



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

Fordham Law | CLE

The Neuroscience and Law Center *presents*

The Diagnosis, Treatment, and Prevention of Concussion



Wednesday, October 17, 2018

8:30 a.m. - 5 p.m.

Skadden Conference Center

Lunchtime Keynote Speaker

DeMaurice F. Smith, Executive Director, National
Football League Players Association

CLE Course Materials
Part 4

Tracy A. Butler, M.D.

Research Assistant Professor of Neurology and Psychiatry,
New York University School of Medicine, Medical Director,
NYU Center for Brain Health

Dr. Butler is a board-certified neurologist with additional clinical subspecialty training in neuropsychiatry and epilepsy. Her clinical work consists of evaluation and treatment of neurologic signs and symptoms in patients with severe psychiatric disease.

Dr. Butler has published over 40 articles in peer-reviewed scientific journals on a wide range of topics in neuroscience and neurology. Her research uses neuroimaging and complementary methods to improve understanding of the brain and the basis of neuropsychiatric disorders such as traumatic brain injury, epilepsy and Alzheimer's disease as well as normal aging. A recent project funded by the Brain and Behavior Research Foundation aimed to determine whether some military veterans with psychiatric symptoms and a history of multiple concussions might have evidence of the neurodegenerative disease, Chronic Traumatic Encephalopathy. New research interests center on understudied risk factors for neurodegeneration that are more common in women than in men, including hormonal dysregulation and intimate partner violence with repeated brain injury.

She received a B.A. in philosophy from Amherst College and an M.D. from Columbia College of Physicians and Surgeons. She completed neurology residency at Columbia.

Art C. Cody, J.D.

Captain USN (Ret.); Deputy Director, Veterans Defense Program,
New York State Defenders Association

Captain Art Cody, USN (Retired) is Deputy Director of the Veterans Defense Program of the New York State Defenders Association. Art first served as a U.S. Army helicopter pilot, followed by similar service in the Navy Reserve. In total, his active and reserve military career spans thirty years and he is a veteran of multiple combat zone deployments. He served aboard *USS Enterprise* (CVN-65) in the initial response to the 9-11 attacks and was most recently deployed to Afghanistan (2011-2012) as the Director of the Rule of Law Section, US Embassy Kabul. As a civilian lawyer, he has represented criminal defendants for over twenty years and chaired the Capital Punishment Committee of the New York City Bar Association. He frequently presents nationally on the defense of veterans, provides counsel to lawyers for veterans, and recently served as lead counsel in a veteran capital clemency hearing. A graduate of West Point, Art has a Master's Degree from the University of Southern California and graduated *magna cum laude* from Notre Dame Law School where he was the Executive Editor of the *Notre Dame Law Review*. His military decorations include the Navy Bronze Star Medal, Meritorious Service Medal, Naval Aviator Badge, Army Aviator Badge and the German Armed Forces Parachutist Badge.

Kristen Dams-O'Connor, Ph.D.

Director, Brain Injury Research Center and Associate Professor,
Department of Rehabilitation, Icahn School of Medicine at Mount Sinai

Kristen Dams-O'Connor, Ph.D., completed a bachelor's Degree in Behavioral Neuroscience at Colgate University, a Ph.D. at the University at Albany, doctoral training at the Rusk Institute of Rehabilitation Medicine at New York University Medical Center and a postdoctoral fellowship in Clinical Neuropsychology at Mount Sinai Medical Center. Her work is focused on understanding and improving long-term outcomes after brain injury, and characterizing clinicopathological signatures of TBI. She leads the Late Effects of TBI (LETBI) brain donor program, and serves as Project Director of the New York Traumatic Brain Injury Model System. Her research is supported by federal grants

from the National Institutes of Health, National Institute for Disability Independent Living and Rehabilitation Research, Department of Defense, Centers for Disease Control, and Patient Reported Outcomes Research Institute. She has published over 70 peer-reviewed manuscripts and chapters on traumatic brain injury treatments and outcomes and has presented her research internationally.

Deborah W. Denno, Ph.D., J.D.

Arthur A. McGivney Professor of Law and Founding Director,
Neuroscience and Law Center, Fordham University School of Law

Deborah Denno is the Arthur A. McGivney Professor of Law and founding director of the Neuroscience and Law Center at Fordham University School of Law. She received her B.A. from the University of Virginia, her M.A. from the University of Toronto, her Ph.D. in sociology with a specialty in criminology from the University of Pennsylvania, and her J.D. from the University of Pennsylvania Law School, where she was the managing editor of the University of Pennsylvania Law Review. Prior to joining the Fordham Law faculty in 1991, Denno clerked for the Honorable Anthony J. Scirica of the Third Circuit Court of Appeals and worked as an associate at Simpson, Thacher and Bartlett. Denno's Neuroscience and Law Center provides evidence-based information to academics, lawyers, and the public about legally relevant advances in neuroscience with the goal of fostering legal scholarship and the use of neuroscience in legal circles. Also at Fordham Law, Denno teaches criminal law, criminal procedure, torts, and seminars on topics such as law and neuroscience as well as advanced criminal law and advanced criminal procedure. In 2016, the Fordham Student Bar Association named Denno Teacher of the Year. In 2007, the National Law Journal selected Denno as one of its Fifty Most Influential Women Lawyers in America. Seven of Denno's articles have been cited by the United States Supreme Court, and the Court has cited four of her articles in the last three years (2015-2017). Denno has published on a broad range of topics relating to criminal law, criminal procedure, social sciences and the law, and the death penalty, including the constitutionality of execution methods. Denno has also initiated cutting-edge examinations of criminal law defenses pertaining to insanity, rape law, gender differences, consciousness, biological and genetic links to crime, drug offenses, jury decision-making, and the impact of lead poisoning. Currently she is working on a book to be published by Oxford University Press analyzing all criminal cases during a two-decade period that have addressed neuroscience evidence. This same study is discussed in her recent article "Concocting Criminal Intent," 105 Georgetown Law Journal 323 (2017).

Steven R. Flanagan, M.D.

Howard A. Rusk Professor of Rehabilitation Medicine, Chair of the
Department of Rehabilitation Medicine, NYU Langone Health

Nationally and internationally recognized as one of the leading experts in the area of brain injury rehabilitation, Dr. Steven Flanagan joined NYU Langone Medical Center in 2008 as Professor and Chairman of Rehabilitation Medicine and Medical Director of Rusk Rehabilitation after serving as Vice Chairman of Rehabilitation Medicine at Mount Sinai School of Medicine from 2000-2008. While at Mount Sinai, Dr. Flanagan and his colleagues developed a seamless continuum of care for people with brain injury that was unique in New York State.

He serves on numerous medical advisory boards, including the India Head Injury Foundation, the Brain Trauma Foundation, and the Brain Injury Association of New York State. He is a peer reviewer for several scientific journals, has previously chaired the Central Nervous System Membership Council of the American Academy of Physical Medicine and Rehabilitation Medicine, and currently chairs the Medical Education Committee and sits on its Board of Governors. He authored numerous chapters and peer-reviewed publications and participated in both federally- and industry-sponsored research. He served as Panel Chair for the TBI/Stroke Group for the VA Merit Review from 2007-2013.

He received awards from several organizations, including the Brain Injury Association of New York State, Attending Physician of the Year Award from the Department of Nursing, and Teacher of the Year from the residents in Rehabilitation Medicine at Mount Sinai. He has been continually listed as one of America's Top Doctors by Castle Connolly since 2010.

Michael Flomenhaft, J.D.

Principal, The Flomenhaft Law Firm, PLLC

Michael Flomenhaft concentrates on representing victims of traumatic brain injury and severe chronic pain. He is a graduate of Boston University School of Law and the Trial Lawyers College. He has been a featured speaker to the New York State Bar Association on cases involving traumatic brain injury. In 2008, Columbia University Medical Center designated him director of neurolaw for its Program for Imaging and Cognitive Sciences. In 2009, he was invited to deliver grand rounds on advanced brain imaging applications for traumatic brain injury to the radiology residency program at Columbia University College of Physicians and Surgeons. In 2011, he was a featured speaker at the Second Circuit Conference on "The Legal Brain-scape: Neuroscience & the Law," where he spoke on imaging neuroscience and its assessment of chronic pain and delivered the paper "The Emerging Imaging Science of Chronic Pain: Objectifying the Subjective." In 2014, he chaired and was a key speaker at the all-day CLE at Fordham Law School "Neuroscience in the Courtroom." He has been featured on CUNY Science Television on neuroscience and law. In 2017, he was featured in a webinar by the American Bar Association as the attorney spokesman for its first ever CLE on neuroscience and law, "Neuroscience and the Law: Using Neuroscience in Criminal and Civil Cases." He is a member of the board of advisors to the Neuroscience and Law Center at Fordham Law School. In his trial work, he has pioneered the admission into evidence of various advanced brain imaging applications. These include diffusion tensor imaging (DTI), quantitative volumetric analysis of MRI, and functional MRI (fMRI).

Yelena Goldin, Ph.D.

Staff Neuropsychologist, JFK Johnson Rehabilitation Institute; Clinical Assistant Professor, Rutgers-Robert Wood Johnson Medical School

Dr. Yelena Goldin received her doctorate degree from Ferkauf Graduate School of Psychology at the Albert Einstein Medical School of Yeshiva University in 2009. She completed her fellowship training in clinical neuropsychology and rehabilitation at Mount Sinai School of Medicine.

Dr. Goldin is a clinical and research neuropsychologist in the Cognitive Rehabilitation Department of JFK Johnson Rehabilitation Institute. She is the principal investigator of JFK TBI Model System site specific project and the JFK TBI Model System Coordinator. She is an Assistant Clinical Professor at Rutgers-Robert Wood Johnson Medical School and Adjunct Assistant Professor at Ferkauf Graduate School of Psychology. Her areas of specialization are traumatic brain injury, stroke, aging, and gender issues. She has experience in comprehensive neuropsychological evaluations and cognitive rehabilitation. She has extensive experience in basic and clinical research in the area of traumatic brain injury. Her research has been presented at national and international conferences and earned several prestigious awards.

Dr. Goldin is involved with research training of residents and fellows at JFK Johnson Rehabilitation Institute. She is an active member of the American Congress of Rehabilitation Medicine, where she sits on the Program Committee, chairs the Poster Committee, is actively involved in the Cognitive Rehabilitation Task Force, and is the co-chair of the Brain Injury Special Interest Group task force on Girls and Women with Acquired Brain Injury. She is an advocate for individuals with traumatic brain injury.

Wayne A. Gordon, Ph.D., ABPP-CN

Jack Nash Professor, Icahn School of Medicine at Mount Sinai

Wayne A. Gordon, Ph.D., ABPP-CN, is the Jack Nash Professor of Rehabilitation Medicine at the Icahn School of Medicine at Mount Sinai. He is a board-certified neuropsychologist. His recent research is focused on cognitive rehabilitation, screening for traumatic brain injury (TBI), developing and testing the utility of behavioral interventions to improve the function of individuals with TBI, and examining the long-term secondary conditions associated with TBI. He has received numerous awards from both professional and consumer organizations, including the Jacobi Medallion for distinguished achievements and extraordinary service to the Mount Sinai Medical Center, the Gold Key Award from the American Congress of Rehabilitation Medicine, the William Fields Caveness Award from the Brain Injury Association of America, the Robert L. Moody Prize for Distinguished Initiatives in Brain Injury Research and Rehabilitation and the Champion of Hope award from the Brain Injury Association of New York State. He has published more than 175 articles and book chapters and has presented nationally and internationally on his research. Dr. Gordon has been the project director on many federally funded grants from the National Institutes of Health, Centers for Disease Control and Prevention and National Institute on Disability and Rehabilitation Research involving multiple research projects along with training and outreach. Dr. Gordon's current research portfolio is funded by grants from NIH, NIDRR, CDC and the Brain Injury Association of America.

Clare Huntington, J.D.

Associate Dean for Research, Joseph M. McLaughlin Professor of Law, Fordham University School of Law

Huntington is an expert in the fields of family law and poverty law. Her book *Failure to Flourish: How Law Undermines Family Relationships* (Oxford 2014) won an Honorable Mention for the Professional and Scholarly Excellence (PROSE) Award in Law and Legal Studies from the Association of American Publishers. Huntington has published widely in leading law journals, exploring the intersection of poverty and families and with a recent focus on non-marital families. Huntington serves as an associate reporter for the American Law Institute's Restatement of the Law, Children and the Law. Huntington's legal experience includes serving as an attorney advisor in the Justice Department's Office of Legal Counsel as well as clerking for Justice Harry A. Blackmun and Justice Stephen Breyer of the Supreme Court of the United States, Judge Merrick B. Garland of the United States Court of Appeals for the District of Columbia Circuit, and Judge Denise Cote of the United States District Court of the Southern District of New York. Prior to joining the Fordham faculty in 2011, Huntington was an associate professor at the University of Colorado Law School. Huntington earned her J.D. from Columbia Law School and her B.A. from Oberlin College.

Samuel Issacharoff, J.D.

Bonnie and Richard Reiss Professor of Constitutional Law, New York University School of Law

Samuel Issacharoff's wide-ranging research deals with issues in civil procedure (especially complex litigation and class actions), law and economics, constitutional law (particularly with regard to voting rights and electoral systems) and employment law. He is one of the pioneers in the law of the political process, where his *Law of Democracy* casebook (co-authored with Stanford's Pam Karlan and NYU's Rick Pildes) and dozens of articles have helped to create a vibrant new area of constitutional law. He is also a leading figure in the field of procedure, both in the academy and outside. He served as the reporter for the Principles of the Law of Aggregate Litigation of the American Law Institute.

Issacharoff is a 1983 graduate of Yale Law School. After clerking, he spent the early part of his career as a voting rights lawyer. He then began his teaching career at the University of Texas in 1989, where he held the Joseph D. Jamail Centennial Chair in Law. In 1999, he moved to Columbia Law School, where he was the Harold R. Medina Professor of Procedural Jurisprudence. His published articles appear in every leading law review, as well as in leading journals in other fields. Issacharoff is a fellow of the American Academy of Arts and Sciences.

Brad S. Karp, J.D.

[Chairman, Paul, Weiss, Rifkind, Wharton & Garrison LLP](#)

Brad Karp is one of the country's leading litigators and corporate advisers. Karp has successfully defended financial institutions and other companies in numerous "bet the company" litigations and regulatory matters. Prior to being named chairman of Paul, Weiss in 2008, Brad chaired the firm's Litigation Department.

Karp has received numerous industry recognitions over the years. Most recently, in January 2018, Karp was named The American Lawyer's "Litigator of the Year" and Best Lawyers' "Securities Lawyer of the Year." In 2017, Karp was selected as a "Litigation Trailblazer" by the National Law Journal and Best Lawyers' "Banking Lawyer of the Year." Karp has been repeatedly named by the National Association of Corporate Directors on its list of most influential people in the boardroom community and selected by Chambers as a "Star" in multiple practice areas.

Karp is active in the community, serving on more than 20 public interest and educational institution boards. Brad is the chairman of the Legal Action Center and a director/trustee of the Riverdale Country School, Mount Sinai Hospital, The Partnership for New York City (Executive Committee), the Harvard Law School Leadership Council, the Lincoln Center Business Advisory Council, the New York City Bar Association (Vice President), the American Constitution Society, Junior Achievement Global, Harvard Law School Center on the Legal Profession, Practicing Attorneys for Law Students Program, Inc., the Leadership Council of the Legal Services Corporation, the Harvard Law School Visiting Committee, the Leadership Council on Legal Diversity, American Friends of Hebrew University, the New York Bar Foundation, the Program Advisory Board of the Brennan Center for Justice, the Mark Messier Foundation, the Best Lawyers Advisory Board, the Economic Club of New York, the Federal Bar Council Second Circuit Inn of Court, the Union College President's Council, and the United States Supreme Court Historical Society.

Karp graduated from Harvard Law School in 1984 and has spent his entire professional career at Paul, Weiss.

James Kelly, M.A, M.D., F.A.A.N., F.A.N.A.

[Executive Director, Marcus Institute for Brain Health, University of Colorado Anschutz Medical Campus; Professor of Neurology, University of Colorado School of Medicine; Fellow, Military Service Initiative, George W. Bush Institute](#)

Dr. James Kelly accepted a Congressional appointment to the US Air Force Academy and later transferred to Western Michigan University where he obtained his B.A. in Psychology in 1974 and MA in Clinical Psychology in 1977. He served his neurology residency and behavioral neurology fellowship at the University of Colorado. He joined the faculty of the University of Colorado School of Medicine in 1989 where he studied brain-behavior relationships and started its first concussion treatment program.

