate focuses of HIPAA, especially with the adoption of the HIPAA Privacy Rule.²⁷ HIPAA applies to three different types of entities, known as *covered entities*: (1) health plans; (2) health care clearinghouses; (3) health care providers who transmit any health information in

²⁵ 104 P.L. 101; 110 Stat. 1936.

²⁶ The stated purpose of HIPAA: “It is the purpose of this subtitle to improve...the efficiency and effectiveness of the health care system, be encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.” 42 USC § 1320d.

²⁷ The HIPAA Privacy Rule – officially titled “Standards for Privacy of Individually Identifiable Health Information” and located at 45 CFR Part 160 and Subparts A and E of Part 164 – “establishes national standards to protect individuals’ medical records and other personal health information...The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections.” The Privacy Rule, U.S. Department of Health and Human Services, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html>. Upon promulgation of the Privacy Rule, the U.S. Department of Health and Human Services (HHS) commented: “Until now, virtually no federal rules existed to protect the privacy of health information and guarantee patient access to such information. This final rule establishes, for the first time, a set of basic national privacy standards and fair information practices that provides all Americans with a basic level of protection and peace of mind that is essential to their full participation in their care. The rule sets a floor of ground rules for health care providers, health plans, and health care clearinghouses to follow, in order to protect patients and encourage them to seek needed care. The rule seeks to balance the needs of the individual with the needs of the society. It creates a framework of protection that can be strengthened by both the federal government and by states as health information systems continue to evolve.” Federal Register Volume 65, Number 250, Dec. 28, 2000 at 82464. HHS went on to discuss the importance of privacy, noting that privacy is a fundamental right and that at the time (that is, in 2000) there was increasing public concern about the loss of privacy. *Id.* at 82464-82465.

connection with a standard transaction.²⁸ The sole focus of this article is the third type of covered entities: health care providers who transmit any health information in connection with a standard transaction.

B. A Few Necessary Operational Definitions

1. Covered Entities and Health Care

A *health care provider*, which is the type of covered entity with which this article will focus is “a provider of medical or health services..., and any other person furnishing health care services or supplies.”²⁹ *Health care*, as provided by health care providers, “means care, services, or supplies related to the health of an individual.”³⁰ The provision of health care by covered entities results in *health information*.

2. Health Information

Health information is defined under the HIPAA statute to include any information that is created by a health care provider and that “relates to the past, present, or future physical or mental health or condition of an individual [or] the provision of health care to an individual.”³¹

²⁸ 42 U.S.C. § 1320d-1(a)(1)-(3) (1996); Detailed explanation of electronic data interchange via standard transaction, as is required for a health care provider to be a covered entity, is beyond the scope of this comment. For clarity, however, HHS’ Centers for Medicare and Medicaid Services states that “Transactions are electronic exchanges involving the transfer of information between two parties for specific purposes. For example, a health care provider will send a claim to a health plan to request payment for medical services... Under HIPAA, if a covered entity conducts... transactions electronically, they must use the adopted standard. This means they must adhere to the content and format requirements of each standard.” Transactions and Code Set Standards, U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services, *available at* <https://www.cms.gov/TransactionCodeSetsStandards/>; See also 45 C.F.R. §§ 160.102, 160.103 (2006); Transaction standards are established by the HIPAA Transaction Rule at 45 C.F.R. Part 162.

²⁹ 1171(3)

³⁰ 45 CFR 160.103. “Health care includes, but is not limited to, the following: (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or the affects the structure or function of the body; and (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.”

³¹ § 1171(4); The HIPAA statute defines *health information* as: “any information, whether oral or recorded in any form or medium, that – (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to the individual.”

Further, some health information can be classified as *individually identifiable health information*, which is any information that is created by a covered entity during or as a result of the provision of health care that identifies the individual “with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.”³²

3. Use of Health Information

Once a covered entity – a health care provider – has provided health care, the covered entity may only use the collected health information for certain, limited purposes. *Disclosure*, under HIPAA, “means the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information.”³³ Further, disclosure can only occur to the extent *minimally necessary*,³⁴ meaning that a covered entity must make all reasonable efforts not to use or disclose more protected health information than is necessary to accomplish the specific purpose of the use or disclosure.³⁵

C. General Structure of the Privacy Rule

The HIPAA Privacy Rule – Standards for Privacy of Individually Identifiable Health Information³⁶ – is administered by the U.S. Department of Health and Human Services’ (HHS) Office Civil Rights (OCR).³⁷ Under the Privacy Rule, individually identifiable health

³² § 1171(6); (6)(B)(2).

³³ 45 CFR 160.103

³⁴ Covered entities must act only to the extent reasonably necessary in: using health information, disclosing health information, and requesting health information. 45 CFR 164.502(b).

³⁵ *Id.*; Consider, also, that “A covered entity must develop policies and procedures that reasonably limit its disclosures of, and requests for, protected health information for payment and health care operations to the minimum necessary. A covered entity also is required to develop role-based access policies and procedures that limit which members of its workforce may have access to protected health information for treatment, payment, and health care operations, based on those who need access to the information to do their jobs. However, covered entities are not required to apply the minimum necessary standard to disclosures to or requests by a health care provider for treatment purposes.” Uses and Disclosures for Treatment, Payment, and Health Care Operations, U.S. Department of Health and Human Services, available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/usesanddisclosuresfortpo.html>.

³⁶ 45 CFR Part 160 and Subparts A and E of Part 164.

³⁷ See, generally, *supra* note 18.

information may be used and/or disclosed for only certain limited purposes.³⁸ Covered entities are permitted to use or disclose health information when giving it to the individual patient and for treatment, payment, and health care operations (“TPO”).³⁹ Outside of these permitted uses or disclosures, covered entities must generally obtain a written authorization from the patient⁴⁰ or must provide the patient with the opportunity to accept or reject the proposed use or disclosure.⁴¹ An opportunity to accept or reject requires the covered entity to first inform the patient in advance of the proposed use or disclosure and then provide three options to the patient: (1) agree to the use or disclosure; (2) prohibit the use or disclosure; or (3) restrict the use or disclosure.⁴² In contrast to an authorization, an opportunity to accept or reject may be done orally; however, documentation is recommended.⁴³

Covered entities are required to provide notice of their privacy practices.⁴⁴ Health care providers with a *direct treatment relationship*⁴⁵ must make a good faith effort to obtain written acknowledgement of receipt of notice of privacy practices.⁴⁶ Further, covered entities must post their Notice of Privacy Practices and, further, must provide this notice upon request.⁴⁷

³⁸ 45 CFR § 164.502.

³⁹ *Id.* Use and disclosure of protected health information is also permitted, and sometimes required, under some more specialized circumstances. For example, as required for public health purposes or under a limited data set. See 45 CFR § 164.514(e).

⁴⁰ 45 CFR 164.508

⁴¹ 45 CFR 164.510

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 45 CFR 164.520

⁴⁵ “Direct treatment relationship means a treatment relationship between an individual and a health care provider that is not an indirect treatment relationship...[An] Indirect treatment relationship means a relationship between an individual and a health care provider in which: (1) The health care provider delivers health care to the individual based on the orders of another health care provider; and (2) The health care provider typically provides services or products, or reports the diagnosis or results associated with the health care, directly to another health care provider, who provides the services or products or reports to the individual.” 45 CFR 164.501.

⁴⁶ 45 CFR 164.520(c)(2)

⁴⁷ 45 CFR 164.520(c)(2)(iii)(B), (iv)

In addition to the right to request and review a covered entity's privacy practices, individuals also have a right to restrict privacy protection.⁴⁸ Individuals are permitted to request restrictions on the use and disclosure of health information, even for treatment, payment, and health care operations, for which disclosure is generally permitted.⁴⁹ Though the covered entity is not generally required to restrict, once a requested restriction is agreed to, the covered entity must document the restriction and follow it.⁵⁰ That is, once a health care provider agrees to a privacy restriction, it cannot reveal personal health information under any circumstance, except as permitted by the individual patient.

The Privacy Rule further requires covered entities to comply with certain administrative requirements.⁵¹ Covered entities must document, for example, a privacy official, who is responsible for developing and implementing its privacy policies and procedures,⁵² as well as a contact for privacy complaints, training for their workforce, and sanctions for privacy violations by their workforce.⁵³

D. Statutorily-Created Hybrid Covered Entities

The HIPAA Statute allows for hybrid entities.⁵⁴ When a single covered entity's business activities include both covered (i.e., the provision of health care to injured athletes) and non-covered functions (i.e., professional baseball operations), that covered entity must divorce its

⁴⁸ 45 CFR 164.522

⁴⁹ *Id.*; see *supra*, note 28 and accompanying text.

⁵⁰ *Id.*

⁵¹ 45 CFR 164.530

⁵² *Summary of the Privacy Rule*, United States Department of Health & Human Services Office for Civil Rights, OCR Privacy Brief 14 (2003), <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>.

⁵³ *Id.*; An exhaustive list of administrative requirements includes: documenting a privacy official, documenting a contact for privacy complaints, documenting training for workforce, documenting sanctions for privacy violations, documenting mitigation of violations, documenting compliance policies and procedures, documenting the Notice of Privacy Practices, complying with updates to laws and regulations, refraining from intimidating or retaliatory acts when privacy violations have been unearthed, and retaining all documentation for six years. 45 CFR 164.530.

⁵⁴ 45 CFR 164.103

health care component from its non-health care component for purposes of HIPAA compliance.⁵⁵

Essentially, a covered entity that engages in both covered and non-covered functions must segregate the non-covered functions from the covered, health care functions, and are “required to create adequate ‘firewalls’ between the health care component(s) and other components.

Transfer [of health information] held by the health care component to other components of the hybrid entity is a disclosure subject to the HIPAA privacy rule.⁵⁶

Part III: Professional Sports Teams: Are They Covered Entities and Are They Subject to HIPAA?

A. Covered Entity: Definition Applied

At the inception of the HIPAA Privacy Rule professional sports leagues⁵⁷ and teams began to worry whether HIPAA regulations and requirements would wholly forbid them from disclosing athletes’ injuries.⁵⁸ HHS responded to the sport industry’s worry about HIPAA Privacy Rule requirements in a most cryptic way: “Professional sports teams are *unlikely* to be covered entities’ under HIPAA and ‘Even if a sports team were to be a covered entity,

⁵⁵ *Id.* A hybrid entity must “designate health care components in accordance with paragraph § 164.105(a)(2)(iii)(C) [“the covered entity is responsible for designating the component(s) that are part of one or more health care components of the covered entity and documenting the designation in accordance with paragraph (c) of this section, provided that, if the covered entity designates a health care component or components, it must include any component that would meet the definition of covered entity if it were a separate legal entity”].