Dr. Kelly is the Senior Fellow at the George W. Bush Institute's Military Service Initiative, serving as an advisor to the former President on traumatic brain injury (TBI) and psychological health conditions in our military veterans - the "Invisible Wounds" of our current conflicts in Iraq

and Afghanistan.

Prior to his current position, Dr. Kelly served as the founding Director of the National Intrepid Center of Excellence (NICoE), where he led the creation of an innovative interdisciplinary team of healthcare professionals who blended high-tech diagnosis and treatment with complementary and alternative medical interventions in a holistic, integrative approach to the care of US military personnel with the complex combination of TBI and psychological conditions such as post-traumatic stress, depression and anxiety. Dr. Kelly has co-authored numerous reports in civilian and concussion care, through funding provided by the U.S. Department of Defense, the Centers for Disease Control, and international sports organizations, including FIFA.

Regina McGlinchey, Ph.D.

[Director, VA RR&D TBI Research Center: TRACTS; Associate Director for Research Training: GRECC, VA Boston Healthcare System; Professor in Psychiatry, Harvard Medical School](#)

Regina McGlinchey is Professor of Psychiatry at Harvard Medical School, Supervisory Research Scientist and Associate Director for Research Training for the Geriatric Research, Education and Clinical Center at the VA Boston Healthcare System. Since receiving her Ph.D. in Experimental Psychology from Tufts University, she has been conducting clinical neuropsychological and neuroscience research on cognitive and neural changes associated with aging, stroke, alcoholism, and military-related brain and psychological trauma. Some of her most important contributions to science have come from her role as Principle Investigator and Director of the VA Rehabilitation Research and Development National Network Center for Traumatic Brain Injury called the "Translational Research Center for TBI and Stress Disorders" (TRACTS). Together with a team of researchers at TRACTS, she is developing a multimodal characterization of mild traumatic brain injury and military blast exposure, and demonstrating how associated stress disorders, including PTSD, depression, substance abuse, etc., influence how brain injury is expressed at the psychological, biological and neurobiological levels.

Barclay Morrison III, Ph.D.

[Professor of Biomedical Engineering, Vice Dean of Undergraduate Programs, School of Engineering & Applied Sciences, Columbia University](#)

Barclay Morrison, Ph.D., is a professor of Biomedical Engineering, director of the Neurotrauma and Repair Laboratory, and serves as Vice Dean of Undergraduate Programs for the Engineering School at Columbia University. His research focus is on the biomechanics of traumatic brain injury (TBI) at the tissue level to better prevent brain injuries, as well as on the biochemical, genomic, and molecular pathways responsible for post-traumatic cell dysfunction in the search for novel therapies to better treat brain injuries. He has published over 80 peer-reviewed scientific manuscripts, serves as a council member and vice president for the International Research Council on Biomechanics of Injury, is a board member of Football Research Inc., and is associate editor for the *Journal of Biomechanical Engineering* and the *Journal of Neurotrauma*. He received his BS in biomedical engineering from Johns Hopkins University, his Ph.D. in bioengineering from the University of Pennsylvania, and continued his academic training as a post-doctoral fellow in the Clinical Neurosciences department at Southampton University in the United Kingdom. Dr. Morrison is past recipient of the Rickard Skalak Best Paper Award given by the American Society for Mechanical Engineers for a publication in the *Journal of Biomechanical Engineering* and the John Paul Stapp Award for the best paper in the *Stapp Car Crash Journal*. More recently, he was the keynote speaker at the annual conference of the International Research Council on Biomechanics of Injury.

James M. Noble, M.D., M.S., C.P.H., F.A.A.N.

Assistant Professor of Neurology, Columbia University Irving Medical Center, Taub Institute for Research on Alzheimer's Disease and the Aging Brain, G.H. Sergievsky Center, Department of Neurology, Columbia University Medical Center

Dr. Noble specializes in behavioral neurology & neuropsychiatry with disorders ranging from concussion to dementia. Since 2011 he has led a concussion care and research initiative at Columbia University and is involved with the care of athletes at Columbia University, Fordham University, as well as the New York Giants. He works with the 22-school Big 10-Ivy Traumatic Brain Injury collaborative research program, the Brain Injury Association of New York State, and is a member of the New York State Athletic Commission Medical Advisory Board, which sets medical policy for combat sports in New York. His recent concussion-related publications include articles in the *American Journal of Sports Medicine*, *JAMA Neurology*, the *Journal of the American Academy of Orthopedic Surgeons*, and *Neurology: Clinical Practice*.

Kimani Paul-Emile, J.D., Ph.D.

Associate Professor of Law, Associate Director, Center on Race, Law & Justice, Faculty Co-Director, Stein Center for Law & Ethics, Fordham University School of Law

Paul-Emile is an associate professor of law, associate director and head of domestic programs and initiatives at Fordham Law School's Center on Race, Law & Justice and faculty co-director of the School's Stein Center for Law & Ethics. Paul-Emile specializes in the areas of law and biomedical ethics, antidiscrimination law, and health law. Her scholarship has been published widely in such journals as the *Virginia Law Review*, *Georgetown Law Journal*, *UCLA Law Review*, *George Washington Law Review*, and the *New England Journal of Medicine*. Paul-Emile's scholarship has appeared in or been covered by over 30 national and international news organizations and other outlets, including *The New York Times*, *National Public Radio*, *CBS News*, *MSNBC*, *CNN*, *Al Jazeera America*, and *The Guardian*.

In 2017, Paul-Emile was awarded a Making a Difference in Real World Bioethics Dilemmas Grant by the Greenwall Foundation. In 2013, the foundation selected her to receive a Faculty Scholar Award in Bioethics: an award intended to enable outstanding junior faculty members to conduct original research to help resolve important policy and clinical dilemmas at the intersection of ethics and the life sciences. In 2012, she was awarded a public health law research grant from the Robert Wood Johnson Foundation, the nation's leading philanthropy on health and health care.

Prior to pursuing her doctoral degree, Paul-Emile served as associate counsel at the Brennan Center for Justice at New York University School of Law, and practiced civil rights law at the Center for Constitutional Rights, where she was a National Association for Public Interest Law (now Equal Justice Works) Fellow and later the William Moses Kunstler Fellow for Racial Justice. She also served as senior faculty development consultant at the New York University Center for Teaching Excellence. Paul-Emile holds an A.B. in political science and in American civilization, with honors, from Brown University; a J.D. from Georgetown University Law Center; and a Ph.D. in American studies from New York University.

Amanda L. Sacks-Zimmerman, Ph.D., ABPP-CN

Assistant Professor of Neuropsychology, Department of Neurological Surgery, Weill Cornell Medicine

Amanda L. Sacks-Zimmerman, Ph.D., ABPP-CN, is a board-certified clinical neuropsychologist who has had extensive experience in assessing and treating neurological disorders with cognitive remediation as well as researching the cognitive impact of brain injury. She treats a variety of patients who suffer from cognitive and emotional difficulties that may be the result of epilepsy; radiation or chemotherapy; cardiopulmonary bypass procedures; surgery; cerebrovascular disease; stroke; silent infarcts; brain tumor resection; movement disorders such as multiple sclerosis, Parkinson's disease, and Huntington's disease; metabolic disorders; infectious processes such as encephalitis or Lyme disease; chemical toxin exposure; traumatic brain injury; and dementia diagnoses including mild cognitive impairment, Alzheimer's disease, multi-infarct dementia, and frontal temporal dementia.

Dr. Sacks-Zimmerman received her undergraduate degree in Psychology from The George Washington University and her Ph.D. in Clinical Psychology from Fairleigh Dickinson University. She completed two postdoctoral fellowships, one at University Behavioral Healthcare, UMDNJ, where her research examined cognitive correlates of emotion in dementia, and one at Mount Sinai Medical Center in New York in the Department of Rehabilitation Medicine, where she was trained in assessing, treating, and researching acquired and traumatic brain injury. During that fellowship she assisted in deriving manualized Cognitive Behavioral Treatment for individuals post-TBI for the purpose of researching the efficacy of this treatment. As a faculty member of the Department of Anesthesiology at NYU Langone Medical Center, Dr. Sacks-Zimmerman analyzed and presented data on post-operative cognitive dysfunction as well as derived research studies on cognitive issues post-operatively in cardiac patients and cognitive issues related to compliance in the wound care population. She is currently conducting research to examine the efficacy of cognitive remediation programs on post-operative cognitive difficulties in brain tumor patients.

Christopher A. Seeger, J.D.

Founding Partner, Seeger Weiss LLP

Chris Seeger is a founding partner of Seeger Weiss and one of the nation's leading attorneys in the areas of complex and mass tort actions. He has earned leadership appointments from state and federal courts throughout the U.S. in many noteworthy multi-district litigations, including pharmaceutical actions involving Vioxx, Zyprexa, Gadolinium, and DePuy ASR, among others. In 2012, the U.S. District Court for the Eastern District of Pennsylvania appointed Chris to lead the multi-district litigation against the National Football League arising out of concussion-related injuries sustained by thousands of former NFL players. In 2016, he was appointed to the Plaintiffs' Steering Committee for the MDL concerning the Volkswagen diesel emissions controversy, in the U.S. District Court for the Northern District of California. Chris serves on the Settlement Committee and was one of the lead negotiators of a \$14.7 billion settlement which includes a massive buyback program for consumers and billions of dollars for environmental remediation. Most recently, he was appointed Plaintiffs' Co-Lead Counsel for the Proton Pump Inhibitor multidistrict litigation in the U.S. District Court for the District of New Jersey; to the Executive and Settlement Committees for the National Prescription Opiate litigation in U.S. District Court for the Northern District of Ohio; and to the Plaintiffs' Settlement Committee, serving as Lead Negotiator, for the Syngenta GMO Corn litigation, resulting in a \$1.5 billion nationwide settlement. He is an elected member of the American Law Institute; a member of the Board of Advisors to the NYU School of Law, Center on Civil Justice; and serves on an Advisory Council to the Duke Law Center for Judicial Studies.

DeMaurice F. Smith, J.D.

Executive Director, National Football League Players Association

During his tenure as the Executive Director of the NFL Players Association (NFLPA), DeMaurice Fitzgerald Smith signed a 10-year Collective Bargaining Agreement (CBA) with NFL management, leading the Players through the owners' 132-day lockout. The new CBA codifies new health and safety protocols for Players, achieved longer off-seasons, significantly reduces the amount of contact during practices, provides for unannounced inspections of training camps, creates the first compliance and accountability structure for NFL medical personnel, and provides the Players' with their highest share of TV contract revenues in history.

Prior to his post at the NFLPA, Smith was an Assistant United States Attorney in the District of Columbia and was Counsel to then-Deputy Attorney General Eric H. Holder, Jr. After Government service, Smith served as a Partner in the law firms of Latham & Watkins, LLP and Patton Boggs, LLP, in Washington, D.C. where he represented corporations, boards of directors and senior executives in civil and criminal matters.

Smith is a 1989 graduate of the University of Virginia School of Law and a 1985 graduate of Cedarville University. He resides in the Washington D.C. metropolitan area with his wife and two children.

Ryan Surujnath, J.D.

Dean's Fellow, Fordham University School of Law

Ryan Surujnath is a Dean's Fellow with the Center for Neuroscience and Law, where he works with legal problems facing artificial intelligence. He obtained his J.D. from Fordham Law School in 2017 and his B.A. in history and political science from Rutgers University in 2014. While in law school, he published his Note on the use of blockchain technology in derivatives market infrastructure. His current research continues to focus on uses and regulatory implications of blockchain.

Terri Tanielian, M.A.

Senior Behavioral Scientist, RAND Corporation

Terri Tanielian is a senior behavioral scientist at the RAND Corporation. She is a nationally recognized expert in military and veteran health care policy. Tanielian was co-study director for RAND's seminal 2008 study *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* and the principal investigator for RAND's comprehensive study of military and veteran caregivers titled *Hidden Heroes: America's Military Caregivers*. She has conducted several assessments of issues facing veterans living in the Detroit Metropolitan Area, Massachusetts and in New York State. She has led several other studies including the Deployment Life Study, a study of military families across the deployment cycle, and a study examining community based models for expanding mental health care for veterans and their families under the Welcome Back Veterans Initiative. Tanielian has published numerous peer-reviewed articles, book chapters, and serves on many advisory committees related to veteran mental health policy. Tanielian was recognized with the AcademyHealth Impact Award in 2009 for her work related to the *Invisible Wounds of War*. Tanielian has a M.A. in psychology from American University.

Table of Contents

1. Speaker Biographies (view in document)
2. CLE Materials

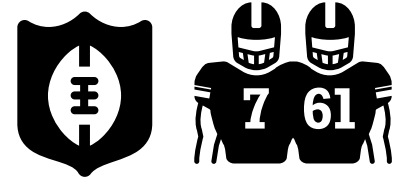
Panel 4: The NFL Concussion Litigation: The Impact of Traumatic Brain Injury on America's Most Popular Sport

Deubert, Christopher R., Fernandez Lynch, Holly, Cohen, I. Glenn. *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*. (View chapters 7- 19 in document)



Chapter 7

The NFL and NFLPA



The NFL and NFLPA are clearly lead stakeholders in protecting and promoting player health. The parties nonetheless have a long and complicated history on the issue and with each other. The most straightforward way to implement many of the changes we recommend to protect and promote player health will be to include them in the next CBA between the parties. That said, whenever change is possible outside of the CBA negotiating process, it should not wait — the sooner, the better. Moreover, although the CBA will often be the most appropriate mechanism for implementing our recommendations, we do not want to be understood as suggesting that player health should be treated like just another issue for collective bargaining, subject to usual labor-management dynamics. This is to say that as an ethical matter, players should not be expected to make concessions in other domains in order to achieve gains in the health domain. To the contrary, we believe firmly the opposite: player health should be a joint priority, and not be up for negotiation.

We begin with a brief historical overview of the activities of the NFL and NFLPA on player health since 1960. As we stressed in the Introduction to this Report, this historical information is being provided as background and context for understanding the current state of play and paths forward. Our goal is not to judge the historical record, but rather to focus on forward-looking recommendations for positive change.

(A) Background on the NFL

The NFL is an unincorporated association of 32 member clubs.¹ The NFL was historically a non-profit association,² but chose to give up that status in 2015.³ Each member club is a separate and distinct legal entity,⁴ with its own legal obligations as discussed in Chapter 8: NFL Clubs. However, the NFL also serves as a centralized body for obligations and undertakings shared among the member clubs.⁵ This chapter focuses on the NFL as an entity, rather than on the individual clubs.

To lead the NFL, the NFL's Constitution and Bylaws dictate that club owners "select and employ a person of unquestioned integrity to serve as Commissioner[.]"⁶ The Commissioner is "the principal executive officer of the League and shall have general supervision of its business and affairs."⁷ The Commissioner has broad authority to conduct the business of the NFL, including but not limited to: incurring necessary expenses;⁸ entering into contracts on behalf of the NFL,⁹ including broadcasting agreements;¹⁰ disciplining players, coaches, club employees, clubs, club owners or others working in the NFL for "conduct detrimental to the welfare of the League or professional football"¹¹; and, resolving disputes between or among those same groups of individuals working in the NFL.¹²

Before we review the background of the NFLPA, we begin with brief discussions of the role of NFL club owners and the history of League-wide rule changes affecting player health in the NFL.

1) NFL CLUB OWNERS

It is important to understand that when we are talking about the 32 member clubs, it is the men and women who own these clubs who largely dictate their operations, and thus the NFL's operations. For all intents and purposes, when discussing the NFL, it is the 32 club owners being discussed.

The NFL's Constitution and Bylaws require individual persons, and not corporations, to own NFL clubs (holding companies created solely for the purposes of operating the

club are permitted).¹³ Thus, each NFL club is controlled by, and sometimes becomes synonymous with, its owner.^a

The power of club owners cannot be understated. The owners are responsible for not only hiring the most important club employees, *e.g.*, general managers and head coaches, but also hiring the NFL Commissioner and dictating the Commissioner's duties, obligations, and scope of authority.¹⁴ All of the owners meet multiple times a year, when they discuss and then vote on the most important issues concerning the NFL at that time.¹⁵ For example, during the 2015 owners' meetings, the owners discussed the possibility of a club moving to Los Angeles (which happened in 2016) and possible playoff expansion, and voted to end the NFL's "blackout" policy that required television broadcasts to be blacked out in a club's home market if attendance for that day's game was below 85-percent capacity.¹⁶

Owners also play a critical role in determining the culture of their club and the pressures placed on the players. The owner's attitude toward player health and safety will often be a factor in the way that the club, and ultimately the NFL, looks at the issue.¹⁷ Unsurprisingly, there has been significant variation in how owners address and perceive player health.