⁵⁶ Hybrid Entity (HIPAA), Privacy/Data Protection Project, University of Miami Miller School of Medicine, http://privacy.med.miami.edu/glossary/xd_hybrids.htm.

⁵⁷ Hereinafter, professional sports leagues will refer generally to Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), and National Hockey League (NHL). However, this paper’s overarching analysis, arguments, and recommendations can be applied to any professional sports league.

⁵⁸ See, e.g., Bustner Olney, BASEBALL; Law May Forbid League to Say If Player Is Hurt, New York Times, June 11, 2002, <http://www.nytimes.com/2002/06/11/sports/baseball-law-may-forbid-leagues-to-say-if-player-is-hurt.html?src=pm>; Leagues Seek Relief From Privacy Law, Buster Olney, New York Times, July 4, 2002, <http://www.nytimes.com/2002/07/04/sports/leagues-seek-relief-from-privacy-law.html?src=pm>; Buster Olney, Pro Football; League Gain a Measure of Relief From Privacy Laws, New York Times, Aug. 14, 2002, <http://www.nytimes.com/2002/08/14/sports/pro-football-legues-gain-a-measure-of-relief-from-privacy-laws.html> (“Teams were worried about whether trainers and doctors would have to obtain written permission from players to discuss medical diagnosis with coaches and management, and whether players could use the privacy rules as leverage in trade talks”).

employment records of a covered entity are not covered by this rule (emphasis added).”⁵⁹ From its language, HHS appeared to be giving professional sports teams a “pass,” effectively exempting them from HIPAA Privacy Rule compliance. But, a plain, literal reading of the law necessitates the determination that professional sports leagues *should* be subject to the HIPAA Privacy Rule.

With its uncommitted language, HHS clearly left open the possibility that professional sports teams could be covered entities.⁶⁰ Moreover, a review of the record demonstrates that HHS has not commented on the issue since 2002.⁶¹ When it made the declaration that professional sports teams are *unlikely* to be HIPAA covered entities, HHS also said that it would disagree with any move to decrease the privacy of players: “No class of individuals should be singled out for reduced privacy protections.”⁶²

⁵⁹ Buster Olney, Pro Football; League Gain a Measure of Relief From Privacy Laws, New York Times, Aug. 14, 2002, <http://www.nytimes.com/2002/08/14/sports/pro-football-legues-gain-a-measure-of-relief-from-privacy-laws.html>; Federal Register Volume 67, Number 157, Aug. 14, 2002 at 53193.

⁶⁰ The comment read: “One commentator suggested that the health records of professional athletes should qualify as ‘employment records.’ As such, the records would not be subject to the protections of the Privacy Rule.” HHS responded: “Professional sports teams are unlikely to be covered entities. Even if a sports team were to be a covered entity, employment records of a covered entity are not covered by this Rule. If this comment is suggesting that the records of professional athletes should be deemed ‘employment records’ even when created or maintained by health care providers and health plans, the Department disagrees. No class of individuals should be singled out for reduced privacy protections. As noted in the preamble to the December 2000 Rule, nothing in this Rule prevents an employer, such as a professional sports team, from making an employee’s agreement to disclose health records a condition of employment. A covered entity, therefore, could disclose this information to an employer pursuant to an authorization.” Federal Register Volume 67, Number 157, Aug. 14, 2002 at 53193. While this response was included in the Federal Register, HHS did not definitively state whether a professional sports team *is* or *is not* a covered entity, and, moreover, did not definitely state that a professional sports team could not be a HIPAA covered entity. While this comment argues that all professional sports teams *should* be covered entities for HIPAA purposes, it remains unclear how a court would apply administrative deference to the interpretive decision of HHS, as required under the *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and the *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) line of cases. Essentially, HSS did not commit to a specific interpretation of whether a professional sports team is, or can be, a HIPAA covered entity.

⁶¹ *Id.*

⁶² See Buster Olney, Pro Football; League Gain a Measure of Relief From Privacy Laws, New York Times, Aug. 14, 2002, <http://www.nytimes.com/2002/08/14/sports/pro-football-legues-gain-a-measure-of-relief-from-privacy-laws.html>; Federal Register Volume 67, Number 157, Aug. 14, 2002 at 53193 (“Even if a sports team were to be a covered entity, employment records of a covered entity are not covered by this Rule. If this comment is suggesting that the records of professional athletes should be deemed ‘employment records’ even when created or maintained by health care providers and health plans, the Department disagrees. No class of individuals should be singled out for reduced privacy protections. As noted in the preamble to the December 2000 Rule, nothing in this Rule prevents

Despite all that HHS has said—and failed to say—a literal reading of the HIPAA statute supports the position that a healthcare provider transmitting personal health information in the sports team setting *is* a covered entity pursuant to HIPAA. As discussed in Part II, any health care provider that transmits personal health information in electronic format, in connection with a standard transaction, is a covered entity. Professional sports teams generally employ both team trainers and team physicians who administer health care to injured athletes.⁶³ If any of these health care providers ever transmits personal health information electronically—for example, a team trainer or physician sending health information about a player to an orthopedic specialist in connection with a consultation for a broken elbow—the team is necessarily a covered entity for HIPAA purposes. As such, these teams, as covered entities, *should* be held to comply with HIPAA privacy regulations and rules.

As a covered entity, the chief issue with team trainer and physician disclosures of personal health information is *not* when disclosure is made to team coaches and management. Some argue that disclosures of this nature are frequently necessary in the sports employment context. The issue, then, is whether sports teams should be able to reveal personal health information to the public—for example, to reporters—and to other teams—for example, in

an employer, such as a professional sports team, from making an employee's agreement to disclose health records a condition of employment. A covered entity, therefore, could disclose this information to an employer pursuant to an authorization.”).

⁶³ All professional sports teams employ athletic trainers for the health benefit of their athletes. “Athletic trainers... provide their expertise of musculoskeletal injury prevention, rehabilitation and treatment to the professional sports world. With their unique skill set, athletic trainers have been trusted by the worlds’ best athletes for years. Approximately 800 NATA members work for professional teams and leagues, including: the NBA, NFL, [MLB], NHL, PGA, professional tennis, auto racing and even the rodeo.” Professional Sports Setting, National Athletic Trainers’ Association, <http://www.nata.org/athletic-training/job-settings/professional-sports-setting>. Many professional sports teams also directly employ physicians. “Professional teams...generally hire a physician or a group of physicians to provide medical care to their athletes...Specific duties may include providing pre-season physical examinations; diagnosing, treating, and rehabilitating athletic injuries; and providing medical clearance for an athlete to play the sport. The team physician may also be responsible for overseeing all sports medicine services provided to a team's athletes and for the supervision of physician assistants, athletic trainers, student assistants, physical therapists, and nurses providing medical care to athletes.” Matthew J. Mitten, *Emerging Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 St. John’s L. Rev. 5, 8, 2002.

contract or trade negotiations—without first obtaining the player’s permission. Moreover, should professional athletes be *required* to give such permission in order to play?

B. As Covered Entities, Professional Sports Teams Must be Hybrid Covered Entities

The provision of health care services is only one minor part of professional sports teams’ operations. That is, only a select few team employees are engaged in the provision of health care; most team employees have nothing to do with the provision of any health care or medical services. Thus, sports teams must segregate their health care component (“HCC”)—that is, team doctors and trainers, nurses, etc.—from the rest of the organization.⁶⁴ Only members of the team’s HCC can ever access, use, or disclose personal health information and, moreover, members of the HCC may only do so within their job scope. Essentially, organizational members in the non-health care component should not have any access to personal health information without direct patient authorization.⁶⁵ Thus, sports teams should be designated as *two* organizations, or entities, under HIPAA: (1) the health care component, including team trainers and physicians, and (2) everyone else, including management, ownership, and public relations personnel.

Part IV: How Do Professional Sports Leagues Currently Handle Health Privacy?

⁶⁴ See discussion, *supra*, Part II(D).

⁶⁵ HHS maintains: “To become a hybrid entity, the covered entity must designate and include in its health care component all components that would meet the definition of a covered entity if those components were separate legal entities. (A covered entity may have more than one health care component.) However, the hybrid entity is not permitted to include in its health care component other types of components that do not perform the covered functions of the covered entity or components that do not perform support activities for the components performing covered functions. That is, components that do not perform health plan, health care provider, or health care clearinghouse functions and components that do not perform activities in support of these functions (as would a business associate of a separate legal entity) may not be included in a health care component. Within the hybrid entity, most of the *HIPAA* Privacy Rule requirements apply only to the health care component, although the hybrid entity retains certain oversight, compliance, and enforcement obligations.” U.S. Department of Health and Human Services, http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/522.html.

Professional sports leagues and teams currently handle health privacy in a variety of ways: through Collective Bargaining Agreements (CBAs), Uniform Player Contracts (UPCs), and Performance Enhancing Drug Policies. Using two of the major U.S. sports leagues, Major League Baseball and the National Basketball Association, as examples,⁶⁶ this section will identify the different ways in which professional sports leagues, and thus their teams, handle health privacy.

A. Collective Bargaining Agreements

Professional athletes in the four major professional sports leagues are members of players associations.⁶⁷ The players associations negotiate, on the player's behalf, with the professional sports teams to produce a collective bargaining agreement that governs the relationship between teams and players.⁶⁸ A negotiated collective bargaining agreement "govern[s] the professional sports players' compensation, the procedures for settling disputes, and address a myriad of other issues relating to the employer-employee relationship in sports."⁶⁹ Because these CBAs are the "supreme governing authority" concerning employment matters within the professional sports

⁶⁶ In addition to the MLB and NBA, however, professional athletes in the following leagues are members of player's associations: Arena Football League, Major Indoor Lacrosse League, Major League Baseball, Major League Soccer, National Basketball Association, National Football League, National Hockey League, Women's National Basketball Association, and North American minor leagues of hockey. While I focus on both MLB and the NBA, the National Football League and the National Hockey League round out the four major professional sports leagues in the United States.

⁶⁷ The four major leagues are: Major League Baseball, National Football League, National Basketball Association, and National Hockey League. "Professional athletes in the following leagues are members of players associations: Arena Football League, Major Indoor Lacrosse League, Major League Baseball, Major League Soccer, National Basketball Association, National Football League, National Hockey League, Women's National Basketball Association, and North American minor leagues of hockey." See Lisa Pike Masteralexis, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 New Eng. L. Rev. 775, note 1 (2006). While collective bargaining negotiations are commonplace in the major professional leagues today, collective bargaining in professional sports is a relatively new development. James T. Gray & Martin J. Greenberg, *Sports Law Practice* § 1.05 (Matthew Bender & Co., Inc., 3d ed. 2011).

⁶⁸ See Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. Disp. Resol. 267 (2008).