On one extreme, a particularly unflattering portrait of former Oakland and Los Angeles Raiders owner Al Davis was painted in the 1994 book by former Raiders doctor Rob Huizenga, entitled "*You're Okay, It's Just a Bruise*": *A Doctor's Sideline Secrets About Pro Football's Most Outrageous Team*. Huizenga described Davis as placing winning above all else, including player health, and routinely pressuring players and the doctors to do anything to get a player back on the field, regardless of the risks.¹⁸ From his perspective, Davis reportedly believed the book to be "ludicrous and untrue."¹⁹ Huizenga's anecdotes are several decades old, but there is reason to believe that at least some owners still impose substantial pressure on injured players.

a For example, George Halas founded the organization now known as the Chicago Bears in 1920, and today that Club is controlled by George McCaskey, Halas' grandson. Similarly, Tim Mara founded the New York Giants in 1925, and today that Club is controlled by his grandson, John Mara. The one notable exception is the Green Bay Packers. The Packers, as a vestige from the league's earliest days, are community-owned by individual shareholders, *i.e.*, fans. See *Birth of a Team and a Legend*, Packers.com, <http://www.packers.com/history/birth-of-a-team-and-a-legend.html> (last visited Aug. 7, 2015), archived at <http://perma.cc/DQ2F-U2GJ>. Entering the 2015 season, there were 5,011,558 shares of stock owned by 360,760 stockholders. The Packers operate through Green Bay Packers, Inc., a Wisconsin corporation governed by a seven-member executive committee, elected from a board of directors. *Executive Committee and Board of Directors*, Packers, <http://www.packers.com/team/executive-committee.html> (last visited Aug. 7, 2015), archived at <http://perma.cc/KW7D-MQS2>.

For example, during the 2014 season, Cowboys quarterback Tony Romo suffered a back injury on Monday Night Football on October 27, after having had back surgery in the prior offseason. Two days later, Cowboys' owner Jerry Jones, who has no medical training, said on a radio station that the only thing that would prevent Romo from playing in the next week's game was "pain tolerance." Romo had already received a pain-killing injection in an effort to return to the October 27 game.²⁰

Conversely, other owners have taken a different approach. For example, the San Francisco 49ers are owned by Dr. John York, a former cancer pathologist,²¹ and Chairman of the NFL's Health and Safety Advisory Committee. During the 2015 offseason, several 49ers players retired due to health concerns. York generally responded with understanding and supportive statements, and has discussed the need for a culture change concerning player health.²²

As will be shown below, the CBA serves as an important constraint on the potential variations in club owners' approaches toward player health. The CBA creates rules concerning player health, which then narrow the permissible practices by clubs.

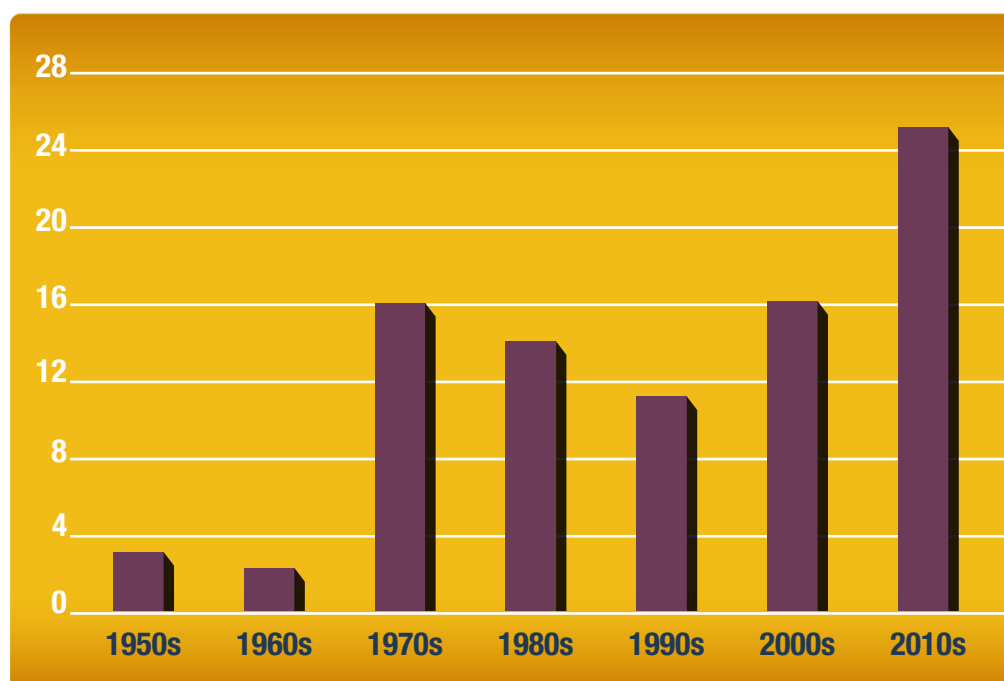
2) PLAYING RULES CHANGES

It is frequently remarked that the NFL has significantly added or changed rules concerning and promoting player health and safety in recent years. This is certainly true, but it is important to recognize that the NFL has generally added and changed rules concerning player health and safety *throughout* its modern history (after the merger with the American Football League in 1970). Included as Appendix I of this Report is a history of NFL rule changes concerning player health and safety, and below is an illustration of the number of changes over time.

NFL rule changes are proposed by the Competition Committee, which consists of club owners, executives, and coaches.²³ In addition, the NFLPA has the right to appoint two persons to attend meetings of the Competition Committee and one of the appointees can vote on all matters related to the Playing Rules.²⁴ If the proposed rule change passes in the Competition Committee, the owners then vote on the proposed rule changes at their annual meeting.²⁵ The Competition Committee also seeks insight from outside experts, including scientists and doctors, concerning proposed rule changes.²⁶ "If the NFLPA believes that the adoption of a playing rule change would adversely affect player safety," then it can pursue a change through the Joint Committee on Player Safety and Welfare and arbitration.²⁷ The NFLPA has not brought any such challenges since 2010.²⁸

Having discussed some of the key features of the NFL, we now turn to the NFLPA.

Figure 7-A: Health-Related On-The-Field Rule Changes in the NFL



(B) Background on the NFLPA

The NFLPA in its present form is a Virginia nonprofit corporation and a tax exempt labor organization.²⁹ Pursuant to the National Labor Relations Act, the NFLPA is “the exclusive representative[] of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”³⁰

As will be explained in more detail below, the NFLPA represents all current players, regardless of whether they are members of the union. Also, as will be explained in more detail below, the NFLPA does not represent former players, even though the NFLPA has taken actions concerning former players and might continue to do so in the future. In a lawsuit between former players and the NFLPA (discussed in more detail below), the Honorable Susan Richard Nelson of the United States District Court for the District of Minnesota was adept in describing the relationship and tension between the NFLPA and current players and former players:

*[T]he NFLPA negotiates with the League on behalf of the active players, and the interests of the active players, if not necessarily antagonistic towards the retired players, are not consistent with that of the retired players insofar as the League offers a single compensation pie to the players, such that any slice allocated to the retired players results in a smaller slice for the active players.*³¹

The NFLPA, based in Washington, D.C., has a staff of approximately 100 people, led by its Executive Director.³² The Executive Director is the “principal administrative officer of the NFLPA” and is responsible for the “day-to-day affairs of the NFLPA.”³³ In many respects, the NFLPA Executive Director is the counterpoint to the NFL Commissioner. The Executive Director is elected to a three-year term by the NFLPA’s Board of Representatives (discussed in more detail below),³⁴ which can be renewed without limit.

The NFLPA’s purpose, according to its Constitution, is as follows:

to provide professional football players employed by Clubs of the NFL with an organization dedicated to the promotion and advancement of all players and of the sport of professional football; the improvement of economic and other working conditions of players; the betterment and maintenance of relations between players, owners, coaches and staffs; the furnishing of information and the providing of membership services; the

negotiation, execution and administration of collective bargaining agreements; the resolution of player grievances, disputes and arbitrations arising under collective bargaining agreements; the representation of members in connection with common problems; the development of enterprises aimed at developing further benefits for the NFLPA and its members; assistance in providing educational advancement and training for members; encouragement of cultural, civic, legislative, charitable and other activities which further the interest of the NFLPA and its members, directly or indirectly; cooperation with and assistance to other organizations having purposes or objectives in whole or in part similar to those of the NFLPA; and the performance of all other actions consistent with this Constitution and appropriate to implement and fulfill the purposes, rights and responsibilities of the NFLPA.³⁵

Each NFL club’s players elect a Player Representative and an Alternate Player Representative to represent them in NFLPA matters.³⁶ The Executive Director, Player Representatives, and the NFLPA President collectively make up the Board of Representatives.³⁷ In addition, the Board of Representatives elects 10 Player Representatives as Vice Presidents.³⁸ The Board of Representatives is responsible for voting on matters concerning the NFLPA’s business.³⁹

The NFLPA President is an NFL player elected to a two-year term by the Board of Representatives,⁴⁰ and is the “principal executive officer of the NFLPA” responsible for “supervis[ing] and direct[ing] the business and affairs of the NFLPA.”⁴¹ Collectively, the President and the Vice Presidents make up the Executive Officers of the NFLPA, to whom the Executive Director is principally responsible for reporting.⁴²

(C) A History of the NFL’s and NFLPA’s Approaches to Player Health

We briefly describe the history of the NFL’s and NFLPA’s efforts on player health up to the present day as background for understanding the current state of play. In order to understand the context of player health issues, we also provide the relevant background of labor relations between the parties. As will be shown, for many years, player health does not appear to have been a priority. Our treatment is far from exhaustive, but will provide a reasonable background in which to ground our forward-looking recommendations.

1) PRE-1970

Former Los Angeles Rams general manager Pete Rozelle was named NFL Commissioner in 1960.⁴³ For much of the 1960s, the NFL was primarily concerned with its business operations. In 1961, the NFL steered the passage of a federal antitrust exemption, the Sports Broadcasting Act, concerning NFL television broadcasts that serves as the basis for approximately two-thirds of the NFL's revenue today (see Chapter 17: The Media). Also in the 1960s, the NFL faced significant competition from the recently formed American Football League (AFL). In 1966, the AFL and NFL agreed to merge operations and play beginning with the 1970 season. Also, beginning with the 1966 season, the NFL and AFL champions played against one another in the Super Bowl.

To counter the NFL, in 1956, players formed a loosely associated NFLPA to pursue their interests.⁴⁴ The NFLPA's initial efforts to increase salaries and to require clubs to pay injured players were largely unsuccessful, but did result in the first ever professional football CBA in 1968.⁴⁵ The 1968 CBA established the players' Retirement Plan,⁴⁶ group medical insurance,⁴⁷ workers' compensation benefits,⁴⁸ a form of Injury Protection,^b and the right to have a neutral physician assess and resolve the extent of a player's injury.⁴⁹

2) 1970s

The year 1970 was an important turning point for the NFLPA. In that year, the NFLPA merged with the American Football League Players Association and gained formal union recognition from the National Labor Relations Board (NLRB).⁵⁰ The NFLPA and NFL also negotiated a new CBA that year, which for the first time required NFL clubs to provide disability benefits,⁵¹ life insurance,⁵² and dental benefits.⁵³ In 1971, the NFLPA hired labor attorney Ed Garvey, who had assisted in the CBA negotiations, to become the NFLPA's first Executive Director.⁵⁴

The 1970 CBA expired at the end of the 1974 season. The players continued playing without a CBA, except for a 41-day strike during the 1974 preseason and a 3-day strike during the 1975 season.⁵⁵ Both strikes failed due to a lack of solidarity among the players.⁵⁶

Finally, the parties agreed to a new CBA in 1977. The 1977 CBA made modest increases in previously agreed-upon benefit and insurance programs, such as retirement, medical, disability, life, and dental. Players had previously gained the right to grieve terminations resulting from injuries as well as Injury Protection (the right to 50 percent of his salary if a player was injured in the prior season and still unable to play). In addition, the 1977 CBA created the Joint Committee on Player Safety and Welfare, established "for the purpose of discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, drug abuse prevention programs and other relevant subjects."⁵⁷ The Joint Committee consisted of three club representatives and three NFLPA representatives.⁵⁸ However, the CBA was very clear that the Joint Committee would "not have the power to commit or bind either the NFLPA or the [NFL] on any issue."⁵⁹ The Joint Committee continues to exist today in substantially the same form.

Although progress was made on basic medical issues during the 1970s, the principal items of negotiation between the NFL and NFLPA at the time were compensation issues and free agency.

In the NFL context, any progress on player health issues must be viewed through, and come as a result of, the process of collective bargaining. Although progress was made on basic medical issues during the 1970s, the principal items of negotiation between the NFL and NFLPA at the time were compensation issues and free agency. Importantly, the 1977 CBA did not provide NFL players with the right to unrestricted free agency,^c even though players in Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) by then enjoyed that right due to a variety of legal proceedings.⁶⁰

b The 1968 CBA provided that "[p]layers who are removed from the active roster by reason of injury between the beginning of training camp period and the first regular season game and who have not signed new contracts, shall be guaranteed 100% of their salaries as stated on the front side of their contracts for the contract year immediately preceding the year in which they are injured." 1968 CBA, Art. XI, § 5. Under the 2011 CBA, a player who is unable to play due to an injury suffered in the prior season, is entitled to 50 percent of his salary up to a maximum of \$1.1 million in the 2015 season. If the player is still unable to play in the second season following the injury, the player is entitled to 30 percent of his salary up to a maximum of \$525,000 for the 2015 season. See 2011 CBA, Art. 45.

c An Unrestricted Free Agent is a player "with four or more Accrued Seasons, who has completed performance of his Player Contract, and who is no longer subject to any exclusive negotiating rights, Right of First Refusal, or Draft Choice Compensation in favor of his Prior Club." 2011 CBA, Art. 1.

3) 1980s

The players engaged in a 57-day strike during the 1982 preseason, following the expiration of the 1977 CBA.⁶¹ The players began the season without a new CBA, but reached a new one in December 1982.⁶² Entering negotiations for the 1982 CBA, the NFLPA sought important changes concerning players' healthcare rights:

*[T]he union wants players to have the right to be treated and examined by a physician of their choice, not the team doctor. Decisions on whether a player is healthy enough to play or when he needs an operation should not be made by a physician whose primary allegiance is to the team's management 'Team physicans (sic) . . . should be chosen jointly by the players and management and should be subject to firing by either.'*⁶³

The NFLPA made some progress on these issues in the 1982 CBA. The 1982 CBA required: all clubs to have a board certified orthopedic surgeon as one of its club doctors;⁶⁴ the club to pay for the cost of medical services rendered by club doctors;⁶⁵ club doctors to advise players about their condition when they have also advised the club;⁶⁶ all full-time trainers to be certified by the National Athletic Trainers Association;⁶⁷ and, for clubs to pay for education and treatment related to chemical dependence.⁶⁸ The 1982 CBA also granted players' certain rights, including: the right to a second medical opinion paid for by the club;⁶⁹ the right to choose their own surgeon at the club's expense;⁷⁰ and, the right to review their medical records twice per season.^{71,d}

The 1982 CBA did not include any right of the players to choose or have input regarding club physicians, nor has any CBA since. Additionally, the NFLPA was again unable to gain free agency as part of the 1982 CBA negotiations.⁷²

One of the biggest health issues in the NFL in the early 1980s was illegal drug use.⁷³ This was an era of escalating and worrisome drug use throughout the country,⁷⁴ and the NFL was not immune to the problem.⁷⁵ As the 1982 CBA negotiations were taking place, former star defensive end Carl Eller estimated that 20 to 25 percent of players were abusing drugs and/or alcohol.⁷⁶ Many players rejected those estimates and refused to permit drug testing.⁷⁷ The 1982 CBA ultimately included the first ever drug testing policy,⁷⁸

permitting club physicians, "upon reasonable cause," to direct a player to a treatment facility for drug testing, but also forbidding clubs from randomly conducting drug tests on players.⁷⁹ The policy also provided for education and treatment for players.⁸⁰ Despite the new policy, drug use continued through the 1980s, as did the NFL's efforts to discipline players who had failed tests.⁸¹

After the 1982 CBA negotiations, Garvey chose to cede his Executive Director position to then-NFLPA President Gene Upshaw in 1983.⁸² Upshaw had been an offensive lineman for the Oakland Raiders from 1967 to 1981.^e

The expiration of the 1982 CBA in 1987 marked a dramatic and litigious turning point in NFL labor relations.⁸³ The players went on strike for 23 days during the 1987 season, during which time the NFL used replacement players.⁸⁴ Between 1987 and 1993, the NFLPA, NFL players and the NFL engaged in multiple courtroom battles over the NFL system, particularly the share of revenues and players' rights to free agency.⁸⁵ The NFLPA dissolved itself as the players' official bargaining representative in 1989 to improve the players' antitrust claims.^f NFL play nevertheless continued during these years without a CBA.

With no hope of a CBA during these years, there was limited opportunity to address player health issues. The one issue that reverberated for years without much resolution was drug testing. The NFLPA successfully blocked the NFL's attempts to unilaterally impose random drug testing in 1986,⁸⁶ before ultimately agreeing to a policy in 1990.⁸⁷

Finally, Rozelle retired as NFL Commissioner in November 1989, amid stalled CBA negotiations and extensive litigation concerning player compensation, and died in 1996 at the age of 70.⁸⁸

e During his career, Upshaw made the Pro Bowl six times and helped the Raiders win two Super Bowls. Upshaw was elected to the Pro Football Hall of Fame in 1987. See *Hall of Famers – Gene Upshaw*, Pro Football Hall of Fame, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=220 (last visited Aug. 7, 2015), archived at <http://perma.cc/EWF2-V3TV>.

f To simplify a complex issue for purposes of this Report, generally speaking, when NFL clubs, as separate and distinct legal entities and competitors, agree on restrictions concerning the labor market for NFL players, e.g., via free agency rules, the Salary Cap, and the NFL Draft, they may be violating Section 1 of the Sherman Antitrust Act's prohibition against unreasonable restraints of trade. See *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Jackson v. Nat'l Football League*, 802 F. Supp. 226 (D. Minn. 1992). However, the clubs' restrictions are exempt from antitrust laws under what is known as the non-statutory labor exemption when the clubs negotiate the restrictions with a labor organization as part of the collective bargaining process. See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). But, if the players dissolve the union's authority, i.e., remove the union's authority to negotiate on behalf of the players pursuant to the NLRA, the clubs are no longer in a bargaining relationship with a labor organization and their restrictions are no longer immune from antitrust laws. See *id.*; *Powell v. Nat'l Football League*, 764 F. Supp. 1351 (D. Minn. 1991). Dissolution is a powerful weapon because the Sherman Antitrust Act provides plaintiffs with treble damages. 15 U.S.C. § 15.

d During the 1982 CBA negotiations, the NFL's chief attorney, Jack Donlan, admitted that players were entitled to a doctor-patient relationship with club physicians, but refused to commit that understanding to writing and fought to prevent players from receiving their own medical records. See Bart Barnes and Paul Attner, *No Progress in Talks; Secret Meeting Confirmed*, Wash. Post, Oct. 1, 1982, available at 1982 WLNR 603101.

4) 1990s

To replace Rozelle, the NFL hired Paul Tagliabue, its chief outside counsel from the Washington, D.C. law firm of Covington & Burling LLP.⁸⁹ Compared to the NFL of 1960—with only 13 clubs, prior to the merger with the AFL, and at the beginning of the television-broadcasting era—the 1989 NFL was a different League entirely. It now included 28 clubs, worth approximately \$80 million each,⁹⁰ and had television revenues of approximately \$1 billion per year.⁹¹

In 1993, after several legal victories for the players, the NFL and the players settled the outstanding lawsuits as part of constructing a new, comprehensive CBA.⁹² The NFLPA also recertified itself as the players' bargaining representative.

The 1993 CBA was groundbreaking and set the framework for every NFL-NFLPA CBA since. The players gained the right to unrestricted free agency for the first time in exchange for a hard Salary Cap. Players could become unrestricted free agents after five years of experience and clubs' payrolls were limited to a range of 62 percent to 64 percent of Defined Gross Revenue,^g depending on the year.⁹³ In terms of player health provisions, the 1993 CBA increased benefit amounts (e.g., medical and life insurance, Injury Protection, and disability) but otherwise made no major changes.

A significant study concerning NFL player health was published in 1994. In the late 1980s, concern began to develop that NFL players might have shorter life spans than the general population.⁹⁴ In response, the NFLPA commissioned a study by the National Institute for Occupational Safety and Health ("NIOSH").⁹⁵ In a 1994 report, NIOSH reported somewhat reassuring results related to the health status of players. Using information from NFL pension fund databases, commercial publications, and death certificates, NIOSH examined all players who played in the NFL for at least five seasons between 1959 and 1988, 3,439 players in total.⁹⁶ NIOSH compared the death rates of the NFL players to men of similar age and race in the general population and found that 46 percent fewer NFL players had died as compared to the general population.⁹⁷ Based on the general population, NIOSH had expected that 189 NFL players would have died, but, in fact, only 103

had.⁹⁸ NIOSH acknowledged that the study contained a "relatively young group of men, only a few of which ha[d] reached the age of 50" and "[r]esearchers therefore [would] not be able to determine their average age of death for several years."⁹⁹ NIOSH updated the study's results in 2012, as will be discussed below.

The 1993 CBA was extended in 1996 and 1998, but player health provisions remained largely the same with the exception of a new Player Annuity Program in 1998,¹⁰⁰ discussed in further detail in Appendix C.

The 1993 CBA was groundbreaking and set the framework for every NFL-NFLPA CBA since.

This extended era of labor peace resulted in some public criticism of the NFLPA. Critics routinely pointed out that NFL players lacked the guaranteed contracts customary to other major professional sports leagues, and surmised that Upshaw was too close with Tagliabue.¹⁰¹ Upshaw's responded to his critics by highlighting the financial gains the NFLPA had made:

"What [Commissioner Paul Tagliabue] and I try to do as stewards of the game is to try to ensure that we have stability and growth," Upshaw said. "My job is to make sure we get our fair share. I've told the players and I've told the owners the same thing. The only chance we have of not having labor peace is if either side gets greedy. For the first time the owners realize the enemy is not the union."

"We've had ugly, nasty clashes" with owners, said Upshaw, who has led the union since 1983 and earns about \$2 million a year. "We've had lock-outs. We've had strikes. We've done everything everyone else does. We still do. It's just not as public as it might have been at one time. . . . To me, the test is, how much do we get of the revenues we generate? In 1987 we were getting 30 percent of the revenues and the owners were getting 70. Now we're getting two-thirds and they are getting a third. For us to do what we've been able to do has just been unbelievable."¹⁰²

^g From 1993 to 2006, Defined Gross Revenue (DGR), was defined as "the aggregate revenues received or to be received on an accrual basis, for or with respect to a League Year during the term of [the CBA], by the NFL and all NFL Clubs (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games," with a few specific exceptions. 1993 CBA, Art. XXIV, § 1 (a)(i). In the 2006 CBA, the term was changed to Total Revenue (TR), and changed again to All Revenue ("AR") in the 2011 CBA.

While some continued to focus on the financial issues in the game, by the mid-1990s, concussions in the NFL had started to become an issue of concern to players and were gaining attention in the media.¹⁰³ The most comprehensive source for understanding the evolution of this issue in the NFL is the 2013 book *League of Denial: The NFL, Concussions and the Battle for Truth*, by ESPN writers Mark Fainaru-Wada and Steve Fainaru.¹⁰⁴ The NFL has never publicly disagreed with any of the factual assertions in *League of Denial*, and instead touted its past and present initiatives designed to address head injuries in sports.¹⁰⁵

The media began to pay more attention to concussions around 1994.¹⁰⁶ Tagliabue called the concussion issue a “pack journalism issue” and insisted that concussions occurred only once every three or four games.^h Nevertheless, by the end of year, the NFL established the Mild Traumatic Brain Injury Committee (MTBI Committee) to study concussions.¹⁰⁷

Tagliabue called the concussion issue a “pack journalism issue” and insisted that concussions occurred only once every three or four games.

The creation, constitution, and work product of the MTBI Committee would become extremely controversial. Tagliabue personally selected New York Jets Club doctor Elliot Pellman as Chairman of the Committee.¹⁰⁸ Although a neurologist would have seemed like the logical choice, Pellman is a rheumatologist,¹⁰⁹ specializing in the treatment of arthritis, and was later found to have exaggerated his resume.¹¹⁰ Years later, Tagliabue insisted that he chose Pellman based on his experience in sports medicine and his recent involvement with Jets wide receiver Al Toon’s concussion-related retirement.¹¹¹ Additionally, beginning in 1997, Pellman was one of Tagliabue’s personal doctors, a relationship that would continue until 2006.¹¹²

Beyond just Pellman, the MTBI Committee seemed to many to lack appropriate expertise and independence. It consisted of several club doctors, two club athletic trainers, a consulting engineer, a club equipment manager, neurologist

Ira Casson (who had studied boxers), and Hank Feuer, an Indianapolis neurosurgeon who worked with the Indianapolis Colts.¹¹³ The MTBI Committee did not include any NFLPA or player representation.ⁱ The MTBI Committee’s initial composition would later be described as “comical” and “bizarre” by Kevin Guskiewicz,¹¹⁴ a former athletic trainer and sports medicine academic who pioneered some of the early research into sports and concussions, and who, in 2010, joined the NFL’s MTBI Committee, when it was renamed the Head, Neck and Spine Committee.¹¹⁵

5) 2000s

The CBA was extended again in 2002 and 2006. Again, player health provisions remained largely the same with the addition of a Tuition Assistance Plan in 2002,¹¹⁶ the redefinition of “disability” to be in line with the American Medical Association’s Guides to the Evaluation of Permanent Impairment,^j a reduction in off-season workout programs from 16 weeks to 14 weeks,¹¹⁷ and, the right of the NFLPA to commence an investigation before the Joint Committee on Player Safety and Welfare.^k However, as is discussed in more detail below, there are important questions about the effectiveness of the Joint Committee.

In October 2003, the MTBI Committee published its first piece of work, after having gathered data with the assistance of club doctors.¹¹⁸ Nevertheless, the NFL made some

i Reports have indicated that the NFLPA played some role in the MTBI Committee, but that role is unclear. See Mike Florio, *League of Denial fails to tell the whole story on concussions*, ProFootballTalk (Oct. 9, 2013 9:48 PM), <http://profootballtalk.nbcsports.com/2013/10/09/league-of-denial-fails-to-tell-the-whole-story-on-concussions/>, archived at <http://perma.cc/8LHU-PNNL>; Mike Florio, *NFLPA finally sued for concussions*, ProFootballTalk (July 18, 2014 3:01 PM), <http://profootballtalk.nbcsports.com/2014/07/18/nflpa-finally-sued-for-concussions/>, archived at <http://perma.cc/T35H-YDHP>. Indeed, when former players sued the NFLPA concerning concussions in 2014, discussed *infra*, they alleged the NFLPA was involved in some way with the MTBI Committee, but provided no details of the involvement. See Class Action Complaint, *Ballard v. Nat'l Football League Players Ass'n*, ¶¶ 33, 56–58, 69, 82, 128, 159–60 (E.D.Mo. 2014) (No. 14-cv-01267). Attorneys for the plaintiffs in the *Ballard* case did not respond to an email requesting further information concerning the possible link between the NFLPA and the MTBI Committee.

j 2002 CBA, Art. XLVII, § 6. The American Medical Association’s Guides to the Evaluation of Permanent Impairment instructed that a permanent disability occurs where the condition: “(1) results in a 50% or greater loss of speech or sight; or (2) results in a 55% or greater loss of hearing; or (3) is the primary or contributory cause of the surgical removal or major functional impairment of a vital organ or part of the central nervous system; or (4) for orthopedic impairments . . . is (a) a 55% or greater loss of the use of the entire lower extremity; or (b) a 30% or greater loss of use of the entire upper extremity; or (c) an impairment to the spine that results in a 29% or greater whole body impairment.” *Id.* The NFL changed the definition again in the 2011 CBA. See 2012 Bert Bell/Pete Rozelle NFL Player Retirement Plan, § 5.2 (a player “will be deemed to be totally and permanently disabled if the Retirement Board or the Disability Initial Claims Committee finds (1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country, and (2) that such condition is permanent.”)

k 2002 CBA, Art. XIII, § 1. In 2012, the NFLPA commenced the first and only Joint Committee investigation. The nature and results of that investigation are confidential per an agreement between the NFL and NFLPA. This information was provided by the NFLPA.

h Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 74 (2013). According to the NFL’s Injury Surveillance System, players suffered a mean of 158.9 concussions during regular season games per season between 2009 and 2015, a rate of about .62 concussions per game. See Chapter 1: Players, Table 1-F.

progress concerning concussions prior to that point. In the early 1990s, Mark Lovell—a Pittsburgh Steelers Club doctor and an original member of the MTBI Committee—had developed a neuropsychological testing program designed to diagnose players with concussion symptoms.¹¹⁹ With the NFL's strong recommendation, by the end of 2001, all but three clubs (Minnesota Vikings, Carolina Panthers, and Dallas Cowboys) were using some form of Lovell's test.¹²⁰

The MTBI Committee's first two papers were well received by sports medicine doctors.¹²¹ They focused on the biomechanics of NFL helmet collisions, specifically where concussive blows were actually delivered.¹²² The papers were published in *Neurosurgery*,¹²³ the official journal of the Congress of Neurological Consultants.¹²⁴ The editor-in-chief of *Neurosurgery* was Michael Apuzzo, a professor of neurology at the University of Southern California and an NFL consultant.¹²⁵

In total, between 2003 and 2009, the MTBI Committee published 16 articles in *Neurosurgery*.¹²⁶ By and large, the MTBI Committee's research claimed that concussion rates in the NFL were extremely low, that the number of concussions suffered by a player bears no relation to future injuries, and, that there is no link between football and brain damage.¹²⁷ The MTBI Committee's research often cited the fact that players returned to play very quickly (92 percent within seven days) after suffering a concussion as proof that concussions were not a major concern.¹²⁸ Importantly, the MTBI Committee assumed that the club doctors would not have cleared players to return to play unless they were healthy enough to do so, and thus that all of the players who returned to play after having suffered a concussion were healthy.¹²⁹

The last 14 papers from the MTBI Committee were repeatedly and strongly criticized by the scientific community. The principal peer reviewers were Guskiewicz, Julian Bailes, a neurosurgeon who worked with the Pittsburgh Steelers, and Robert Cantu, a Boston University neurosurgeon. Cantu was also the editor of *Neurosurgery*'s sports section and responsible for the review of the MTBI Committee's publications.¹³⁰ Despite Guskiewicz', Bailes', and Cantu's criticisms and insistence that the MTBI Committee's work not be published, Apuzzo reportedly ignored standard peer-reviewed publication guidelines and published the work anyway, permitting the reviewers an opportunity to append their criticisms.¹³¹ The criticisms generally focused on the MTBI Committee's failure to recognize that concussions were often unreported or undiagnosed and that players routinely returned to play before they were healthy.¹³² Those critical of the work believed the MTBI Committee was essentially creating data designed to protect and serve the interests of the NFL.¹³³

In 2005, the MTBI Committee's work came under increased scrutiny when *Neurosurgery* published an article authored by Bennet Omalu, a forensic pathologist in Pittsburgh.¹³⁴ Omalu happened to have been responsible for performing the autopsy on deceased Pittsburgh Steelers Hall of Fame center Mike Webster after Webster's death in 2002.¹³⁵ Omalu examined Webster's brain and, with the assistance of colleagues, diagnosed the brain with what Omalu labeled chronic traumatic encephalopathy ("CTE"),¹ a form of brain damage.¹³⁶ Omalu's paper claimed Webster's brain damage had been caused by "repetitive concussive brain injury" from playing football.¹³⁷

Pellman, Casson and Dr. David C. Viano, another member of the MTBI Committee, unsuccessfully requested that Omalu's paper be retracted.¹³⁸ The doctors insisted that there was no evidence that football caused brain damage.¹³⁹

The year after Omalu's article, the NFL and NFLPA agreed to a new CBA. The 2006 CBA made some changes concerning player health, including a Health Reimbursement Account,¹⁴⁰ and the "88 Benefit" to compensate retired players suffering from dementia.¹⁴¹ These and other benefit programs are discussed in further detail in Appendix C. After completing negotiations of the 2006 CBA, Tagliabue announced in March 2006 that he would retire before the 2006 season.¹⁴² The owners selected Roger Goodell, the current NFL Commissioner, to replace him.¹⁴³

Attention to the issue of concussions continued to grow in Goodell's first year on the job, as additional deceased players were diagnosed with CTE.¹⁴⁴ The NFL, through Pellman and Casson, continued to deny there was any connection between brain damage and related conditions (such as depression, dementia, or Alzheimer's disease) and football.¹⁴⁵ Despite the denials, the board responsible for overseeing the NFL's Retirement Plan had, on several occasions, granted disability benefits to NFL players for brain damage.¹⁴⁶