⁶⁹ *Id.* at 267.

leagues,⁷⁰ players associations, as the entities that negotiate for the athletes, wield great influence and power.⁷¹

The National Labor Relations Act (NLRA) provides for the collective bargaining process that permits professional athletes and their respective leagues to negotiate over league policies and regulations.⁷² In *American League of Prof'l Baseball Clubs v. Ass'n of National Baseball League Umpires* the NLRA established that its jurisdiction encompasses professional sports leagues.⁷³ Thus, professional athletes, typically through a player's association, are free to negotiate terms of employment, including health privacy.⁷⁴ If both parties—the athletes and the league—negotiate in good faith and if the bargaining is conducted at arm's-length, a CBA results that governs the athletes' employment.⁷⁵

⁷⁰ Matthew J. Parlow, Professional Sports League Commissioners' Authority and Collective Bargaining, 11 Tex. Rev. Ent. & Sports L. 179, 196-7 (2010); see also Matthew A. Mahone, Jr., Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy, 11 Vand. J. Ent. & Tech. L. 181, 192 (2008).

⁷¹ See George T. Stiefel III, Hard Ball, Soft Law in MLB: Who Died and Made Wada the Boss?, 56 Buff. L. Rev. 1225, 1257-64 (2008) for an examination of the unique qualities that characterize Major League Baseball Player's Association (MLBPA) and the power it has.

⁷² 29 U.S.C. § 151-159; see also 29 U.S.C. § 159(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to...confer in good faith with respect to wages, hours, and other terms and conditions of employment"); The NLRA confers on players specific rights upon entering into labor negotiations with management, including that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [158(a)(3) of this title]." 29 U.S.C. § 157.

⁷³ *American League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires*, 180 NLRB 190, 191 (1969).

⁷⁴ See Christian Dennie, From Claret to Mayo: The Antitrust Labor Exemption Argument Continues, 8 Tex. Rev. Ent. & Sports L. 63 (2007), for an outline of some of the mandatory subjects of collective bargaining in professional sports; see generally Ryan T. Dryer, Beyond the Box Score: A Look At Collective Bargaining Agreements in Professional Sports and Their Effect on Competition, 2008 J. Disp. Resol. 267 (2008) (for a surveying of some of fundamental aspects of collective bargaining in professional sports); It has been argued that "mandatory subjects of collective bargaining within a sports setting basically cover all aspects of professional sports: The phrase 'wages, hours, and other terms and conditions of employment' covers so wide a range of items, it is possible and even likely that in the long run virtually all aspects of professional sports, from contract provisions to play, scheduling, equipment design, and game rules will be the subject of collective bargaining proposals at one time or another." James T. Gray & Martin J. Greenberg, Sports Law Practice § 1.05[2] (Matthew Bender & Co., Inc., 3d ed. 2011) (quoting L. Sobel, Professional Sports and the Law 299 (1977)).

⁷⁵ See George T. Stiefel III, Hard Ball, Soft Law in MLB: Who Died and Made Wada the Boss?, 56 Buff. L. Rev. 1225, 1229 (2008).

1. Major League Baseball

The 2007-2011 Major League Baseball Collective Bargaining Agreement (“MLB CBA”)⁷⁶ includes extensive provisions regarding health privacy. First, the MLB CBA requires that each player, upon reporting to spring training or signing a UPC for that season, whichever is first, execute an authorization for the use and disclosure of health information.⁷⁷ Second, a club physician or trainer is authorized to disclose “all relevant medical or health information concerning the Player” to certain persons and entities, including the employing club.⁷⁸ Third, for public relations purposes, teams are permitted to disclose general information about “the nature of a Player’s employment-related injury...the prognosis and the anticipated length of recovery from the injury, and...the treatment or surgical procedures undertaken or anticipated in regard to the injury.”⁷⁹ The MLB CBA, as currently negotiated, clearly requires Major League Baseball players to waive their federal health privacy rights through authorization. Thus, if players want to play for an MLB team in any given year, they must be willing to sign the required authorization and permit the disclosure of their health information.⁸⁰

⁷⁶ MLB CBA, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf; In 2011 MLB and the MLB Player’s Association reached a new labor agreement. This new agreement has not been fully implemented as of the time of this writing and therefore I do not rely upon it as an accurate representation of MLB’s currently enforced policies. See MLB Press Release, MLB, MLBPA Reach New Five-Year Labor Agreement, Nov. 22, 2011, *available at* http://mlb.mlb.com/news/article.jsp?ymd=20111122&content_id=26025138&vkey=pr_mlb&c_id=mlb.

⁷⁷ MLB CBA, Article XIII(G)(1).

⁷⁸ “A Club physician or trainer treating a Player...and any other physician or medical professional treating or consulting with a Player...is authorized to disclose all relevant medical or health information concerning the Player to (a) the Club by which the Player is employed, including the Club officials set out in the Authorization, (b) any entity from which such Club seeks to procure, or has procured, an insurance policy covering such Player’s life or any disability, injury or illness such Player may suffer or sustain, (c)...physicians and officials of a Club contemplating the assignment of the Player’s UPC, and (d)...the Office of the Commissioner.” MLB CBA, Article XIII(G)(2).

⁷⁹ MLB CBA, Article XIII(G)(3). This provision further states: “For any other medical condition that prevents a player from rendering services to his Club, a Club may disclose only the fact that a medical condition is preventing the Player from rendering services to the Club and the anticipated length of the Player’s absence from the Club. A Club physician or trainer treating a Player pursuant to Regulation 2 of his UPC and any other physician or medical professional treating or consulting with a Player pursuant to Regulation 2 or Article XIII(D) shall be prohibited from making any public disclosure of a Player’s medical information absent a separate, specific written authorization from the Player authorizing such public disclosure.”

⁸⁰ The required authorization (“Authorization”) can be located at Attachment 18 to the MLB CBA. MLB CBA, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf.

2. National Basketball Association

The National Basketball Association and the NBA Players Association agreed to a new CBA in December 2011.⁸¹ As a result of a lockout that lasted 161 days, and CBA negotiations that were ongoing for months, the start of the 2011-2012 NBA season was delayed and the season ultimately shortened.⁸² A 66-game schedule began on December 25, 2011, which will be governed by the newly agreed to CBA.⁸³ Although the new NBA CBA is now in effect, the previous NBA CBA⁸⁴ will serve as the focus for this comment.⁸⁵

Like the MLB CBA, the NBA CBA permits teams to make public medical information relating to their players.⁸⁶ The provision on the release of medical information, however, restricts disclosure to information related to the reasons why a player is unable to participate in team activities, including games.⁸⁷ Further, a player or his immediate family has the right to approve the terms and timing of the public release “of any medical information relating to any injuries or illnesses suffered by the player that are potentially life- or career-threatening, or that do not arise from the player’s participation in NBA games or practices.”⁸⁸ The NBA CBA, just like the MLB CBA, clearly requires professional basketball players to waive their privacy rights

⁸¹ Players, Owners Approve Agreement, ESPN.com, Dec. 9, 2011, http://espn.go.com/nba/story/_/id/7332374/nba-labor-players-owners-vote-ratify-new-labor-agreement.

⁸² *Id.*; See, also, Howard Beck, N.B.A. Talks Stall and More Games Are Canceled, New York Times, Oct. 28, 2011, <http://www.nytimes.com/2011/10/29/sports/basketball/nba-talks-stall-and-more-games-are-expected-to-be-canceled.html>.

⁸³ Players, Owners Approve Agreement, ESPN.com, Dec. 9, 2011, http://espn.go.com/nba/story/_/id/7332374/nba-labor-players-owners-vote-ratify-new-labor-agreement.

⁸⁴ NBA CBA, available at <https://www2.bc.edu/~yen/Sports/NBA%20CBA.pdf>.

⁸⁵ While there is now a new NBA CBA in effect, it was not fully implemented at the writing of this comment. Consequently, this comment uses the former CBA to analyze the NBA’s handling of athlete health privacy. The contents of the respective CBAs were not a factor in the decision to use the former CBA as the focus of this comment’s analysis.

⁸⁶ NBA CBA, Article XXII(3) Release of Medical Information: “Subject to subsection (b) below, each Team may make public medical information relating to players in its employ, provided that such information relates solely to the reasons why any such player has not been or is not rendering services as a player.”

⁸⁷ *Id.*

⁸⁸ NBA CBA, Article XXII(3)(b); While a player or his immediate family has the right to approve the terms and time of the public release of certain medical information, the NBA CBA does not define immediate family nor does it specifically indicate in what circumstances the immediate family may exercise this right.

in order to participate in the NBA. In contrast to MLB, however, the NBA CBA does not include an authorization, HIPAA-compliant or otherwise, that players are required to sign. But, the NBA UPC does include such an authorization.⁸⁹

B. Uniform Player Contracts

In addition to CBAs, Uniform Player Contracts also contain expansive health privacy provisions. UPCs are often found within CBAs and are standard form contracts that remain constant from team to team.⁹⁰ Once a player agrees to sign with a team, “the player signs a ‘standard’ or ‘uniform’ player contract, the terms of which, according to league rules, cannot be varied from player to player or team to team, except as to salary.”⁹¹ The MLB and NBA UPCs illustrate that UPCs contemplate health privacy.

1. Major League Baseball

The MLB UPC,⁹² as included in the MLB CBA, speaks directly to the use and disclosure of players’ personal health information. Clause 6(b), titled “Medical Information,” provides that a club’s physician or any medical professional consulted by the player “may furnish to the Club all relevant medical information relating to the Player.”⁹³ The UPC does not provide guidance as to what constitutes “relevant medical information.” Ostensibly, a club physician could reveal to

⁸⁹ Section 7(i) of the NBA UPC provides that players must execute individual authorization(s) as requested by the team: “[i]f and to the extent necessary to enable or facilitate the disclosure of medical information as provided for by this Contract or Article XXII of the CBA, the Player shall execute such individual authorization(s) as may be requested by the Team or as may be required by health care providers who examine or treat the Player.” NBA UPC, Section 7(i): Physical Condition, available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf>.

⁹⁰ See Michael Jay Kaplan, Application of Federal Antitrust Laws to Professional Sports, 18 A.L.R. Fed. 489 at § 7[b] (1974).

⁹¹ *Id.*

⁹² MLB UPC, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf.

⁹³ MLB UPC Clause 6(b)(1). Medical Information. While this clause states that the team, including the team physician, “is prohibited from re-disclosing any such information without the express written consent of the Player[.]” this prohibition against re-disclosure is subject to the CBA Article XIII(G), which permits public disclosure for public relations purposes. See *supra*, Part IV, for a discussion of MLB’s CBA.

the team any medical information about a player, including medical information unrelated to the player's ability to engage in sports-related activity.

Further, when a team contemplates assigning a player's UPC to another team or teams—for example, when trading the player—the MLB UPC permits the team to disclose “all relevant medical information” to the other team or teams.⁹⁴ While the UPC requires health information confidentiality on the part of the receiving team or teams and, moreover, requires the receiving team or teams to return the medical records if no assignment is concluded,⁹⁵ the permitted relinquishment of the health information in the first place necessitates the player's waiver of his federal health privacy rights under HIPAA.

2. *National Basketball Association*

The NBA UPC⁹⁶ likewise includes a clause referencing the use and disclosure of player health information. First, the UPC requires players to supply their team with “complete and truthful information with *any* medical examinations or requests for medical information authorized by [the UPC] (emphasis added).”⁹⁷ Further, a player who consults any third party physician – that is, any physician other than the team physician – must provide the team with notice of that consultation and must authorize and direct the third party physician to provide the team with any requested medical information that the team's physician judges important to the player's ability to play “skilled basketball.”⁹⁸ So long as the team physician deems medical

⁹⁴ MLB UPC Clause 6(b)(2).

⁹⁵ *Id.* (“In addition, within thirty (30) days from the receipt of the Player's medical information, the physicians and officials of the Club which requested the medical information will return any and all documents received to the Player's Club, and will not keep copies of any documents it received or any other records indicating the substance of the medical information transmitted.”)

⁹⁶ NBA UPC, Section 7: Physical Condition, available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf>.

⁹⁷ NBA UPC, Section 7(g).

⁹⁸ NBA UPC, Section 7(h).

information relevant to a player's ability to play basketball, any player-third party physician consultation is required to be disclosed to the team.

Ostensibly, just as with the MLB CBA,⁹⁹ NBA team physicians could reveal to the team any medical information about a player, including medical information unrelated to the player's ability to engage in sports-related activity. That is, a team physician's definition of "any...medical information...important to the player's ability to play 'skilled basketball'"¹⁰⁰ could be much more encompassing than necessary, requiring disclosure of any and all medical information. A more limited definition, one tailored only to information regarding a player's ability to engage in sports-related activity, should be employed. For example, a diagnosis of Psoriasis, which "is a common skin condition that causes skin redness and irritation" and often results in "thick, red skin with flaky, silver-white patches called scales"¹⁰¹ is likely *not* important to a player's ability to play "skilled basketball." However, a diagnosis of Hypertension, or high blood pressure, is likely *always* important to a player's ability to play "skilled basketball" because Hypertension, ineffectively treated, can lead to severe complications, including heart attack, heart failure, kidney disease, stroke, and vision problems.¹⁰² Under a limited definition—of medical information important to a player's ability to play skilled basketball—tailored only to information regarding a player's ability to engage in sports-related activity, athletes would be better able to protect their health privacy as they would only be required to disclose certain health conditions.

⁹⁹ MLB UPC, Clause 6(b)(1)

¹⁰⁰ NBA UPC, Section 7(h).

¹⁰¹ Psoriasis, A.D.A.M. Medical Encyclopedia, PubMed Health, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001470/>.

¹⁰² Hypertension, A.D.A.M. Medical Encyclopedia, PubMed Health, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001502/>.

The most expansive health privacy provision in the NBA UPC is located in Section 7(i), Physical Condition.¹⁰³ This provision provides that players must execute individual authorization(s) as requested by the team in order to facilitate the disclosure of medical information as provided by Article XXII of the CBA.¹⁰⁴ Thus, the NBA UPC requires professional basketball players to waive their federal privacy rights through forced authorizations for the use and disclosure of personal health information. By signing a UPC, thereby being able to play in the NBA, players are required to waive privacy rights that they otherwise would retain.

C. MLBs “Authorization for the Use and/or Disclosure of Major League Player Health Information”

Major League Baseball’s CBA includes an “Authorization for the Use and/or Disclosure of Major League Player Health Information,” (“MLB Authorization”) a standard form authorization for the use and/or disclosure of personal health information.¹⁰⁵ This authorization applies to “all health information about [the player]” that is in the “possession, custody or control” of certain health care providers, including the club physician, other physicians, laboratories, clinics, and club trainers.¹⁰⁶ Health information, as defined by the MLB Authorization, means a player’s

“entire health or medical record, including, but not limited to, all information relating to any injury, sickness, disease, mental health condition, physical condition, medical history, medical or clinical status,

¹⁰³ NBA UPC, Section 7(i).

¹⁰⁴ *Id.* (“If and to the extent necessary to enable or facilitate the disclosure of medical information as provided for by this Contract or Article XXII of the CBA, the Player shall execute such individual authorization(s) as may be requested by the Team or as may be required by health care providers who examine or treat the Player.”); see also NBA CBA, Article XXII.

¹⁰⁵ Authorization for the Use and/or Disclosure of Major League Player Health Information, Attachment 18 to the CBA, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf.

¹⁰⁶ Authorization for the Use and/or Disclosure of Major League Player Health Information, Attachment 18 to the CBA, Clause 1-2. (“I authorize the following persons and entities (or classes of persons or entities) to use and/or disclose...any of the health information about me that is (or, during the period covered by this authorization, may be) in their possession, custody or control for the purposes described in paragraph 3 below: All health care providers (including but not limited to [add Club orthopedist and medical internist], other physicians, laboratories, clinics and Club trainers) with whom I have consulted pursuant to my Uniform Player’s Contract (“UPC”) or the Basic Agreement.”)

diagnosis, treatment or prognosis, including without limitation clinical notes, test results, laboratory reports, x-rays, and diagnosis imaging results.”¹⁰⁷

This health information may be disclosed to a certain enumerated list of persons.¹⁰⁸

In addition to disclosure to the employing team, the MLB Authorization also allows for certain disclosures under Major League Baseball’s Joint Drug Prevention and Treatment Program (“MLB Drug Program”). The MLB Authorization permits any health care provider with whom a player has consulted under the MLB Drug Program “to disclose to members of the Health Policy Advisory Committee health information about me [the player] (including, but not limited to, drug test results) that is...in their possession, custody or control.”¹⁰⁹

While the MLB Authorization limits the nature of the disclosures authorized,¹¹⁰ it states that HIPAA may *not* prevent the recipients of medical information (i.e., the team physician) from re-disclosing the information.¹¹¹ Such re-disclosure is limited, however, by Paragraph 6(b) of the MLB UPC.¹¹² The MLB Authorization does in fact limit the nature of the disclosure of player health information, but simultaneously requires players to acknowledge that they may not rely on their federal HIPAA privacy rights to limit the use or disclosure of personal health information.

¹⁰⁷ Authorization for the Use and/or Disclosure of Major League Player Health Information, Attachment 18 to the CBA, Clause 1.

¹⁰⁸ *Id.* Clause 3 (Authorizing disclosure to “the Owner, President, General Manager, Assistant General Manager, Manger, Physicians and such medical personnel as they may designate, Trainer and Assistant Trainer of the Club or Clubs for which I have agreed (or may agree) to render playing services during the period covered by this authorization and...the Office of the Commissioner.”)

¹⁰⁹ *Id.* Clause 4.

¹¹⁰ *Id.* Clause 5. (“The disclosure of health information pursuant to this authorization is solely for the purposes of this authorization. The health information may not be disclosed to any person or entity other than those specified herein without my express written consent. The health information may not be utilized for any purpose other than that specified herein without my express written consent...This authorization is further conditioned upon the express understanding that neither the Major League Club to which I am under contract nor any other Major League Club will assert that the disclosure of health information pursuant to this authorization other than for the limited purposes specified herein constitutes a waiver of any right to privacy or confidentiality with respect to that medical information under federal or state law, or any regulation.”)

¹¹¹ *Id.* Clause 6.

¹¹² See *supra*, Part IV(B); MLB UPC Clause 6(b).

That is, for example, a player cannot decide to prevent the team physician from revealing to the team a certain “set” of medical information.

The MLB Authorization further states that if a player refuses to sign the authorization, he may nevertheless obtain treatment from the club physician.¹¹³ However, despite refusal to sign the authorization, the treating club physician will still disclose the player’s personal health information to the employing team.¹¹⁴ Most important, the MLB Authorization provides that a player’s failure to sign the authorization, and its included limitations on health privacy, may constitute a breach of contract.¹¹⁵

The MLB Authorization’s extensive provisions on player’s health privacy comply with HIPAA authorization requirements.¹¹⁶ However, it is not the authorization itself that is of primary issue. Rather, the issue is in the requirement that players sign the MLB authorization and agree to its terms, including the wholesale waiver of health information privacy.

D. Privacy and Performance Enhancing Drug Policies

The National Labor Relations Board has held that drug testing of employees is a mandatory subject of collective bargaining.¹¹⁷ As such, the NBA CBA contains the league’s performance enhancing drug policy.¹¹⁸ Conversely, MLB has adopted a performance-enhancing drug program separate from the MLB CBA – Major League Baseball’s Joint Drug Prevention and Treatment Program¹¹⁹ – that covers health confidentiality and the disclosure of player health information. While personal health information is obtained from the process of testing athletes

¹¹³ Authorization for the Use and/or Disclosure of Major League Player Health Information, Attachment 18 to the CBA, Clause 7.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See 45 CFR 164.508.

¹¹⁷ Johnson-Bateman Co., 295 NLRB 180, 182 (1989).

¹¹⁸ See NBA CBA, Article XXXIII, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20XXXIII.pdf>.

¹¹⁹ Major League Baseball’s Joint Drug Prevention and Treatment Program, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

for performance-enhancing drug (e.g., steroid) use, a survey of both MLB and the NBA illustrates that personal health information in this context is treated somewhat differently than personal health information is generally treated.

1. Major League Baseball

MLB's performance-enhancing drug policies, including testing policies, has become quite expansive in recent years.¹²⁰ This has been, in part, because of widespread criticism that MLB has in the past failed to adequately enforce steroid policies and penalties.¹²¹ The current program – MLB's Joint Drug Prevention and Treatment Program ("MLB Program" or "MLB Drug Program") – has a three-fold purpose: 1) "to educate Players...on the risks associated with using" performance enhancing drugs and steroids; 2) "to deter and end the use by Players of" performance enhancing drugs and steroids; and 3) to provide for...an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the...agreement."¹²²

The MLB Drug Program discusses health privacy in two sections, section six on confidentiality and section seven on disclosure of player information. The MLB Program clearly states that: "The confidentiality of Players' participation in the Program is essential to the Program's success."¹²³ In order to ensure confidentiality, the MLB Program prevents the public disclosure of "information about an individual Player's test results or testing history, Initial Evaluation, diagnosis, Treatment Program..., prognosis or compliance with a Treatment

¹²⁰ See, e.g., Doug Miller, Players Welcome New Drug Policy, MLB.com, Nov. 15, 2005, http://mlb.mlb.com/news/article.jsp?ymd=20051115&content_id=1268766&vkey=news_mlb&fext=.jsp&c_id=mlb; Mitchell Report: Baseball Slow to React to Player's Steroid Use, ESPN.com, Dec. 14, 2007, <http://sports.espn.go.com/mlb/news/story?id=3153509>.