To assist Goodell in understanding the issues, in June 2007, the NFL held a summit of all club doctors, athletic trainers, the MTBI Committee, and those who had disagreed with the MTBI Committee's work for a variety of presentations on concussion issues.¹⁴⁷ The MTBI Committee members and their dissenters presented their work amid sharp disagreement.¹⁴⁸ Guskiewicz has said the summit was "the turning point" in the NFL's longstanding denial of the relationship between brain injuries and football,¹⁴⁹ and that

1 For a longer discussion on the issues surrounding CTE, see the Introduction.

it led Goodell and NFL General Counsel Jeff Pash to recognize the seriousness of the problem at hand.¹⁵⁰ Indeed, at the conclusion of the summit, Pash encouraged Guskiewicz to continue to challenge the MTBI Committee's work.¹⁵¹

The NFLPA was also facing scrutiny concerning player health issues, amid increasing stories of retired NFL players suffering from debilitating injuries and conditions.¹⁵² Despite his own playing career, Upshaw—still NFLPA Executive Director at the time—had developed a contentious relationship with other retired players. For example, in response to criticism from retired players that the CBAs did not provide sufficient benefits to retired players, Upshaw responded: “The bottom line is I don’t work for them. They don’t hire me and they can’t fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote.”¹⁵³ Additionally, according to former Seattle Seahawks club doctor Pierce Scranton and former President of the NFL Physician Society (NFLPS), the NFLPS invited Upshaw to its meetings to discuss player health but Upshaw declined to meet with or engage the NFLPS.¹⁵⁴

Despite the NFL’s 2007 concussion summit, the MTBI Committee continued its work and Goodell’s attention shifted toward CBA negotiations. In May 2008, NFL clubs unanimously voted to opt out of the 2006 CBA, accelerating the CBA’s expiration date from March 2013 to March 2011. The clubs’ decision to opt out centered on their desire to receive a share of revenues beyond the approximately 50 percent to which they were entitled pursuant to the 2006 CBA.¹⁵⁵

Any chance of jump starting CBA negotiations was halted when Upshaw died unexpectedly on August 21, 2008 after a brief battle with pancreatic cancer,¹⁵⁶ only three months after the clubs’ decision to opt out of the 2006 CBA.¹⁵⁷ On March 16, 2009, the NFLPA elected Washington, D.C.-based litigation attorney DeMaurice Smith as its new Executive Director.¹⁵⁸

As Smith began his new position, it became increasingly clear that player health issues would be a major component of the new CBA. Indeed, on October 28, 2009, the House Judiciary Committee held a hearing on football player head injuries at which both Smith and Goodell testified.¹⁵⁹ At that hearing, Goodell declared that in his three years as Commissioner, he had spent more time devoted to player health issues, particularly concerning retired players, than any other issue.¹⁶⁰ Goodell testified that the NFL had routinely increased benefit amounts, expanded benefit programs as part of collective bargaining, and had recently streamlined the benefits process for former players.¹⁶¹

Goodell, in a prepared statement, emphasized the NFL’s commitment to additional research and education concerning brain injuries.¹⁶² Moreover, he stressed that the NFL’s newest guidelines concerning players suspected of having suffered a concussion returning to play:

*All return-to-play decisions are made by doctors and doctors only. The decision to return to the game is not made by coaches. Not by players. Not by teammates. If a player suffers a concussion and loses consciousness, he cannot return to the same game under any circumstances. That was not the rule as recently as 2006. Moreover, our doctors have developed guidelines that we believe are consistent with best medical practice. A player may not return to a game or practice unless he is fully asymptomatic both at rest and after exertion.*¹⁶³

Smith’s prepared testimony at the same hearing emphasized his intention to focus on player health issues while also acknowledging the NFLPA’s perceived past failures in this regard:

As Executive Director, my number one priority is to protect those who play and have played this game. There is no interest greater than their health and safety. Let me say this again: Safety of the Players is Paramount.

* * *

I have one simple declaration on behalf of those who play and those who played this game:

WE ARE COMMITTED TO GETTING THE RIGHT ANSWERS, TO WORK WITH EVERYONE WHO HAS THE GOAL OF PROTECTING OUR PLAYERS AND TO SERVE AS A MODEL FOR FOOTBALL AT EVERY LEVEL.

Given that commitment, I acknowledge that the Players Union in the past has not done its best in this area. We will do better.

* * *

*Finally we, the players, will not bargain for medical care; we will not bargain for health and safety; and we will not bargain for basic provisions of the law as patients. We will continue to work with the League but medical care is not and will never be a Collective Bargaining issue.*¹⁶⁴

The hearing occurred approximately six months after the NFL hosted Dr. Ann McKee, a Boston University neuropathologist, who had begun to take the lead in studying the brains of deceased NFL players and diagnosing chronic traumatic encephalopathy (CTE).^{165,m} Some of the attendees indicated that the meeting was combative, including multiple interruptions.^{166,n}

Also at the NFL's meeting was Peter Davies, a Long Island-based expert in Alzheimer's disease and neurological conditions.¹⁶⁷ At the NFL's request Davies reviewed Omalu's conclusion that brain tissue from several former NFL players demonstrated brain damage.¹⁶⁸ Davies substantially confirmed Omalu's findings.¹⁶⁹

At the October 2009 House Judiciary Committee hearing, when pressed as to whether there was a link between football and brain injuries, Goodell deferred to the ongoing debate among the scientists.¹⁷⁰ Nevertheless, the October 2009 hearing marked the end of the MTBI Committee as it had previously existed. Pellman, Casson and Viano left the Committee,¹⁷¹ and it was re-named the Head, Neck and Spine Committee. The NFL brought in Richard Ellenbogen and Hunt Batjer, respected neurosurgeons with no previous ties to the NFL, as co-chairmen.¹⁷² According to Mitch Berger, a prominent San Francisco neurosurgeon who joined the Committee at that time, the Committee "essentially started from zero."¹⁷³ Guskiewicz joined the Committee in 2010, convinced that Goodell was committed to addressing the concussion issue properly.¹⁷⁴

In reviewing a draft of this Report, the NFL requested that we add additional context for "the disbanding of the MTBI Committee and establishment of the Head, Neck and Spine Committee."¹⁷⁵ Citing a *New York Times* article, the NFL noted that Dr. Ellenbogen and Dr. Batjer "concurred that data collected by the NFL's former brain-injury leadership was 'infected' [and] that their committee should be assembled anew. The doctors said the old committee's ongoing studies on helmets and retired players' cognitive decline—whose structure and data were strongly criticized by outside experts—would not be used in any way moving forward."¹⁷⁶

Eventually, several of the authors of the predecessor MTBI Committee's research later repudiated the Committee's findings and tried to distance themselves from the work.¹⁷⁷

The October 2009 hearing marked the end of the MTBI Committee as it had previously existed.

The October 2009 hearing did not result in any legislation but served as a precursor for the 2011 CBA negotiations.

6) 2010–PRESENT

The 2011 CBA negotiations ultimately resembled a condensed version of what took place between 1987 and 1993, when the NFL operated without a CBA and the parties engaged in extensive litigation.^o On March 11, 2011, after CBA negotiations centering around the split of revenues broke down, the NFLPA dissolved its status as the bargaining representative of NFL players and filed a class action antitrust lawsuit (*Brady v. NFL*).¹⁷⁸ After extensive litigation and public politicking, the NFLPA and NFL reached a new CBA in July 2011 (which included the NFLPA again reconstituting itself as the players' bargaining representative).¹⁷⁹

The 2011 CBA substantially amended and supplemented player health and safety provisions. The most important changes include:

^o The 1982 CBA expired after the 1986 season. When the parties were unable to reach a new CBA, the players engaged in a failed 57-day strike followed by several lawsuits claiming that various NFL policies concerning compensation and free agency violated antitrust laws. In 1989, at the suggestion of the United States Court of Appeals for the Eighth Circuit, *see Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989), the players voted to dissolve the NFLPA as the official bargaining representative of NFL players to eliminate the NFL's immunity from antitrust scrutiny while there was still an ongoing collective bargaining relationship. The players thereafter won two antitrust lawsuits seeking injunctive relief, *see McNeil v. Nat'l Football League*, 790 F. Supp. 871, 876 (D. Minn. 1992); *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 228 (D. Minn. 1992), before filing a larger antitrust lawsuit seeking over \$1 billion in damages, *see White v. Nat'l Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993). The case was settled in 1993 with the creation of the modern day CBA and the recertification of the NFLPA. *See* Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1, 9–12 (2012) (discussing NFL-NFLPA labor relations between 1987 and 1993).

^m More information about Dr. McKee's work on CTE is provided in the Introduction.
ⁿ Colonel Michael Jaffee, a neurologist with the Defense and Veterans Brain Injury Center who attended the meeting said "Casson interrupted the most . . . He was the most challenging and at times mocking." Similarly, McKee said "I felt that they were in a very serious state of denial . . . I felt like they weren't really listening. That's honestly what I thought. That's how it felt, like they had their heads in the sand. They didn't want to see it, so they didn't see it." *See* Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 268–70 (2013).

- The availability of “Extended Injury Protection,” permitting players to earn 50 percent of their salary up to \$500,000 for the second season removed from the season in which the player suffered an injury that prevented the player from continuing to play;¹⁸⁰
- An overhauled disability plan providing for increased benefits depending on the cause and nature of the disability;¹⁸¹
- A reduction of offseason workouts from 14 weeks to 9 weeks in three phases of varying intensity, including new prohibitions on the use of pads during practice (contact was already prohibited);¹⁸²
- A limit of 14 padded practices and three hours of on-field activities per day during the season with all practices filmed for possible compliance review;¹⁸³
- A requirement that clubs have an orthopedic surgeon and an internist, family medicine, or emergency medicine physician;¹⁸⁴
- A requirement that all club physicians have a Certification of Added Qualification in Sports Medicine;¹⁸⁵
- A requirement that clubs have neurological, cardiovascular, nutritional, and neuropsychological consultants;¹⁸⁶
- A requirement that the game-day neutral physician be experienced in rapid sequence intubation and be board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery;¹⁸⁷
- The NFL’s agreement that “each Club physician’s primary duty in providing player medical care shall be not to the Club but instead to the player-patient”;¹⁸⁸
- The NFLPA Medical Director’s inclusion as a voting member on all NFL health and safety committees with the same access to data as the NFL Medical Advisor;¹⁸⁹
- The creation of an Accountability and Care Committee to advise on player medical issues, as well as conducting a confidential survey every two years to solicit players’ input regarding the adequacy of their medical care (discussed further below);^p
- The establishment of the Legacy Benefit program for retired players with a contribution from the NFL of \$620 million over the life of the CBA, to be disbursed as part of increased benefits under the Retirement Plan;¹⁹⁰ and,

- The creation of the Neuro-Cognitive Disability Benefit, permitting qualifying players to receive no less than \$3,000 per month for a maximum of 180 months.^{191,q}

In addition, the 2011 CBA allocates \$22 million per year to healthcare and related benefits, funds, and programs for retired players, increasing at 5 percent annually, at the NFLPA’s discretion.¹⁹² The NFLPA used the money to create “The Trust,” a program intended to be a “set of resources, programs and services designed to provide former players with the support, skills and tools to help ensure success off the field and in life after football.”¹⁹³ The Trust and other programs supported by the NFLPA are discussed in further detail in the section on Current Practices of the NFLPA, below.

The 2011 CBA also allocates \$11 million annually for the duration of the CBA (10 years) for medical research.¹⁹⁴ In 2012, the NFL announced it would be donating \$30 million of these funds for brain injury research at the National Institutes of Health (NIH).¹⁹⁵ As discussed previously in this Report, by agreement dated February 2014, the NFLPA chose to fund The Football Players Health Study at Harvard University.

The 2011 CBA nevertheless failed to appease some former players. Former player Carl Eller filed a class action lawsuit against the NFLPA, Smith, and several players involved in the CBA negotiations alleging that they had no authority to bargain with the NFL about the terms of pension, retirement, and disability benefits.¹⁹⁶ Eller had previously filed a similar lawsuit against the NFL while the *Brady* case was proceeding,¹⁹⁷ which was settled shortly after *Brady*.¹⁹⁸ In his case against the NFLPA, Eller sought to have any issues relating to NFL retirees in the 2011 CBA “excised from that agreement and . . . renegotiated between Plaintiffs and the League.”¹⁹⁹ Eller’s case against the NFLPA was dismissed in May 2012.²⁰⁰ The United States District Court for the District of Minnesota held that: (1) the plaintiffs could not state a claim for tortious interference; (2) that the NFLPA does not owe a fiduciary duty to former players; and, (3) the plaintiffs’ claims to renegotiate the CBA were not judiciable controversies.²⁰¹

Outside of the CBA, the NFL and NFLPA also agreed to a revised Concussion Protocol and infectious disease prevention standards. There may also be other changes to player health policy that the NFL and NFLPA have made but about which information is not publicly available. Concerning infectious disease prevention standards, the NFL and

p 2011 CBA, Art. 39, § 3. Despite the provisions of the CBA, the first survey was not conducted until 2015. Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 AM), <http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/>, archived at <http://perma.cc/GE9A-RMRC>.

q For a detailed summary of the benefits available to players, including the Neuro-Cognitive Disability Benefit, see Appendix C.

NFLPA have partnered with the Duke Infection Control Outreach Network (DICON) Program.²⁰² The DICON Program has visited all of the clubs' training facilities and created a best practices manual for their use.²⁰³

At the same time a new CBA was being negotiated with a focus on player health issues, NIOSH was updating the results from its 1994 report that showed NFL players died at lower rates than men of similar demographics in the general population, as discussed above. By 2012, out of the 3,439 players in the study, NIOSH expected that 625 would be deceased. However, only 334 were deceased (53 percent of the expected number). NIOSH also reported that players generally died of cancer and heart disease at lower rates than the general population. Yet, NIOSH also determined that defensive linemen and players with a Body Mass Index of 30 or more were more likely to die of heart disease than the general population.²⁰⁴

As part of the 2012 update, NIOSH also examined the number of deaths caused at least in part by the neurodegenerative conditions of dementia, Alzheimer's disease, Parkinson's disease, or amyotrophic lateral sclerosis (ALS).²⁰⁵ 17 of the 334 deceased former players had a neurodegenerative condition included as either the underlying or contributing cause of death listed on their death certificates, a rate three times higher than that of the general population according to the study's authors.²⁰⁶ The study acknowledged that due to the low incidence of neurodegenerative conditions and deaths, it was required to adopt broad confidential intervals.²⁰⁷ As an additional limitation, the study acknowledged it did not have information on environmental, genetic, or other risk factors for neurologic disorders.²⁰⁸

In July 2014, the NFLPA for the first time was sued by former NFL players for allegedly intentionally and negligently concealing the risks of traumatic brain injury from playing football.²⁰⁹ Also named as defendants in the lawsuit were three former NFLPA Presidents: Trace Armstrong (1996–2003); Troy Vincent (2004–2008); and Kevin Mawae (2008–2012). The players' case was dismissed in 2015 as is discussed in more detail below.

The NFL has similarly continued to face scrutiny concerning NFL player health, including multiple lawsuits discussed in more detail below.

At the 2015 Super Bowl, the NFL announced that it had hired cardiologist Dr. Elizabeth Nabel as its first ever Chief Health and Medical Advisor. In the new role, according to the NFL, Nabel provides "strategic input to the NFL's medical, health and scientific efforts; participate[s] as an ex-officio member on each of the NFL's medical

advisory committees; and identify[ies] areas for the NFL to enhance player safety, care and treatment."²¹⁰ At the time of her appointment, Nabel was president of Brigham and Women's Hospital in Boston and a professor of medicine at Harvard Medical School. Nabel continues in both positions in addition to her work with the NFL. Additionally, The Leadership Team of The Football Players Health Study at Harvard University has met with Nabel, but she is not nor has she ever been affiliated with The Football Players Health Study. According to the NFL, Nabel's appointment did not replace Pellman, who, at the time, remained an "advisor" to the NFL and provided "administrative functions" in a role that was "subordinate to Dr. Nabel."²¹¹ Pellman retired from the NFL in July 2016.²¹²

Having provided a chronological history of player health issues in the NFL, for both the NFL and NFLPA, we now explain their current legal obligations, relevant ethical codes, current practices, and possible enforcement mechanisms.

The programs and benefits available to NFL players are extraordinary, and both the NFL and NFLPA should be commended for this fact.

(D) Current Legal Obligations of the NFL

The NFL is frequently sued, and often the plaintiffs are NFL players themselves. Emerging from all these lawsuits are many different theories about the NFL's legal responsibilities to players. Ultimately, the clearest source for understanding the relationship between players and the NFL are collectively bargained documents, including the 2011 NFL-NFLPA CBA, the Policy and Program on Substances of Abuse (Substance Abuse Policy), and the Policy on Performance-Enhancing Substances (PES Policy).

r The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

1) COLLECTIVELY BARGAINED AGREEMENTS

The 2011 CBA contains multiple provisions governing the NFL's health obligations to its players.