¹²¹ *Id.*

¹²² Major League Baseball's Joint Drug Prevention and Treatment Program, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

¹²³ Major League Baseball's Joint Drug Prevention and Treatment Program, Section 6, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

Program...”¹²⁴ While this provision seeks to prevent the public disclosure of player health information, as related to steroid testing, it does not purport to limit (or prevent) the disclosure of such information to the employing team. In fact, the provision assumes that such health information will be made available to the employing teams, without attempting to limit which team employees (e.g., General Manager) to which the information may be disclosed.¹²⁵

Section 7 of the MLB Drug Program further polices the disclosure of player information. If a player is on the “Clinical Track,”¹²⁶ his employing team is prohibited from public disclosure, including to the media, of any information regarding his participating in the MLB Drug Program.¹²⁷ If a player is on the “Administrative Track”¹²⁸ the detail of his treatment program, the results of any testing, and any discipline imposed, must remain strictly confidential.¹²⁹ But, if a player is suspended under the MLB Program, a public statement will be made, indicating only that the player was suspended for a specified number of days for a violation of the

¹²⁴ Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 6(A).

¹²⁵ *Id.* (“the Commissioner’s Office, the Association, the Treatment Board, the IPA, the Medical Testing Officer, Club personnel, and all of their members, affiliates, consultant and employees, are prohibited from publicly disclosing information about an individual Player’s [test results or participation the MLB Program] (emphasis added)”).

¹²⁶ All players who enter the MLB Drug Program as a result of use or suspected use of a Drug of Abuse are automatically placed on the Clinical Track. Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 4(B)(1). Drugs of Abuse are “Any and all drugs or substances included on Schedules I and II of the Code of Federal Regulations’ Schedule of Controlled Substances” and include cocaine, LSD, marijuana, opiates, Ecstasy, GHB, and Phencyclidine. Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 2(A).

¹²⁷ Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 7(A)(1).

¹²⁸ A player is placed in the Administrative Track if: (1) the player tests positive under a performance enhancing drug test; (2) the Treatment Board determines that the player failed to cooperate with his Initial Evaluation (“The purpose of the Initial Evaluation is to ascertain whether the Player shall enter the Program and, if so, the type of Treatment Program that, in the opinion of the Treatment Board, would be most effective for the Player involved. The Initial Evaluation shall include at least one meeting between the Player and one or both of the Medical Representative(s).” Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 4(D).); (3) the Treatment Board determines that the player failed to comply with his Treatment Program (“The Treatment Program may include any or all of the following: counseling, inpatient treatment, outpatient treatment and follow-up testing.” Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 4(E).); (4) the player is subject to discipline under Section 8 of the MLB Drug Program. Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 4(C). Performance enhancing substances are “Any and all anabolic androgenic steroids covered by Schedule III of the Code of Federal Regulations’ Schedule of Controlled Substances.” Over 50 performance enhancing substances, as well as 30 stimulants, are enumerated. Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 2(B)-(C).

¹²⁹ Major League Baseball’s Joint Drug Prevention and Treatment Program, Section 7(A)(2).

program.¹³⁰ This section also states that the Commissioner's Office may, without a player's consent, disclose the player's MLB Drug Program status to his employing team's general manager.¹³¹ The general manager may, in turn, disclose the information to the general manager of a team interested in acquiring the subject player - for example, in a trade.¹³²

MLB clearly protects a player's privacy when he tests positive for performance enhancing drugs, as well as when he tests positive for drugs of abuse, such as narcotics. The *only* public disclosure permitted is a discrete statement that informs of the player's suspension and that the suspension was for a violation of the MLB Drug Program. Thus, comparison of the MLB CBA and UPC with the MLB Drug Program indicates that MLB is concerned with athlete health privacy in some circumstances, but not in others. MLB's disparate treatment of injury and drug test violations invites the question: should there be any difference between the two in terms of the public disclosure of personal health information?

2. *National Basketball Association*

The NBA CBA contains the league's Anti-Drug Program, including policies regarding confidentiality and performance-enhancing drugs.¹³³ Both the league and its teams are prohibited from publicly disclosing information about any players participating in the drug program.¹³⁴ This includes information about test results and compliance with the league's drug

¹³⁰*Id.*

¹³¹*Id.* ("In addition, other than in the case of a first positive test for a Stimulant, the Commissioner's Office may, without a Player's consent, disclose the Player's status on the Administrative Track, including a Player's likely availability to his Club, and/or the reason for any discipline imposed on the Player to the General Manager of the Player's Club, who shall keep such information confidential, except that the General Manager, and only he, may disclose such information to the General Manager of a Club that has expressed an interest in acquiring such Player's contract via assignment, and that General Manager also shall keep such information confidential.")

¹³²*Id.*

¹³³*See* NBA CBA, Article XXXIII, Section 3.

¹³⁴NBA CBA, Article XXXIII, Section 3(a) ("Other than as reasonably required in connection with the suspension of disqualification of a player, the NBA, the Teams, and the Player's Association, and all of their members, affiliates, agents, consultants, and employees, are prohibited from public disclosing information about the diagnosis, treatment, prognosis, test results, compliance, or the fact of participation of a player in the Program.").

policies.¹³⁵ Upon a positive test for banned substances, the nature of the league's public disclosure depends on the circumstances of the failed test. If a player tests positive for a "Drug of Abuse or marijuana," the NBA will not make a public disclosure regarding the particular prohibited substance involved.¹³⁶ However, if a player tests positive for conduct involving a steroid, a performance-enhancing drug, or a masking agent (collectively "SPED"),¹³⁷ the particular SPED will be publicly disclosed.¹³⁸ Just as MLB, the NBA is more restricted in what health information can be disclosed when the subject of the health information is related to performance-enhancing drug than when the subject is related to sports injury. Moreover, the NBA, like MLB, protects players' health privacy in terms of drug testing, but not in terms of injuries.

E. HIPAA and Employment Records: The Employment Record Exception

Protected health information¹³⁹ *excludes* individually identifiable health information in "Employment records held by a covered entity in its role as an employer."¹⁴⁰ When the definition of protected health information was amended to include this exclusion, HHS sought public comment regarding the change.¹⁴¹ In response to public concern, HHS stated that "a covered entity must remain cognizant of its dual roles as an employer and as a health care provider...Individually identifiable health information created, received, or maintained by a

¹³⁵ *Id.*

¹³⁶ *Id.*; The NBA CBA identifies Drugs of Abuse as amphetamines and their analogs (including but not limited to methamphetamine), cocaine, LSD, opiates, and Phencyclidine (PCP). NBA CBA, Exhibit 1-2, Prohibited Substances, available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20I-2.pdf>.

¹³⁷ The NBA CBA's Anti-Drug Program defines a SPED as "any of the steroids, performance-enhancing drugs and masking agents listed in Exhibit 1-2 to this Agreement." NBA CBA, Article XXXIII, Section 1(o). Exhibit 1-2 identifies over 80 drugs that constitute SPEDs (steroids, performance enhancing drugs, or making agents) and, moreover, over 20 banned diuretics. NBA CBA, Exhibit 1-2, Prohibited Substances, available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20I-2.pdf>.

¹³⁸ NBA CBA, Article XXXIII, Section 3(a).

¹³⁹ *See supra*, Part II.

¹⁴⁰ 45 CFR 160.103, Protected Health Information (2)(iii).

¹⁴¹ *See* Federal Register, Volume 67, Number 157 at 53192 ("The Department [HHS] is sensitive to the concerns of commenters that a covered entity not abuse its access to an employee's individually identifiable health information which it has created or maintains in its health care, not its employer, capacity...").

covered entity in its health care capacity is protected health information.”¹⁴² Thus, the employment record exception applies only to make clear that individually identifiable health information within the employee record that was submitted by the patient-employee does not make that employee record become protected health information.

HHS has declined to define what constitutes an employment record.¹⁴³ Thus, covered entities must decide, when dealing with an employee, whether the particular transaction was conducted as a health care provider or as an employer. When the covered entity acts as a health care provider, medical records are covered by HIPAA.¹⁴⁴ Conversely, when a covered entity acts solely as an employer – when “the entity is making hiring, firing, promotion, or payment decisions when it receives the employee’s health information” – the information is part of the employment record and thus is afforded no HIPAA protection.¹⁴⁵ Drug test results provide an effective example because of their applicability to professional sports teams. HIPAA protection results “[w]hen the entity administers the drug screening test to the employee...”¹⁴⁶ HIPAA protection does not result “[w]hen, pursuant to the employee’s authorization, the test results are provided to the entity and placed into the employee’s employment record.”¹⁴⁷

In sum, if employers (here, professional sports teams and leagues) obtain health information for employment purposes, that health information is not subject to HIPAA Privacy Rule protection. However, if such employers create personal health information (generally as a

¹⁴²*Id.* (HHS further stated: “It does not matter if the individual is a member of the covered entity’s workforce or not. The [employer]...in most cases will need the employee’s authorization to access or use the medical information for employment purpose.”).

¹⁴³ “The Department does not believe that it has sufficient information to provide a complete definition of employment record...but does clarify that...files or records related to occupational injury, disability insurance eligibility, sick leave requests and justifications, drug screening results, workplace medical surveillance, and fitness-for-duty tests of employees, *may* be part of the employment records maintained by the covered entity in its role as an employer. (emphasis added).” Federal Register (Vol. 67, Number 157) at 53192.

¹⁴⁴ Presentation by Luci L. Nelson, Confidentiality Requirements of Employment Laws, Ogletree Deakins Law Firm, available at <http://www.gha.org/telnet/2472.pdf>.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.*

hybrid covered entity), HIPAA Privacy Rule protections do result. If employers (i.e., professional sports teams) find it necessary to use the personal health information of their athletes for any reason, they should make it their practice to obtain written authorizations from the athletes. Authorizations will put into place clear parameters as to what health information can be revealed and to whom.