The NFL is responsible for funding and administering (sometimes in conjunction with the NFLPA) various player health-related programs and benefits, including:

- Retirement Plan (created in 1968);
- Group Insurance (1968);
- Disability Plan (1970);
- Severance Pay Plan (1982);
- Second Career Savings Plan (1993);
- Player Annuity Plan (1998);
- Tuition Assistance Plan (2002);
- The 88 Plan (2006);
- Health Reimbursement Account (2006);
- Former Player Life Improvement Plan (2007);
- Legacy Benefit (2011);
- Long Term Care Insurance Plan (2011); and,
- Neuro-Cognitive Disability Benefit (2011).

These programs and benefits are discussed in detail in Appendix C. The programs and benefits available to NFL players are extraordinary, and both the NFL and NFLPA should be commended for this fact. Nevertheless, access to the programs and benefits appears to be an issue,^s and questions remain whether players are sufficiently made aware or avail themselves of these programs and benefits, as discussed in Chapter 1: Players. The NFL stated that in 2015 that it spent \$1,084,118,072 on these health-related programs and benefits.²¹³

These benefits are funded by NFL and NFL club revenues and are different from health-related programs offered and funded by the NFL or the NFLPA respectively, detailed in Appendices D and E. The more than \$1 billion amount mentioned above does not include the costs of these programs.²¹⁴

In addition to the above-mentioned benefits and programs, the NFL participates in two committees with the NFLPA concerning player health (additional committees not involving the NFLPA are discussed in Section D: Current Practices).

First, as noted above, the Joint Committee on Player Safety and Welfare (“Joint Committee”), established in 1974, consists of three club representatives and three NFLPA representatives and discusses “player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects.”²¹⁵ The Joint Committee is merely advisory and has no binding decision-making authority.^t

Second, the NFL participates in the Accountability and Care Committee (ACC), created in 2011. The ACC consists of the NFL Commissioner (or his designee), the NFLPA Executive Director (or his designee), and six additional members “experienced in fields relevant to healthcare for professional athletes,” three appointed by the Commissioner and three by the NFLPA Executive Director.²¹⁶ The ACC is obligated to: (i) encourage and support programs for outstanding professional training by club medical staffs; (ii) develop a standardized preseason and postseason physical examination and education protocol to inform players of the risks associated with playing football; (iii) conduct research into prevention and treatment of illness and injury commonly experienced by professional athletes; (iv) conduct a confidential player survey at least once every two years to solicit the players’ input and opinion regarding the adequacy of medical care; (v) assist in the development and maintenance of injury surveillance and medical record systems; and, (vi) undertake such other duties as the Commissioner and Executive Director may assign.²¹⁷ Additionally, players can make complaints about

^s Former Player 3 explained former players’ frustrations with the various benefit programs: “I think that a lot of guys get frustrated with the system . . . I don’t think guys necessarily trust when they’re done playing that the PA’s going to take care of them. They don’t trust that the league is going to take care of them. . . . They get bombarded with paperwork. They get frustrated. They deserve better. They become bitter. Maybe they just give up on the process.” As a solution, Former Player 3 explained “I would like to see a third party sort of take over the process, just somebody who really has no vested interest in anything other than serving the players and helping them. And really understands all the different things that former players go through—emotionally, mentally, physically, spiritually—experts on former players to take control.”

^t See 2011 CBA, Art. 50, § 1 (a). In *Stringer v. Nat’l Football League*, the Court also expressed concerns about the effectiveness of the Joint Committee: “While the NFL is required to give ‘serious and thorough consideration’ to recommendations of the Joint Committee, the CBA imposes no independent duty on the NFL to consider health risks arising from adverse playing conditions, or to make recommendations for rules, regulations or guidelines for the clubs to follow.” 474 F.Supp.2d 894, 896 (S.D. Ohio 2007).

their medical care to the ACC, but the ACC then refers those complaints to the NFL and Club involved.^u

Since its creation, the ACC procured a third-party vendor, Synernet, to verify all club medical staff credentials and licensing, including with states and the Drug Enforcement Administration,²¹⁸ and also facilitated the first survey of players concerning a range of health and safety-related topics.²¹⁹ The results of that survey are not public and it is unclear whether they will ever be made public. We address this issue further in our recommendations below.

It is also important to understand the source and relative amount of funding for the various player benefits and programs mentioned above. NFL players, as a group, are entitled to different percentages of different revenue sources: (1) 55 percent of League Media, which consists of all NFL broadcasting revenues;²²⁰ (2) 45 percent of NFL Ventures/Postseason revenue, which includes all revenues arising from the operation of postseason NFL games and all revenues arising from NFL-affiliated entities, including NFL Ventures,²²¹ NFL Network,²²² NFL Properties,²²³ NFL Enterprises,²²⁴ NFL Productions,²²⁵ and NFL Digital;²²⁶ and, (3) 40 percent of Local Revenues, which includes those revenues not included in League Media or NFL Ventures/Postseason, and specifically includes revenues from the sale of preseason television broadcasts.²²⁷ These revenues are collectively known as All Revenue or AR.²²⁸ AR in 2015 was approximately \$12.4 billion.²²⁹

The players' share of AR is referred to as the Player Cost Amount.²³⁰ The Player Cost Amount is one of two essential components for calculating the Salary Cap—the “absolute maximum amount of Salary that each Club may pay or be obligated to pay or provide to players . . . at any time during a particular League Year.”²³¹ The other essential component of the Salary Cap calculation is Player Benefit Costs. Player Benefit Costs are the total amounts the NFL and its clubs spend on all the above-described programs and benefits, in addition to the costs of providing medical care to NFL players.²³² The Salary Cap is determined by subtracting Player Benefit Costs from the Player Cost Amount and dividing by the number of clubs in the NFL.²³³ In other words, the Salary Cap equals Player Cost Amount minus Player Benefit Costs

divided by 32. *Thus, the more that is paid to NFL players, including retired players, in the form of benefits and medical care, i.e., Player Benefit Costs, the less they are able to receive in the form of salary.* Indeed, in 2015, when the Salary Cap was \$143,280,000 per club, each club was charged \$37,550,000 in Player Benefit Costs. Thus, out of a possible \$180,830,000 that could have been spent on player salaries by each Club, 26.2 percent was allocated to player benefits.

It is important to clarify these figures. As Figure 7-B shows below, about 50 percent of a club's revenue is allocated to the players. The club keeps the other 50 percent. Of the 50 percent allocated for the players (the Player Cost Amount), in 2015, 26.2 percent of that was used on player benefits. Thus, in 2015, we can estimate that each club had approximately \$361,660,000 in revenue, \$180,830,000 of which would be available for players. Thus, \$37,550,000 was spent on player benefits. The \$37,550,000 is 26.2 percent of the Player Cost Amount and 10.4 percent of the club's revenue.

In 2015, when the Salary Cap was \$143,280,000 per club, each club was charged \$37,550,000 in Player Benefit Costs. Thus, out of a possible \$180,830,000 that could have been spent on player salaries by each club, 26.2 percent was allocated to player benefits.

u The three NFL-appointed members of the ACC are: Dr. Matthew Matava, Club doctor for the St. Louis Rams and former President of the NFLPS; Rick Burkholder, athletic trainer for the Kansas City Chiefs and President of the Professional Football Athletic Trainers (PFATS); and, Dr. Elliott Hershman, Chairman of NFL Injury and Safety Panel, Department of Orthopaedic Surgery, Lenox Hill Hospital and Team Orthopedist, New York Jets. The three NFLPA-appointed members of the ACC are: Dr. Anthony Alessi, neurologist and Associate Clinical Professor of Neurology, University of Connecticut; Dr. Ross McKinney, Director, Trent Center for Bioethics, Humanities & History of Medicine, Duke University & School of Medicine; and, Dr. Johnny Benjamin, orthopedist and Director, Pro Spine Center.

In addition to the CBA, the Substance Abuse Policy contains important provisions concerning player health. The Substance Abuse Policy prohibits players from using common street drugs, such as cocaine, marijuana, amphetamines, opiates, opioids, phencyclidine (PCP), and 3,4-methylenedioxymethamphetamine (MDMA, or “ecstasy”).²³⁴ Players are subject to pre-employment tests and one test during the pre-season.²³⁵ Players are not subject to regular season testing unless they have agreed to be or have previously failed a drug test.²³⁶ Importantly, players who fail tests are not immediately disciplined but instead enter an intervention program where they are assessed and treated by medical personnel.²³⁷ Players are only disciplined if they fail to comply with their treatment plans, for example, by failing additional drug tests.²³⁸

In contrast, players who test positive for performance enhancing drugs under the Performance-Enhancing Substance (PES) Policy are immediately disciplined and no treatment is mandated.²³⁹ Discipline includes: a 2-game suspension for a first positive test result for diuretics or masking agents; a 4-game suspension for a first positive test for stimulants during the season or anabolic steroids; a 6-game suspension for positive test result plus a diuretic, masking agent, or attempt to substitute or dilute; a 10-game suspension for a second violation; and a 2-year ban for a third violation.²⁴⁰

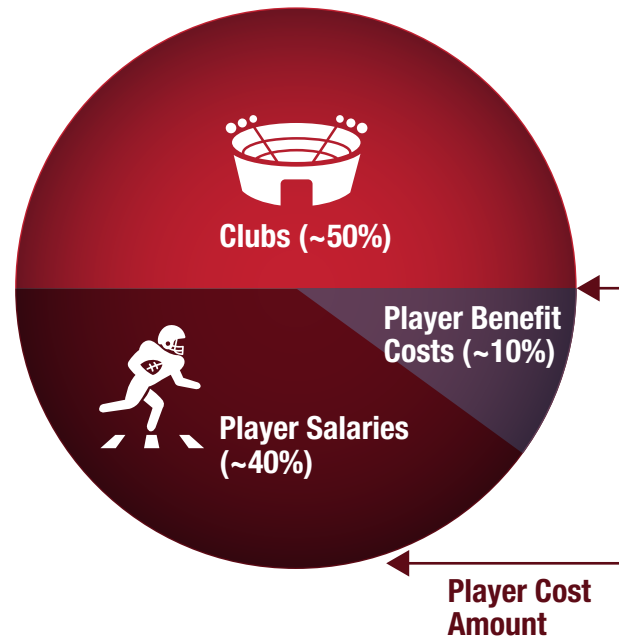
Ten players per club are randomly tested for performance enhancing drugs each week of the preseason, regular season, and postseason.²⁴¹ In addition, the 2014 PES Policy initiated blood testing for human growth hormone (HGH), with a limit of six tests per player per calendar year.²⁴²

In our forthcoming report *Comparing the Health-Related Policies and Practices of the NFL to Other Professional Sports Leagues*, we provide an in-depth analysis of both the Substance Abuse and PES Policies. However, our research has not revealed any reliable data on the usage of recreational or performance-enhancing drugs by NFL players. Additionally, in Chapter 2: Club Doctors, Section I: The Special Case of Medications, we discuss prescription and painkilling medications as they concern NFL players at length.

2) STATUTORY OBLIGATIONS

The 2010 Patient Protection and Affordable Care Act (ACA) obligates employers who employ an average of at least 50 full-time employees on business days to provide

Figure 7-B: Division of All Revenue^w



some basic level of health insurance to its employees or pay a financial penalty,²⁴³ more commonly known as the employer mandate. After several delays, the employer mandate went into effect in 2015. The CBA provides health insurance to NFL players, so this is not a concern at present, but for the sake of completeness, we note that the question remains whether in the absence of the CBA, the NFL would have any obligation to provide health insurance to NFL players. While the NFL might not be considered an employer of players for purposes of the ACA,²⁴⁴ the clubs certainly would be. Again, however, the issue is purely hypothetical.

The NFL also has obligations under other statutes, such as the Occupational Safety and Health Act,²⁴⁵ the Americans with Disabilities Act (ADA)²⁴⁶ and the Genetic Information Nondiscrimination Act (GINA). An analysis of the NFL's intersection with these statutes are the subject of future work of the Law and Ethics Initiative of The Football Players Health Study at Harvard University.²⁴⁷

3) COMMON LAW OBLIGATIONS

The existence and extent of common law^w obligations of the NFL toward promoting and protecting the health of NFL players are debatable. *In re National Football League Players' Concussion Injury Litigation*, 12-md-2323 (E.D.Pa.) (“Concussion Litigation”) concerned exactly those duties. On July 19, 2011, 75 former NFL players, led

v In reviewing a draft of this Report, the NFL stated that “the roughly 50%-50% split in revenue as depicted in the chart is generally accurate, with the understanding that the revenue split does not reflect the owners’ substantial costs incurred subsequent to the split of revenue.” Letter from Larry Ferazani, NFL, to authors (July 18, 2016).

w Common law refers to “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions.” Black’s Law Dictionary (9th ed. 2009).

by former NFL linebacker Vernon Maxwell, filed a lawsuit against the NFL in California Superior Court, Los Angeles County, alleging that the NFL had negligently and fraudulently concealed the risk of brain injury associated with playing football.²⁴⁸ The *Maxwell* case was the first of many concussion-related lawsuits against the NFL.

In total, former and current NFL players have filed more than 240 lawsuits against the NFL in federal and state courts all across the country.²⁴⁹ On January 31, 2012, the cases existing as of that time were transferred and consolidated into the “Concussion Litigation.”²⁵⁰ On July 17, 2012, the plaintiffs filed an Amended Master Administrative Long-Form Complaint summarizing the various claims at issue.²⁵¹ After that date, many more lawsuits were filed, transferred, and consolidated into the Concussion Litigation.²⁵² In sum, more than 5,500 players filed Short-Form Complaints in the Concussion Litigation.²⁵³

The Concussion Litigation plaintiffs alleged the NFL owed a variety of common law and assumed duties to NFL players. These duties can generally be grouped into three categories: (1) the NFL’s alleged duty to inform or disclose the risks associated with brain injuries in football;²⁵⁴ (2) the NFL’s alleged duty to protect NFL players;²⁵⁵ and, (3) the NFL’s alleged duty to competently study the risks of brain injuries in football.²⁵⁶

Whether the NFL actually owed any of these duties as a matter of law may never be resolved, *i.e.*, a court may never have to rule on whether the NFL had to actually do any of the things the Concussion Litigation plaintiffs claimed they had to do. In April 2015, the United States District Court for the Eastern District of Pennsylvania approved a settlement between the parties that provided all former NFL players the opportunity to undergo baseline neurological and neuropsychological examination and the opportunity for monetary awards (subject to various adjustments) for the following conditions:

- Amyotrophic lateral sclerosis (ALS): \$5 million;
- Death with CTE prior to the date of the settlement (diagnosed after death): \$4 million;
- Parkinson’s disease: \$3.5 million;
- Alzheimer’s disease: \$3.5 million;
- Level 2 Neurocognitive Impairment (*i.e.*, moderate Dementia): \$3 million; and,
- Level 1.5 Neurocognitive Impairment (*i.e.*, early Dementia): \$1.5 million.²⁵⁷

The players are not required to prove that their conditions are related to having played in the NFL to obtain an award. Additionally, the NFL did not admit any wrongdoing or liability as part of the settlement. In approving the settlement, the Court cited numerous expert opinions in noting that “[a] consensus is emerging that repetitive mild brain injury is associated with [the conditions covered by the settlement].”^{258,x} The NFL’s financial obligations under the settlement are not capped, except that the settlement expires after 65 years.

In April 2016, the United States Court of Appeals for the Third Circuit affirmed the District Court’s approval of the settlement.²⁵⁹ In August 2016, some of the plaintiffs petitioned the Supreme Court of the United States to review the case.²⁶⁰ At that time, approximately 169 former players and 20 former player family members had chosen to opt out of the settlement, providing them the opportunity to press their claims and the NFL’s alleged duties in new lawsuits.

(E) Current Ethical Codes Relevant to the NFL

There are no known codes of ethics currently applicable to the NFL and player health.

(F) Current Practices of the NFL

As discussed in the background to this chapter, the NFL’s practices and policies concerning player health have improved dramatically over the decades. Moreover, those improvements have accelerated in recent years following leadership changes at both the NFL and NFLPA and with the execution of the 2011 CBA. Table 7-A below lists NFL committees that perform player health-related work, as of the 2016 season.²⁶¹ It is important to note that these committees are created and facilitated by, and principally serve in an advisory capacity to, the NFL. As a result, it is difficult to fully evaluate their work.

x The Court, however, denied the argument that CTE after the date of the settlement should be covered, noting that the study of CTE is in its early stages and much is still unknown, including its symptoms. *In re Nat’l Football League Players’ Concussion Injury Litigation*, 307 F.R.D. 351, 397–401 (E.D. Pa. 2015) (“Beyond identifying the existence of abnormal tau protein in a person’s brain, researchers know very little about CTE.”). The Court also denied arguments that mood and behavioral disorders should be covered by the settlement. *See id.* at 401 (quoting the Declaration of Dr. Christopher Giza: “While medical literature and clinical practice has associated psychological symptoms such as anxiety, depression, liability, irritability and aggression in patients with a history of concussions, this association has not led to *conclusive causation*.”) (Emphasis in the Court’s opinion).

Table 7-A: NFL Health and Safety Committees^z

Committee	Areas of Focus	Membership
General Medical Committee	<ul style="list-style-type: none"> • Behavioral health • Cardiovascular • Environmental • Infectious disease • Pain management • Miscellaneous 	<ul style="list-style-type: none"> • Dr. Andrew Tucker • Dr. Deverick Anderson • Rick Burkholder • Dr. Doug Casa • Dr. Rob Heyer • Dwight Hollier • Dr. Patrick Strollo • Dr. Robert Vogel • Dr. Elizabeth Nabel • Dr. Thom Mayer
Musculoskeletal Committee	<ul style="list-style-type: none"> • Foot and ankle • Lower extremity trauma • Upper extremity trauma • Studies 	<ul style="list-style-type: none"> • Dr. Robert Anderson • Dr. Ed Wojtys • Dr. Asheesh Bedi • Dr. Robert Brophy • Rick Burkholder • Dr. Mike Coughlin • Dr. Rob Heyer • Dr. Thomas Hunt • Dr. William Levine • Joe Skiba • Dr. Kurt Spindler • Dr. Elizabeth Nabel • Dr. Thom Mayer
Head, Neck and Spine Committee	<ul style="list-style-type: none"> • Concussion • Moderate and severe brain injury • Neck and spine 	<ul style="list-style-type: none"> • Dr. Hunt Batjer • Dr. Rich Ellenbogen • Dr. Mitch Berger • Dr. Javier Cardenas • Dr. Russell Lonser • Dr. Margot Putukanian • Dr. Robert Cantu • Dr. Joseph Maroon • Dr. Elizabeth Nabel • Dr. Thom Mayer

^z Also of note, according to former Seattle Seahawks club doctor Pierce Scranton, at some point in the 1990s, the NFL did establish a Safety Committee that included the NFLPS President as a member and began to study issues affecting player health and safety, including playing surfaces and concussions. Pierce E. Scranton, Jr., *Playing Hurt: Treating and Evaluating the Warriors of the NFL* 145–46 (2001).

Thom Mayer, the NFLPA's Medical Director, is a voting member on all NFL health and safety committees.²⁶² In addition, the NFLPA has “the right to appoint two persons to attend those portions of the annual meeting of the NFL Competition Committee dealing with playing rules to represent the players’ viewpoint on rules. One of the appointees shall have a vote on all matters considered at the meeting which relate to playing rules.”²⁶³ A history of health-related rule changes in the NFL is included as Appendix I.

We were unable to extensively document all of the information the NFL, through these committees or otherwise, provides to NFL players concerning health and safety issues. Nevertheless, it is clear that the NFL does provide at least some information. Prior to the 2015 season, for the first time ever, each club’s medical staff held a one-hour pre-season meeting with the club’s players to discuss health and safety issues.²⁶⁴ In addition, NFL clubs post a large poster in their locker room detailing facts about concussions, including symptoms and recommended steps in the event a player suspects he has a concussion.²⁶⁵ The poster was developed in conjunction with the NFLPA, NFL Physicians Society, Professional Football Athletic Trainers Society, and the Centers for Disease Control and Prevention.

In addition to the above committees and the collectively bargained benefits and programs mentioned earlier, the NFL has a Player Engagement Department²⁶⁶ that provides a number of programs designed to help players as well as others involved in the world of football, including:

- NFL Prep 100;
- Prep Leadership Program;
- NFL Prep Sports Career Expo;
- NFL-NCAA Summit;
- NFL-NCAA Life Skills Roundtable;
- 1st & Goal Program;
- Broadcast Boot Camp;
- Business Management and Entrepreneurial Program;
- Business of Music Boot Camp;
- Financial Education;
- Franchising Boot Camp;
- Hospitality & Culinary Management Workshop;
- NFL-NCAA Champion Forum;

- NFL-NCAA Coaches Academy;
- NFL-NCAA Future Football Coaches Academy;
- Rookie Transition Program;
- Pro Hollywood Boot Camp;
- Sports Journalism & Communications Boot Camp;
- Consumer Products Boot Camp;
- Bill Walsh NFL Minority Coaching Fellowship;
- Transition Assistance Program; and,
- Legends Community.

Each of these programs offered by the NFL’s Player Engagement Department is discussed in detail in Appendix D. In addition, the NFL’s Player Engagement Department works with players to place them in off-season or post-career internships in a wide variety of industries.^z

Moreover, in 2007, the NFL and NFLPA jointly created the NFL Player Care Foundation, which funds research into issues affecting NFL players, provides grants to former players in need, and otherwise assists former players in obtaining support for a healthy life.²⁶⁷ Entering the 2015 season, the NFL Player Care Foundation had arranged for 3,599 former players to undergo a series of private and comprehensive medical examinations.²⁶⁸

Despite these extensive programs, committees, and other attention from the NFL, in discussing the NFL’s approach to player health, players, contract advisors and financial advisors generally (but not universally) had a negative reaction:^{aa}

- **Current Player 1:** “[i]t would seem that they’re more concerned about making money than protecting their players.”
- **Current Player 2:** “I think that the changes are more for public image I don’t really think that player safety and health is as big a concern for them and has as much importance to them as they portray. I think at the end of the day, it’s still big business and they’re still trying to put a product out there that’s going to be profitable.”

z The industries include: advertising/media; consulting; consumer products; corporate finance; financial services; gaming/digital media; hospitality management; mortgage banking; the National Football League; non-profit/advocacy; public relations; real estate; scouting; sports marketing; television production and development; and, youth football.

aa We reiterate that our interviews were intended to be informational but not representative of all players’, contract advisors’, or financial advisors’ views, and should be read with that limitation in mind.

- **Current Player 3:** “[The NFL is] trying to do a good job to make the game safer at the end of the day.”
- **Current Player 4:** “I think they’re trying to avoid the hundred million dollar settlements like they recently had more than they are generally concerned with player safety. I think it’s more about public image more than it is really caring about players’ health and safety.”^{ab}
- **Current Player 5:** “As far as the Concussion Protocol, I think that they’re doing a great job I don’t think there has been an interest in player safety from the league besides the Concussion Protocol.”
- **Current Player 6:** “I think the NFL is more concerned about the appearance of taking care of players more than actually taking care of players.”
- **Current Player 8:** The NFL takes player health “as serious as the [Concussion] lawsuit indicates I think the NFL is concerned with player health as far as they can afford it.”
- **Current Player 9:** “I would say the NFL’s approach is, to me, reactionary [T]he bottom line for the NFL is to increase revenues. So when it comes to player safety, sometimes that’s an afterthought[.]”
- **Current Player 10:** “I think [the NFL] has been great [T]he changes that I’ve seen in the last 10 years, I think they’ve really made it a priority. And I think that has changed.”
- **Former Player 1:** “[F]or sure they want to have this great product just for the fans, all the revenue that they can, also just like any business I mean they want to have the best product and what does that mean? Keeping their top superstar athletes in the best health.”
- **Former Player 2:** “I think they’ve done an okay job. I wouldn’t say great.”
- **Former Player 3:** “I don’t think anybody is out there saying ‘hey, screw the players.’ I think they have honestly invested significant resources into it.”
- **Contract Advisor 1:** “I think it’s mixed You can say I don’t want to blow up the NFL with how much we’re going to have to pay in litigation and on the other side of it Roger Goodell is not going to want to watch every player he’s come to know have issues ten years after they’re playing.”
- **Contract Advisor 3:** “[The NFL’s approach] has definitely gotten a lot better as the NFL teams made it a bigger issue, but to say that they do it just because they want to be good guys, I wouldn’t put it in that category.”
- **Contract Advisor 4:** “[T]he NFL is strictly a business. People always say that there’s a business side. There is no business side. It is a business.”
- **Contract Advisor 5:** “They don’t care They’re going to keep it under the rug as long as they can until something really comes into play.”
- **Contract Advisor 6:** “Litigation avoidance.”

Multiple contract advisors specifically identified the NFL’s interest in expanding the regular season from 16 to 18 games^{ac} as evidence that the NFL’s financial interests are more important than player health.^{ad}

A 2014–2015 survey of former players by *Newsday* garnered responses from 763 individuals, 85 percent of whom did not feel that the NFL adequately prepared them for the transition to post-football life.²⁶⁹ However, 48 percent of respondents believed the NFL is doing enough to make the game safer, as compared to only 31 percent who do not.²⁷⁰ The survey did not ask the former players whether they felt the NFLPA had adequately prepared them for the transition to post-football life. There are also several other limitations to the survey: (1) the survey was sent via email and text message by the NFLPA to more than 7,000 former NFL players, thus eliminating former players that were less technologically savvy and also possibly skewing the sample towards those former players closer to the NFLPA; (2) the response rate for the survey was low (approximately 11 percent); and, (3) the study does not discuss the demographics of those that responded, making it difficult to ascertain whether those who responded are a representative sample of all former players. Nevertheless, we provide the reader with the best existing data.

For more specific guidance, the NFL’s current practices concerning health are best understood by examining the practices of the NFL-affiliated stakeholders discussed in this Report: Chapter 2: Club Doctors; Chapter 3: Athletic Trainers; Chapter 8: NFL Clubs; Chapter 9: Coaches; Chapter 10: Other NFL Club Employees; and, Chapter 11: Equipment Managers.

ab Current Player 4 also praised the NFL for its rules protecting “defenseless players” but also thought more needed to be done to protect defensive linemen from cut blocking and blocks on interceptions.

ac The NFL cannot increase the length of the regular season without the NFLPA’s approval. 2011 CBA, Art. 31.

ad In reviewing a draft of this Report, the NFL clarified that any proposal to increase the regular season from 16 to 18 games would also reduce the preseason from 4 to 2 games. NFL Comments and Corrections (June 24, 2016).

(G) Enforcement of the NFL's Legal and Ethical Obligations^{ae}

As discussed above, the NFL's principal legal obligations concerning player health, as opposed to those of the clubs, are to fund and administer various benefit programs. In the event any player is dissatisfied with his benefits, *i.e.*, believes he is entitled to more than he is receiving, he can commence an arbitration before the neutral Benefits Arbitrator.

Aside from the NFL's benefit-related obligations, if a player believes the NFL has violated some other obligation he could commence a Non-Injury Grievance.^{af} The 2011 CBA directs certain disputes to designated arbitration mechanisms²⁷¹ and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.²⁷² Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."²⁷³ Many of the NFL's above-described legal obligations could be the subject of a Non-Injury Grievance. However, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based."²⁷⁴ Additionally, it is possible that under the 2011 CBA, the NFL could argue that complaints concerning medical care are designated elsewhere in the CBA and thus should not be heard by the Non-Injury Grievance arbitrator.²⁷⁵

Lawsuits against the NFL are another possible enforcement method, but face significant barriers. This is because the Labor Management Relations Act (LMRA)²⁷⁶ bars or "preempts" state common law^{ag} claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the"

CBA."²⁷⁷ In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance), rather than through litigation. Next, we provide a summary of some important lawsuits involving the NFL that also exemplify the preemption defense.

In *Williams v. NFL*, the United States Court of Appeals for the Eighth Circuit held that common law claims by Minnesota Vikings players Kevin Williams and Pat Williams against the NFL concerning a failed test under the NFL's Policy and Program on Anabolic Steroids and Related Substances ("Steroid Policy")^{ah} were preempted by the LMRA. However, non-common law claims brought pursuant to Minnesota state *statutes* were not.^{278,ai} The most important outcome of the "StarCaps" case, as it has become known, is the clear message that the CBA, Steroid Policy, and any other collectively bargained agreement, such as the NFL's Policy and Program for Substances of Abuse, must comply with each individual state's laws. The NFL argued that "subjecting the [Steroid] Policy to divergent state regulations would render the uniform enforcement of its drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible."²⁷⁹ The Eighth Circuit rejected this argument, explaining that deference to collective bargaining does not "grant the parties to a CBA the ability to contract for what is illegal under state law."²⁸⁰ Indeed, throughout the StarCaps case, "the NFL concede[d] that its steroid testing procedures do not comply with the letter of Minnesota state law."²⁸¹

Another prominent case concerning the NFL and the defense of preemption is *Stringer v. Nat'l Football League*.²⁸² In 2001, Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.²⁸³ Stringer's family filed two lawsuits: one against the Vikings, Vikings coaches, trainers, and affiliated doctors;²⁸⁴ and a second against the NFL and Riddell, the equipment manufacturer. In the second suit, Stringer's family alleged that the NFL was negligent in its regulation and control of training camps, equipment, and working conditions, and that Riddell sold defectively designed equipment.²⁸⁵ In a February 2007 decision, the United States District Court for the Southern District of Ohio held that Stringer's common

ae Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA can seek to enforce them on players' behalves.

af The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care that are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

ag Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

ah In 2014, the Steroid Policy was renamed the "Policy on Performance-Enhancing Substances."

ai Christopher R. Deubert, an author of this Report, formerly practiced at the law firm of Peter R. Ginsberg Law, LLC, which represented the Williamses in the StarCaps case. However, the case decisions discussed here occurred prior to Deubert joining the firm. Also of note, the StarCaps case involves multiple decisions in both state and federal courts, with varying degrees of success for the parties.

law wrongful death claim was “inextricably intertwined and substantially dependent upon an analysis of certain CBA provisions” and thus preempted.²⁸⁶ However, the Court held that Stringer’s negligence claims against the NFL concerning equipment safety were not preempted, since the CBA imposes no obligations concerning equipment.²⁸⁷ Stringer’s family and the NFL settled the lawsuit in January 2009.²⁸⁸

Prior to settlement of the Concussion Litigation, courts in a handful of cases had decided whether players’ concussion-related claims were preempted. In December 2011, in three related cases, the United States District Court for the Central District of California determined that at least some of the plaintiffs’ claims were preempted and thus denied the plaintiffs’ motion to remand the action back to state court (the Court, at that stage of the legal proceedings, did not have to consider whether all the claims were preempted).²⁸⁹ Similarly, in a lawsuit brought by the estate of former Chicago Bear and suicide victim David Duerson, the United States District Court for the Northern District of Illinois held that Duerson’s estate’s concussion-related claims were “substantially dependent on the interpretation of CBA provisions” and thus preempted.²⁹⁰ All of these cases were later transferred and consolidated into the Concussion Litigation. The NFL’s principal defense in the Concussion Litigation—as it has been in almost any case brought by players alleging common law violations—was preemption.

In contrast, in *Green v. Arizona Cardinals Football Club LLC*, the United States District Court for the Eastern District of Missouri held that a former player’s concussion-related claims against the Arizona Cardinals (but not the NFL) merely required reference to, and not interpretation of, the CBA and thus were not preempted.²⁹¹ As a result, the plaintiffs in the *Green* case potentially had the unique opportunity to pursue discovery against an NFL club on his claims.²⁹² However, in December 2015, after some of the plaintiffs left the case and the remaining plaintiffs filed an amended complaint, the Cardinals removed the case from Missouri state court to federal court and successfully had it consolidated with the Concussion Litigation.²⁹³ Thus, the unique opportunity presented by the initial decision of the Eastern District of Missouri court seems to have dissolved.