Part V: Athlete Injuries and Performance Enhancing Drug Violations

A. The Health Care Provider-Patient Relationship and Confidentiality

The American Medical Association (AMA) declares that a “physician shall respect the rights of patients and shall safeguard patient confidences within the constraints of the law.”¹⁴⁸ Confidentiality, in the physician-patient context, is distinct from privacy. Confidentiality arises only when there is a special relationship between parties, such as exists between a physician and his patient.¹⁴⁹ Once such a relationship exists, “[p]ersonal information obtained in the course of that relationship should not be revealed to others unless the patient is first made aware and consents to its disclosure.”¹⁵⁰ When a special relationship, particularly the physician-patient relationship, is established, “only those with information derived from the special confidential relationship have a duty to maintain...confidentiality...confidentiality protects information privacy interest by requiring recipients of information deemed confidential to restrict access to that information.”¹⁵¹ Ultimately, patients come to trust their physicians.¹⁵²

¹⁴⁸ American Medical Association, Principles of Medical Ethics, Section IV, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?>

¹⁴⁹ See, e.g., Lawrence O. Gostin et al., Privacy and Security of Health Information in the Emerging Health Care System, 5 Health Matrix 1, 3 (1995) (“Confidentiality is a form of informational privacy characterized by a special relationship”).

¹⁵⁰ *Id.*

¹⁵¹ Ilene N. Moore et al., Confidentiality and Privacy in Health Care From the Patient’s Perspective: Does HIPAA Help?, 17 Health Matrix 215, 221 (2007).

¹⁵² “Trust is the core, defining characteristic of the doctor-patient relationship—the ‘gule’ that holds the relationship together and makes it possible.” Mark Hall, Law, Medicine, and Trust, 55 Stan. L. Rev. 463, 470-71 (2002). While

Team physicians and trainers have conflicting duties to both the athletes they treat and the team entity that employs them. First, team health care providers must maintain their professional duty to respect the confidences of their patients. A team physician's unauthorized release of an athlete's medical condition to a third party – for example, the media – violates a physician's ethical obligation to maintain his patient's confidentiality.¹⁵³ But, physicians and other health care providers employed by sports teams will often feel a sense of obligation to the team that employs them.¹⁵⁴

As far back as 1979 the public disclosure of athlete's health information was at issue. In *Chuy v. Philadelphia Eagles Football Club*, the plaintiff, Chuy, sought compensation from the Philadelphia Eagles when the team physician released his potentially career-ending medical condition to the press without his authorization.¹⁵⁵ Dr. Nixon, the Eagles' team physician, was quoted in a Philadelphia Bulletin article confirming that Chuy had suffered a shoulder injury, had developed a pulmonary embolism, and that it was "recommended that Chuy no longer participate in contact sports such as pro football."¹⁵⁶ While Chuy's claim was based in tort rather than

HIPAA focuses on the improper disclosure of personal health information, betrayal of trust is nevertheless a serious harm that results from a healthcare provider's breach of his patients' confidence. "[T]he physician is bound,...upon his own professional honor and the ethics of his high profession, to keep secret [his patient's medical information]...A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for damages naturally flowing from such wrong." (emphasis added) *Simonsen v. Swenson*, 117 N.W. 831, 832 (Neb. 1920).

¹⁵³See Matthew J. Mitten, *Emerging Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 St. John's L. Rev. 5 (2002); *Biddle v. Warren*, 715, N.E.2d 518 (Ohio 1999).

¹⁵⁴See, e.g., Laura Miller, 8 Biggest Challenges Facing Team Physicians for Professional Athletes, *Becker's Orthopedic, Spine and Pain Management Review*, April 8, 2011, <http://www.beckersorthopedicandspine.com/sports-medicine/item/3646-8-biggest-challenges-facing-team-physicians-for-professional-athletes>; see also Steve Chen and Enrico Esposito, *Practical and Critical Legal Concerns for Sports Physicians and Athletic Trainers*, *The Sports Journal*, <http://www.thesportjournal.org/article/practical-and-critical-legal-concerns-sport-physicians-and-athletic-trainers> ("When a...professional sports team hires the team physicians, a duty is created not only between the physicians and the athletes, but also to the hiring entity. Although the well-being of athletes should be the most important concern of physicians and trainers who render medical service, it is not always easy for physicians and trainers to make their decisions based on this principle due to the immense pressure from the coaches, management, the press, and even the motivated athletes themselves.").

¹⁵⁵*Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (1979).

¹⁵⁶*Id.* at 1284.

federal health privacy law,¹⁵⁷ which did not exist in 1979, his claim nevertheless illustrates that physicians (as well as other health care providers, such as athletic trainers) owe a duty of confidentiality to their patients, even in the professional sports setting. This case further shows that it is best practice for team health care providers to obtain an athlete's authorization before disclosing any medical information to anyone, including the employing team itself. That is, team health care providers should not rely solely on league documents, such as the CBA or UPC, but should rather obtain individual authorizations to release medical information, thereby protecting their ethical obligation to maintain patient confidences.

B. Disclosures of Athletes' Injuries

Public disclosure of athletes' injuries is generally not a very structured event. Specifically, teams freely speak in the public forum about their player's injuries, often including how long an injury is likely to prevent a player from engaging in sports-related activities and steps undertaken to rehabilitate or correct the injury. In fact, the National Football League (NFL) requires teams to disclose all player injuries to the league, other teams, and the media.¹⁵⁸ Take for example, the 2011 MLB World Series between the St. Louis Cardinals and the Texas

¹⁵⁷ Breaches of physician-patient confidentiality have traditionally been governed by state law, as in *Chuy*. State courts have developed common law rules to protect the confidences revealed by the patient to the physician. For example, in *Humphers v. First Interstate Bank of Oregon*, 298 Or. 706 (1985), the Supreme Court of Oregon found a cognizable breach of confidentiality claim where a physician helped a woman, who was not his patient, to reveal the identity of her mother, who gave the woman up for adoption at birth and was the physician's patient. See, also, *Berger v. Sonneland*, 101 Wash.App. 141 (2000) (allowing state law action for unauthorized disclosure of patient's confidential information); *Herman v. Kratche*, 2006 WL 3240680 (Ohio Ct. App.) (2006) (tort exists for the unauthorized disclosure to a third party of nonpublic medical information that a physician learns as a result of the physician-patient relationship).

¹⁵⁸ See, Mike Reiss, NFL: How Hurt Is He? The Lists Don't Tell, *New York Times*, Nov. 8, 2006, <http://www.nytimes.com/2006/11/09/sports/09iht-nfl.3461396.html>; Scott Boeck and Skip Wood, Analysis: Injury Report is Game Within the Game, *USA Today*, Nov. 25, 2007, http://www.usatoday.com/sports/football/nfl/2007-11-22-injury-report-cover_N.htm.

Rangers where news reports abound about player injuries with most speculating whether those injured players would be able to continue play in the World Series.¹⁵⁹

In light of professional sports leagues' CBAs and UPCs, teams and leagues are essentially free to disclose any player health information that they see fit.¹⁶⁰ If the leagues employ an authorization, such as MLB's "Authorization for the Use and/or Disclosure of Major League Player Health Information,"¹⁶¹ HIPAA has been complied with. Because individuals, including professional athletes, can authorize any use or disclosure of their personal health information as they see fit, an authorization allows teams and leagues to disclose injuries while not violating players' privacy rights. However, authorizations of this sort should be as specific as possible, clearly stating which disclosures the player has agreed to and under what circumstances those disclosures can be made. That is, teams and leagues should not employ blanket authorizations.

C. Disclosure of Performance Enhancing Drug Testing Violations

In contrast to sports injuries, the leagues, rather than individual teams, disclose performance-enhancing drug violations.¹⁶² Consequently, a team is unable to publicly comment about its player's drug testing violations unless the individual player authorizes it to so comment. It becomes clear from the privacy-protective policies of the anti-drug programs of MLB and the

¹⁵⁹See, e.g., Richard Durrett, Nelson Cruz, Mike Napoli in Lineup, ESPNDallas.com, Oct. 28, 2011, http://espn.go.com/dallas/mlb/story/_/id/7161443/2011-world-series-texas-rangers-nelson-cruz-mike-napoli-lineup-injuries; R.B. Fallstrom, Cards' Holliday to Miss World Series Game 7, Yahoo! Sports, Oct. 28, 2011, <http://sports.yahoo.com/mlb/news?slug=ap-worldseries-cardinals-holliday>.

¹⁶⁰See, *supra*, Part IV for a discussion of the provisions of the CBAs and UPCs of MLB and the NBA that permit disclosure of injured player health information.

¹⁶¹See, *supra*, Part IV, Section B.

¹⁶²See Major League Baseball's Joint Drug Prevention and Treatment Program, Section 7(A)(2) ("the only public comment from the Club or the Commissioner's Office shall be that the Player was suspended for a specified number of days for a violation of this Program..."); NBA CBA, Article XXXIII, Section 3(a) ("If a player is suspended or disqualified for conduct involving a Drug of Abuse or marijuana, the NBA shall not publicly disclose the particular Prohibited Substance involved, absent the agreement of the Players Association or the prior disclosure of such information by the player (or by a person authorized by the player to disclose such information). If a player is suspended or disqualified for conduct involving a SPED, the particular SPED shall be publicly disclosed along with the announcement of the applicable penalty.").

NBA that the professional sports leagues value player health privacy more when that privacy is related to performance-enhancing drugs than when it is related to injury.

As with injuries, if the leagues employ an authorization, whereby players can, in written form, waive their rights to health privacy, HIPAA has been complied with. Moreover, as with injuries, authorizations should be as specific as possible, specifically enumerating what information can be released and to whom. Authorizations are a major issue of health privacy in sports, however. Essentially, should professional sports leagues and teams be able to require players to sign authorizations, often blanket authorizations, thereby waiving all of their federal health privacy rights?

Part VI: Recommendations

A. Compliance: All Professional Sports Organizations Should Adopt a Uniform Authorization Template

While this comment argues that professional sports teams and leagues *should* be HIPAA covered entities,¹⁶³ there is nevertheless uncertainty regarding whether they are such entities.¹⁶⁴ As a result of this uncertainty, professional sports teams (and their respective leagues) should employ authorizations for the release of personal health information. These authorizations, moreover, should comply with HIPAA's authorization requirements.¹⁶⁵

By obtaining comprehensive authorizations from every athlete that specifically enumerate the information permitted to be disclosed, the parties who may disclose, the parties to whom disclosure may be made, and the purposes for which disclosure may be made, professional

¹⁶³See, *supra*, Part III.

¹⁶⁴See, *supra*, note 59 and accompanying text. HHS has decline to affirmatively state one way or the other whether professional sports teams are HIPAA covered entities.

¹⁶⁵As defined in 45 CFR 164.508. Authorizations for the use and/or disclosure of personal health information must contain the following elements: (1) description of the information to be used or disclosed that specifically identifies the information; (2) name or specific identification of the person(s) authorized to make the use or disclosure; (3) name or specific identification of the person(s) to whom disclosure can be made; (4) description of the purpose of the requested use or disclosure; (5) expiration date or expiration event that relates to the individual or the purpose of the use or disclosure; (6) signature of the individual and date. 45 CFR 164.508(c)(1)(i)-(vi).

sports teams will be in compliance with HIPAA, including the HIPAA Privacy Rule.¹⁶⁶

However, rather than forcing professional athletes to agree to authorizations, presumably through CBAs and UPCs, teams should provide their players with a meaningful opportunity to limit authorizations for the disclosure of personal health information. That is, teams should not merely rely on blanket authorizations.¹⁶⁷ For example, the circumstances under which individuals agreed to and sign blanket authorizations can be coercive.¹⁶⁸ A coercive authorization would likely make the authorization unenforceable.¹⁶⁹ Moreover, individuals agreeing to and signing authorizations may not completely understand what they are signing and exactly what information may be released.¹⁷⁰ While blanket authorizations are appealing to teams from a convenience perspective, “[a] one-time blanket authorization signed by a patient that permits the release of ‘any and all’ information is not permissible under HIPAA because it does not meet the requirements that the authorization be described in a specific and meaningful fashion.”¹⁷¹

A uniform authorization template should, at the player’s request, limit the nature of the information that is subject to public disclosure. Public disclosures could thus be limited to on-the-field injuries and off-the-field physical injuries¹⁷² that affect a player’s performance. For example, Major League Baseball’s New York Yankees would be free to publicly disclose Alex

¹⁶⁶*Id.*

¹⁶⁷ “Blanket authorizations have traditionally been used by covered entities upon a patient’s first visit to a facility or at the onset of each visit...Blanket authorizations must be given special consideration in light of the specific authorization requirements [*see, supra*, note 165]...that the HIPAA privacy rule has imposed.” Laurinda B. Harman, *Ethical Challenges in the Management of Health Information* 59 (2nd ed. 2006).

¹⁶⁸*Id.*

¹⁶⁹ *Id.* “A one-time blanket authorization signed by a patient that permits the release of ‘any and all’ information is not permissible under HIPAA because it does not meet the requirement that the authorization be described in a specific and meaningful fashion.”

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷² As opposed to mental health issues, which should not be disclosed unless they completely prevent a player from engaging in sports-related activities. *See, e.g.*, Greene on DL for 2nd Time With Anxiety, ESPN.com, June 29, 2009, <http://sports.espn.go.com/mlb/news/story?id=4295644> (outlining MLB’s Khalil Greene’s consistent issues with anxiety).

Rodriguez's 2011 knee surgery¹⁷³ but the Kansas City Royals would not, without obtaining additional authorization, be able to publicly reveal Zack Greinke's battle with depression and social anxiety.¹⁷⁴ The point is this: there are certain off-the-field injuries, or more properly medical ailments, that are either irrelevant to athletic performance or unimportant in the short run. For example, most would agree that Alopecia Areata, which is "a condition that causes round patches of hair loss, and can lead to total hair loss,"¹⁷⁵ is an off-the-field medical ailment that is irrelevant to the athletic performance of any professional athlete. Likewise, most would agree that Huntington's disease, which is a disease that, over time, can cause the brain cells to degenerate,¹⁷⁶ is unimportant in the short run. Although it could be argued that young players trying to break into the professional leagues would sell their soul for any chance they could get to play professionally, including disclosing anything the team wanted them to, players in the middle or twilight of their careers are unlikely to want such personal medical information floating throughout the public forum.

B. Amelioration: Professional Athletes Should Be Aware of Their Federal Health Privacy Rights, Thus Enabling Those Rights to Be Asserted in CBA Negotiations

If a HIPAA covered entity, or an individual agent of a covered entity, uses or discloses protected health information for any unauthorized purpose – for example, to “snoop” on a

¹⁷³ Ian Begley and Mike Mazzeo, Alex Rodriguez to Have Knee Surgery, ESPN.com, July 11, 2011, <http://sports.espn.go.com/new-york/mlb/news/story?id=6754883>.

¹⁷⁴ John Donovan, 'A Long Way to Go' Greinke Battles Depression in Bid for K.C. Rotation, SI.com, Mar. 15, 2007, http://sportsillustrated.cnn.com/2007/writers/john_donovan/03/15/royals.greinke/index.html; It could be argued that mental health issues, such as depression, or, more likely, social anxiety, factor into how professional athletes are able to handle high-pressure situations, such as the playoffs or playing for a large-market, media saturated team like the New York Yankees or the Boston Red Sox. I do not dispute that an athlete, for example, Zack Greinke, should inform his team of such mental health issues before commencing contract negotiations. Teams should be able to count on their players to be able to handle stressful game situations, such as starting a World Series game. But, these intimate health statuses need not be publicly disclosed. We, spectators and fans, have no legitimate interest in knowing or need to know of such player health matters.

¹⁷⁵ Alopecia Areata, A.D.A.M. Medical Encyclopedia, PubMed Health, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002421/>.

¹⁷⁶ Huntington's Disease, A.D.A.M. Medical Encyclopedia, PubMed Health, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001775/>.

celebrity patient or “break” the news of an NFL star’s season-ending injury to the local sportswriter – HHS may impose penalties.¹⁷⁷ The HIPAA penalty framework divides penalties into two levels: (1) the general penalty and (2) the specific penalty. Failure to comply with HIPAA regulations can result in civil monetary penalties under the general penalty and, more harshly, both financial and criminal penalties under the specific penalty.¹⁷⁸

The general penalty distinguishes between a covered entity violator’s mental state in determining the penalty severity. These employee mental states include, in progressive order of severity: (1) the violator did not know (and by exercising reasonable diligence would not have known) of the violation; (2) the violation was due to reasonable cause; (3) the violation was due to willful neglect; (4) the violation was due to willful neglect and was not corrected.¹⁷⁹ The civil penalty amounts begin at \$100 and can increase to \$1.5 million.¹⁸⁰ Although HHS has wide discretion in imposing the general penalty for Privacy Rule violations, “[a] violation of a provision...due to willful neglect is a violation for which the Secretary [of HHS] is required to impose a penalty.”¹⁸¹

The specific penalty, likewise, distinguishes between a violator’s mental state in determining the penalty severity. Any person who knowingly violates HIPAA by “obtain[ing] individually identifiable health information relating to an individual” or by “disclos[ing] individually identifiable health information to another person shall be punished.”¹⁸² A knowing violation of HIPAA can result in a financial penalty of up to \$50,000 and a prison sentence of up to one year. A knowing violation under false pretenses can result in a financial penalty of up to

¹⁷⁷ 42 U.S.C. § 1320d-5 (1996).

¹⁷⁸ *Id.*

¹⁷⁹ 42 U.S.C. § 1320d-5(a)(1)(A)-(C) (1996).

¹⁸⁰ 42 U.S.C. § 1320d-5(a)(3)(A)-(D).

¹⁸¹ 42 U.S.C. § 1320d-5(c)(1) (1996).

¹⁸² 42 U.S.C. § 1320d-6(a)(1)-(3).

\$100,000 and a prison sentence of up to five years. Lastly, a knowing violation with the intent to sell, transfer, or use individually identifiable health information for commercial advantage, person gain, or malicious harm can result in a financial penalty of up to \$250,000 and a prison sentence of up to 10 years.¹⁸³ As is evident from the potential severity of the financial penalty, coupled with the possibility of prison time, the specific penalty is much harsher than the general penalty.

While this substantial statutory framework is in place, permitting HHS to take action against violating entities by issuing penalties, HIPAA does not include a private right of action.¹⁸⁴ Essentially, a person substantially affected by a medical privacy “leak” is without individual rights to sue. The only action the aggrieved individual can take is to file a complaint with HHS¹⁸⁵ and hope that HHS will then decide to act on the complaint pursuant to its enforcement powers.¹⁸⁶ Consequently, HIPAA, specifically the Privacy Rule, does not have much force from an individual perspective. Yet this does not mean that professional athletes should not enjoy the protections entitled to them by the HIPAA statute. Rather, professional athletes should employ their federal health privacy rights as an ameliorative measure.

¹⁸³ 42 U.S.C. § 1320d-6(b)(1)-(3).

¹⁸⁴ HIPAA does not provide for individual causes of action. See e.g., *Acara v. Banks*, 470 F.3d 569 (5th Cir. CA, 2006) (upholding a district court decision that HIPAA does not afford a private right of action). However, HHS does accept Privacy Rule violation complaints from anyone. See Health Information Privacy Complaint Form, available at <http://www.hhs.gov/ocr/privacy/hipaa/complaints/hipcomplaintform.pdf>. Some have argued against this existing framework and instead for an individual cause of action. A private right of action would provide individualized rights of action for aggrieved patients. See, e.g., Joshua D.W. Collins, *Toothless HIPAA: Searching for a Private Right of Action to Remedy Privacy Rule Violations*, 60 VAND. L. REV. 199 (2007) and Sharona Hoffman and Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. Rev. 331, 354-59 (2007).

¹⁸⁵ See 45 C.F.R. § 160.306 (2006); Health Information Privacy Complaint Form, available at <http://www.hhs.gov/ocr/privacy/hipaa/complaints/hipcomplaintform.pdf>.

¹⁸⁶ “Although the [HIPAA] statute allows the HHS Secretary to impose civil and criminal sanctions on those who blatantly ignore the Privacy Rule regulations, this type of enforcement only deters future violations – it does nothing to compensate those patients who have suffered real and direct harm as a result of such unauthorized disclosures.” Joshua D.W. Collins, *Toothless HIPAA: Searching for a Private Right of Action to Remedy Privacy Rule Violations*, 60 VAND. L. REV. 199, 232 (2007).

If professional athletes are cognizant of their federal health privacy rights under HIPAA, those rights could serve as a valuable bargaining chip for athletes that could lead to team and league concessions. Essentially, players, through their respective player's association, could assert federal health privacy rights as a means to gain valuable concessions on other important issues. When engaging in CBA negotiations, for example, players could use HIPAA to extract better terms, whether a higher minimum salary, a pension system for retired players, or, in the case of the National Football League, heightened league and ownership responsibilities in combating and controlling dangerous game-induced head trauma, namely concussions.

Concussions in the National Football League (NFL) have become a problem of exceeding concern.¹⁸⁷ Since July 2011 more than a dozen lawsuits have been filed “on behalf of more than 120 retired players and their wives” alleging that “the N.F.L. and in some cases helmet manufacturers deliberately concealed information about the neurological effects of repeated hits to the head.”¹⁸⁸ While these lawsuits will undoubtedly face many roadblocks, and may ultimately result in victory for the NFL, the NFL has begun to respond to criticism of its handling of head trauma. For example, the NFL, in 2010, began alerting current players about the long-term effects of concussions through posters and documents.¹⁸⁹ More importantly, in

¹⁸⁷ See Alan Schwarz, N.F.L. Scolded Over Injuries to Its Players, New York Times, Oct. 28, 2009, http://www.nytimes.com/2009/10/29/sports/football/29hearing.html?_r=1&scp=5&sq=concussions%20judiciary%20committee%20october%202009&st=cse (“With evidence mounting of a link between playing professional football and cognitive impairment in later life, and news reports of poor medical treatment for some former players with dementia and other signs of mental decline, the [House Judiciary] committee repeatedly challenged the commissioner, Roger Goodell, to defend the league’s policies and research.”); Sam Borden, N.F.L. Plans Broader Concussion Research, New York Times, Oct. 3, 2011, <http://www.nytimes.com/2011/10/04/sports/football/nfl-plans-more-scientific-study-of-concussions.html>; Alan Schwarz, N.F.L. Acknowledges Long-Term Concussion Effects, New York Times, Dec. 20, 2009, <http://www.nytimes.com/2009/12/21/sports/football/21concussions.html?pagewanted=all>.

¹⁸⁸ Ken Belson, For N.F.L., Concussion Suits May Be Test for Sport Itself, New York Times, Dec. 29, 2011, <http://www.nytimes.com/2011/12/30/sports/football/nfl-faces-retired-players-in-a-high-stakes-legal-battle.html?pagewanted=all>.

¹⁸⁹ *Id.* (“One poster created by the league used words like ‘depression’ and ‘early onset of dementia’. Another document warned players that repeated concussions ‘can change you life and your family’s life forever,’ a nod to retired players’ wives who have spoken out on the issue.”).

December 2011 the NFL began stationing certified athletic trainers at all games to monitor players for concussion symptoms.¹⁹⁰ Despite the widespread public discussion about concussions in the NFL and the NFL's new precautions, head trauma is an inevitable part of football. In fact, some players have revealed that they are still willing to hide concussions from their physicians, athletic trainers, coaches and teams, despite their increased knowledge of the risks concussions pose.¹⁹¹

Because of the long-term risks associated with head trauma, players clearly want better head injury protection, including protection from their own judgment (or lack thereof).¹⁹² If NFL players, through the NFL Players Association, asserted their federal health privacy rights under HIPAA, they could conceivably use those rights to extract better CBA terms related to the NFL's required response to and prevention of football-related head trauma, including better in-game care, better access to long-term health care, and even increased penalties for players who engage in play prohibited by NFL rules and regulations.¹⁹³

C. MLB As A Useful Model For All Professional Leagues

¹⁹⁰ Jason La Confora, NFL Stationing Trainers in Stadiums to Monitor Concussions, NFL Network, Dec. 20, 2011, <http://www.nfl.com/news/story/09000d5d82540bae/article/nfl-stationing-trainers-in-stadiums-to-monitor-concussions>.

¹⁹¹ Howard Fendrich, Some NFL Players Still Willing to Hide Concussions, USA Today, Dec. 26, 2011, <http://www.usatoday.com/sports/football/nfl/story/2011-12-26/concussions-players-hide/52231024/1> ("In a series of interviews about head injuries...23 of 44 NFL players – slightly more than half – said they would try to conceal a possible concussion rather than pull themselves out of a game. Some have acknowledged they already have. Players also said they should be better protected from their own instincts: More than two-thirds of the group...wants independent neurologists on sidelines during games.").

¹⁹² *Id.*

¹⁹³ For example, the NFL prohibits unnecessary roughness, including use of the helmet in tackling and blocking. Under NFL Rule 12, Player Conduct, Article 8, Section (g), it is unnecessary roughness "if a player uses any part of his helmet (including the top/crown and forehead/"hairline" parts) or facemask to butt, spear, or ram an opponent violently or unnecessarily." Further, Article 13, Section (3) requires that "In covering the passer position, Referees will be particularly alert to fouls in which defenders impermissibly use the helmet and/or facemask to hit the passer, or use hands, arms, or other parts of the body to hit the passer forcibly in the head or neck area...This rule does not prohibit incidental contact by the mask or non-crown parts of the helmet in the course of a conventional tackle on a passer." NFL Rulebook, *available at* <http://www.nfl.com/rulebook>.

Major League Baseball has, arguably, the most extensive policies currently in place governing the disclosure of player injuries and player performance enhancing drug violations.¹⁹⁴ MLB goes as far as to include, in the MLB CBA, an authorization that regulates the use and disclosure of major league player health information.¹⁹⁵ The extensive policies employed by Major League Baseball, as negotiated by the MLB Player's Association in the MLB CBA, and the inclusion of an authorization make MLB a useful and practical model for all professional sports leagues in the United States to follow.

There is, however, one major problem with MLB's model: it requires, under the CBA, all players to execute the Authorization for the Use and/or Disclosure of Major League Player Health Information.¹⁹⁶ But, MLB's policies do limit the nature of these required authorizations.¹⁹⁷ Moreover, Major League Baseball's Joint Drug Prevention and Treatment Program places strict regulations on player's confidentiality when in the realm of testing for performance enhancing drug use.¹⁹⁸

Professional sports leagues should implement policies that closely mirror what MLB has done. First, leagues should clearly and specifically define what health information each player is required to disclose to his respective team and what that information will be used for once it is within the team's purview. Teams should use a player's personal health information only to make sports-related personnel decisions, and, when necessary, to let the public know of a player's status as it relates to his ability to engage in sports-related activity. This would mean that only certain organizational members should have access to player health information. While

¹⁹⁴ See, *supra*, Part IV.

¹⁹⁵ See, *supra*, note 105.

¹⁹⁶ MLB CBA, Article XIII(G)(1), *available at*, http://mlb.mlb.com/pa/pdf/cba_english.pdf.

¹⁹⁷ See, *supra*, notes 106-110 and accompanying text.

¹⁹⁸ Major League Baseball's Joint Drug Prevention and Treatment Program, Section 6, *available at* <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

this list of individuals should generally be limited to management, coaches, team physician, and team athletic trainers, situations could arise where this list could be expanded, for example, when another team is taking steps necessary to acquire the particular player (i.e., in a trade).

Second, leagues should implement a standard authorization.¹⁹⁹ This authorization should delineate, with specificity, what health information the team is permitted to disclose and to whom. Ideally, only health information that is related to an athlete's ability to engage in sports-related activity, including on-the-field injuries, will be publicly disclosed. While the league is undoubtedly permitted to require players to agree to an authorization for the release of certain personal health information as a condition of the Uniform Player Contract, as MLB does – that is, in order to play in the league – it would be best practice for the league not to do so. The UPC in any particular league should not require a player to waive his federal health privacy rights. It can be argued that professional athletes generally receive significant annual salaries, salaries that hinge upon management knowing the health risks the organization undertakes when players are signed to such large contracts. Professional sports teams should take all necessary precautions when signing a player to a large contract, including ensuring comprehensive knowledge of that player's medical history. But, ensuring that a player truthfully reveals his medical history in conjunction with signing a UPC is entirely different than requiring a player to sign an authorization that permits the team to use and disclose his past and future medical conditions.

Third, leagues should ensure that performance enhancing drug testing is achieved with the utmost level of confidentiality. Just as MLB requires, a drug testing program should prevent public disclosure of “information about an individual Player's test results or testing history, Initial Evaluation, diagnosis, Treatment Program..., prognosis or compliance with a Treatment

¹⁹⁹ See, *supra*, Part IV(C) for a discussion of the authorization employed by Major League Baseball.

Program...²⁰⁰ The only public disclosure that should be permitted, when a violation occurs, is a discrete statement that informs of the players suspension and that the suspension was for a violation of the league's drug testing program.

D. Conclusion

Sports injuries and performance-enhancing drug testing are not new phenomena; they will continue for as long as competitive professional sports are played. In February 2012 Milwaukee Brewers MVP and all-star Ryan Braun became MLB's first player to successfully appeal a positive drug test and thus avoid a 50-game suspension.²⁰¹ While MLB has adhered to its policy of confidentiality when a player tests positive for performance-enhancing drugs, uncertainty surrounds Braun's integrity, and moreover, his reputation.²⁰² Whatever one thinks of Braun's guilt or innocence, or why he tested positive,²⁰³ we must respect his health privacy.

Sports injuries are a major part of American professional sports organizations. Moreover, performance-enhancing drug testing has become an ever-increasing aspect of professional sports leagues, particularly in recent years. While injuries are inevitable, and performance-enhancing drug testing is necessary, professional sports teams and leagues must strive to respect their player's federal health privacy rights, as prescribed by HIPAA. We all expect a certain level of privacy in our everyday lives, including the privacy of our personal health information. Just

²⁰⁰ Major League Baseball's Joint Drug Prevention and Treatment Program, Section 6(A).

²⁰¹ Ken Belson, Braun Wins Appeal on Positive Drug Test and Avoids Suspension, New York Times, Feb. 23, 2012, <http://www.nytimes.com/2012/02/24/sports/baseball/braun-wins-appeal-on-positive-drug-test-and-will-avoid-suspension.html?scp=5&sq=ryan%20braun%20steroids&st=cse>.

²⁰² *Id.* Braun said that winning his appeal "is the first step in restoring [his] good name and reputation."

²⁰³ Wide speculation has surrounded the reason for Ryan Braun's positive performance-enhancing drug test. For example, some have speculated that he failed the test because of medication he was taking to treat an STD. However, Braun has denied this, saying that he has "[n]ever [had] a personal medical issue [and] never had an STD." He further stated: "[m]any of the of the erroneous stories reported by the networks continue to live on, which is disappointing." Aaron Gleeman, Ryan Braun Press Conference Notes and Quotes, NBC Sports HardballTalk, Feb. 24, 2012, <http://hardballtalk.nbcsports.com/2012/02/24/ryan-braun-press-conference-notes-and-quotes/>.

because professional athletes work in a segment of the entertainment industry does not mean they should not be afforded the same level of privacy that you and I expect.

Every American professional sports team and league should employ injury and performance-enhancing drug testing authorizations that comply with the HIPAA Privacy Rule. Doing so will ensure that athletes are cognizant of their federal health privacy rights and, moreover, that teams and league, as HIPAA covered entities, are in compliance with HIPAA regulations. It is vital, however, that any authorization employed must be neither coercive nor a blanket authorization that purports to permit the use and disclosure of *any* player health information, even information that does not relate to the player's ability to engage in sports-related activity. Authorizations that are coercive or over-encompassing would likely render them unenforceable and would thus subject the teams or league to HIPAA Privacy Rule violation liability. Although HIPAA compliance is certainly not ideal for either teams or leagues from an administrative or self-interest perspective, professional athlete's federal health privacy rights *must* be respected and teams and leagues must be held accountable for violations of those rights.