In addition to the concussion-related litigation, in May 2014, several former players, led by former Chicago Bear Richard Dent, filed a class action lawsuit alleging that the

NFL and its clubs negligently and fraudulently prescribed and administered painkilling medications during their careers.²⁹⁴ The lawsuit generally focused on three types of medications: opioids, which “act to block and dull pain”; non-steroidal anti-inflammatory medications, such as Toradol, which have “analgesic and anti-inflammatory effects to mitigate pain”; and, local anesthetics, such as lidocaine.²⁹⁵ In December 2014, the United States District Court for the Northern District of California ruled that the players’ claims were preempted by the LMRA.²⁹⁶ Effectively, the court found that to determine the validity of the players’ claims would require interpretation of the CBA, and thus the players should have pursued grievances as opposed to lawsuits.²⁹⁷ In Chapter 2: Club Doctors, Section I: The Special Case of Medications, we discuss issues concerning painkilling and prescription medication in the NFL.^{aj}

The above cases demonstrate the difficulty players are likely to have in pursuing health-related lawsuits against the NFL. Generally speaking, if a player’s common law claim requires the Court to analyze the terms of the CBA, the player will be unable to pursue that claim in a lawsuit.^{ak} The concept of preemption effectively forces parties to settle their disputes via collectively bargained arbitration procedures rather than in lawsuits.^{al}

While arbitration can provide meaningful recourse for the players, the short statute of limitations makes it difficult to pursue claims.

aj In that section, we discuss a case related to the *Dent* lawsuit, led by former player Chuck Evans. The *Evans* plaintiffs alleged substantially the same allegations as in the *Dent* case, but alleged *intentional* wrongdoing by the clubs, as opposed to merely negligent conduct. For reasons discussed in that section, the court denied a motion to dismiss by NFL clubs and the case is ongoing as of the time of this publication. See *Evans v. Arizona Cardinals Football Club*, 16-cv-1030, 2016 WL 3566945, *1 (N.D.Ca. July 1, 2016).

ak Nevertheless, it is important to note that, in May 2016, in a lawsuit substantially similar to the NFL’s Concussion Litigation, the United States District Court for the District of Minnesota denied the National Hockey League’s motion to dismiss concussion-related claims on preemption grounds. In many respects, the Court held that the issue would have to be decided on summary judgment after additional discovery in the case. See *In re Nat’l Hockey League Players’ Concussion Injury Litigation*, 14-md-2551, 2016 WL 2901736 (D. Minn. May 18, 2016).

al Arbitration generally minimizes costs for all parties and leads to faster and more accurate resolutions of legal disputes. See Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209 (2000); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1 (1995). We recognize that arbitration also raises potential concerns for claimants, including the upfront costs of the arbitration and bias in favor of repeat parties, typically the defendant. See David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014). However, these concerns are not present in arbitrations involving NFL players where the NFL and NFLPA (and not the player) generally bear the costs of the arbitration equally, the NFL and NFLPA are involved in nearly all of the arbitration proceedings, and both generally retain the ability to remove arbitrators with whom they are dissatisfied.

(H) Current Legal Obligations of the NFLPA^{am}

It is important to situate the NFLPA's legal obligations within its role as a labor union, which requires clarifying the difference between the NFLPA's membership and the bargaining unit it is bound to represent. First, in terms of membership, the NFLPA Constitution declares that "[t]here shall be three types of membership in the NFLPA: active, retired and associate membership."^{an} However, "[o]nly active members in good standing shall be eligible to vote in elections of Player Representatives and Alternates, contract ratification or any other matter which affects active players."²⁹⁸ In 2013, there were 5,430 total members: 2,006 active (nearly all active players in the NFL); 3,230 former (out of an estimated 20,000); and 194 associate.²⁹⁹

Membership in the NFLPA must be differentiated from the bargaining unit, *i.e.*, the persons the NFLPA represents in collective bargaining negotiations and other NFL-employment matters. The bargaining unit consists of:

"(1) All professional football players employed by a member club of the National Football League; (2) All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club; (3) All rookie players once they are selected in the current year's NFL College Draft; and (4) All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player."³⁰⁰ In contrast, the union only consists of those players within the bargaining unit that choose to be members of the union, which almost all do. It is important to note that the bargaining unit does not include players until the NFL Draft takes place, *i.e.*, players at the NFL Combine are not within the bargaining unit and thus are not protected or represented by the NFLPA.

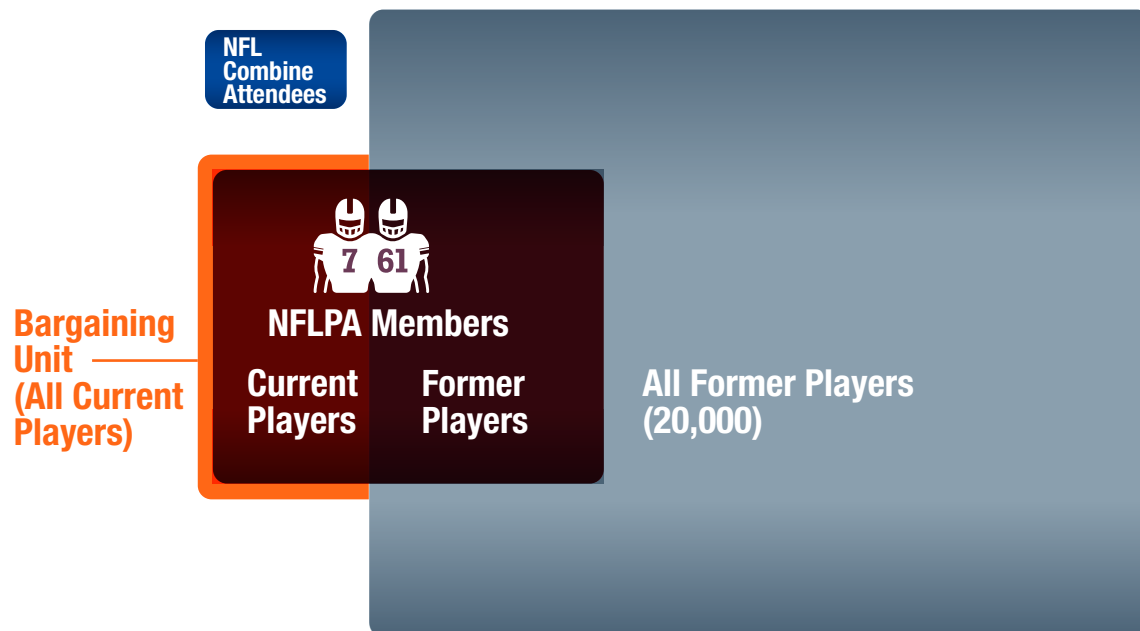
Importantly, players who previously played in the NFL but are no longer seeking employment with an NFL club, *i.e.*, retired or former players, are not part of the bargaining unit. Former players remain NFLPA members, in their limited capacity, only so long as they pay NFLPA dues.³⁰¹

Active NFL players, *i.e.*, those within the bargaining unit, similarly remain an NFLPA member only so long as they pay their dues.³⁰² As part of the CBA, NFL clubs agree to provide "check-off" authorization forms to the players,

^{am} The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

^{an} When asked, the NFLPA was uncertain as to what an "associate" member was and such membership is not described in the NFLPA Constitution.

Figure 7-C: NFLPA Membership and Bargaining Unit



permitting the clubs to directly withhold a portion of the players' paychecks to be sent to the NFLPA for dues.³⁰³ In the event a player chooses not to join the NFLPA, he still must pay "an annual service fee in the same amount as any initiation fee and annual dues required of members of the NFLPA."³⁰⁴ This is essentially a protection against non-member players receiving the benefits the NFLPA negotiates on behalf of the entire bargaining unit, which cannot be segregated from benefits available only to members. If the player refuses to pay the initiation fee, the NFLPA has the right to request that the player be suspended without pay until the fee is paid.³⁰⁵ Nevertheless, even if an active player is not an NFLPA member, he is still within the bargaining unit and thus entitled to the rights, benefits, and obligations provided for in the CBA.³⁰⁶

All of this is to say that, even though retired players can be "members" of the NFLPA, they are not in the same legal relationship with the NFLPA as those players in the bargaining unit ("Active Members" for purposes of this chapter). The differences in these legal relationships are discussed below.

The NFLPA has legal obligations towards those players in the bargaining unit (generally, current players and those actively seeking employment in the NFL). Specifically, the NFLPA owes a duty of fair representation to those in the bargaining unit.³⁰⁷ A union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."³⁰⁸ Although a union has wide discretion in representation of its the bargaining unit, it must exercise that discretion in good faith.³⁰⁹ If players believe the NFLPA had failed to make a good faith effort to protect their health or otherwise abide by its obligations under its Constitution,

they could seek legal recourse against the NFLPA.³¹⁰ Situations in which players have sued the NFLPA are discussed later in this chapter.

Unions in any industry do not owe a duty of fair representation to former members, *i.e.*, anyone outside of the bargaining unit.³¹¹ Thus, the NFLPA does not owe a duty of fair representation to former NFL players.

The NFLPA might also have fiduciary obligations towards those in the bargaining unit. A fiduciary duty obligates the fiduciary "to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."³¹² Determining whether a fiduciary relationship exists between two parties requires a fact-based inquiry into the relationship.³¹³ The duty of fair representation is considered a fiduciary duty³¹⁴ and thus there exists a strong argument that the NFLPA owes a fiduciary duty to players in the bargaining unit, which would include looking out for their best interests.

On multiple occasions, courts have found that the NFLPA did not owe a fiduciary duty to retired players,³¹⁵ but the courts have not addressed that question as it concerns current players.

(|) Current Ethical Codes Relevant to the NFLPA

The NFLPA does not have a governing code of ethics. This is not unusual for a labor organization. Nevertheless, the NFLPA Constitution does contain some statements of ethical responsibility, as discussed in the background to this chapter.

Generally speaking, if a player's common law claim requires the court to analyze the terms of the CBA, the player will be unable to pursue that claim in a lawsuit.



(J) Current Practices of the NFLPA

Despite the NFLPA's structural challenges, discussed in more detail below, substantial progress on player health issues has been made during NFLPA Executive Director Smith's tenure, particularly as part of Article 39 of the 2011 CBA, as previously discussed. Appendix C summarizes the various health-related programs and benefits available to players, Appendix D summarizes the various programs available to players through the NFL's Player Engagement Department, and Appendix E summarizes programs available to players through the NFLPA.

In addition to the above-mentioned programs, the NFLPA offers several programs to help current and former players, including: (1) an externship program with a variety of companies; (2) business classes through Indiana University's Kelley School of Business; (3) a college coaching internship; (4) The Trust—a “set of resources, programs and services designed to provide former players with the support, skills and tools to help ensure success off the field and in life after football”;³¹⁶ and, (5) the Gene Upshaw Player Assistance Trust Fund, which provides former players facing financial hardship or who wish to finish their undergraduate degrees with financial grants.³¹⁷

The NFLPA also employs five former players as Player Advocates to assist players.³¹⁸ The Player Advocates are assigned to specific regions and are responsible for the players of the clubs in their region. The Player Advocates are generally available to the players to help them with club-related matters, to steer them to the appropriate resources such as the NFLPA, and to provide general support.

The NFLPA meets with players during training camp and during the season to discuss relevant issues, including injury trends, existing science, the Concussion Protocol and health-related rights under the CBA.³¹⁹ The NFLPA also sends players quarterly emails on these issues and a pamphlet concerning concussions created in collaboration with the American Academy of Neurology.³²⁰ Finally, the NFLPA is currently in the process of creating a video concerning concussions for presentation to the players.³²¹

In addition to the NFLPA's programs, beginning in 2014, the NFLPA has sponsored The Football Players Health Study at Harvard University, of which this Report is a part. The Study is a long-term research project with the goal of improving the health of NFL players, including

by understanding the health consequences of an NFL career; identifying and supporting groundbreaking medical research that can benefit players; and, analyzing the legal and ethical issues affecting player health.

Finally, in 2009, the NFLPA created the Mackey-White Committee,³²⁰ consisting of current players, former players, doctors, and others for the purpose of “assist[ing] the NFLPA in its development of policies concerning workplace safety and the health of NFLPA members.”³²² The Mackey-White Committee has four objectives:

- (1) identify and analyze the health and safety hazards in the NFL and recommend control measures to eliminate or reduce the risks to players from such hazards;
- (2) interpret the science related to work place injuries and conditions arising from employment in the NFL, including, without limitation, repetitive brain trauma, and to disclose the short and long term risks associated therewith, in an effort to better inform and protect NFLPA members, past, present and future;
- (3) change the culture of professional football by (i) educating players, coaches and members of the medical community about the short and long-term effects of concussions and other injuries and (ii) advocating for progressive changes, based on science, to the ways in which injuries are managed by the NFL and its Clubs whenever necessary; and
- (4) protect youth athletes by raising awareness of the risks associated with repeat concussions, and help educate our elected officials and the general public about health issues related to the professional football occupation.³²³

According to the NFLPA, the Mackey-White Committee has played an advisory role in essentially all of the NFLPA's accomplishments concerning player health and safety, including but not limited to the credentialing of medical staff, revisions to the Concussion Protocol, and the decision to fund The Football Players Health Study at Harvard University.³²⁴

Notwithstanding the programs and efforts described above, discussions and interviews with current and former players revealed a wide variety of reactions to the NFLPA. Some place the blame for any issues players face at the feet of the NFL and believe the NFLPA has fought hard to protect players. Some—former players in particular—think the

320 The Mackey-White Committee is named for Hall of Fame tight end John Mackey who was the first President of the NFLPA (1970–73), and Hall of Fame defensive end Reggie White. Both Mackey and White were lead plaintiffs in lawsuits challenging the NFL's player movement and salary restrictions.

NFLPA has failed and continues to fail to protect players.^{ap} Players sometimes express concern that the NFLPA works much harder on behalf of star players than the rank and file.^{aq} Of course, there are also many with a viewpoint somewhere in between. Below we offer a sampling of the perspectives of current players that we interviewed concerning the NFLPA,^{ar}

- **Current Player 1:** *“I feel like they have our best interests at heart [but] I don’t know if I would say they’re that effective but I think . . . they’re kind of limited as to what they can do for us.”*
- **Current Player 2:** *“I think that they’ve certainly made strides in the right direction . . . but I still think that there’s a long way for us to go in order to get where we’d all like to see it go.”*
- **Current Player 3:** *“I think the NFLPA has done a good job because we’ve been in situations where we’ve been able to negotiate and get some things done with practice scheduling [W]hen you talk about the NFLPA, you’re going to have some guys that love the PA and other guys who hate it There’s no way you can make everything perfect for each individual. You just have to make it good for the whole That’s just part of dealing with that many different people because if you’ve got 2,000 players, you’ve got 2,000 different situations and there’s just no way that you can instantly cover each situation.”*
- **Current Player 4:** *“I’m definitely not [happy with the NFLPA] It seems very disorganized I think it does not do enough to help players avoid problematic situations with financial advisors and agents I don’t think they’re very good as it relates to player health.”^{as}*
- **Current Player 5:** *“I believe in the union and everything like that but I think in general they’re not seen as doing very much for the players.”*
- **Current Player 6:** *“I think the PA is doing a really good job. Whether that’s helping guys find out their rights, whether*

that’s offering resources like through the PA office, I’m really happy with the PA’s work.”

- **Current Player 8:** *“I think there are a lot of great ideas being thrown around. I think there’s a lot of movement and momentum starting.” However, Current Player 8 also stated: “I am frustrated with the lack of consensus [in medical information], but I wish the PA could provide a direct source to the information.”*
- **Current Player 9:** *“I think the PA has done a good job protecting players I’m not going to sit here and say that the PA in the past has acted always as quickly as we needed them to.”*
- **Current Player 10:** *“They’ve done well in that they can bring the issue up, they can talk to us in our meetings about it, but I don’t think they are a very big player in it to be honest The NFLPA’s whole tune is always anti-establishment, basically us against them . . . but I think the NFL, in general, has done a good job by themselves with player issues in the forefront [The NFLPA] is a lot about politics and I don’t know if it’s always necessarily about the players first more so than some of the people in the organization.”*

The NFLPA’s membership composition poses considerable challenges. As discussed above, the NFLPA has approximately 2,000 active members, only slightly less than the estimated 2,340 active members of the Major League Baseball Players Association, National Basketball Players Association and National Hockey League Players Association combined.³²⁵ When coupled with the fact that the average NFL player’s career is generally shorter than that of players in the other leagues,³²⁶ it is clear that the NFLPA membership is a massive and constantly changing group. Members of this group are likely to have heterogeneous or in some cases conflicting interests.

There are also potential concerns about the enforcement of player health rights. Since the execution of the 2011 CBA, there have been no grievances concerning Article 39: Players’ Rights to Medical Care and Treatment decided on the merits.³²⁷ Additionally, the Joint Committee on Player Safety and Welfare has only conducted one investigation concerning the medical care of a club.³²⁸ These facts suggest that either there are no problems, which seems unlikely considering the issues discussed in this Report and the contentious relationship between the NFL and NFLPA, or that there are opportunities for additional enforcement of player health provisions.

ap Former Player 1: “The NFLPA is the most inept organization in professional sports. That’s my personal opinion. I’ve had multiple dealings with the NFLPA and I have never felt so underserved I think it is an incompetent body that’s basically beholden to the ownership and the NFL and they do not have the players’ best interests in mind regardless of what they say.” Former Player 2: “I think it’s a weak union, a very weak union. I think the NFL and the owners they dominate everything.” Also, in a 2014–2015 survey of 763 former players by *Newsday*, *Newsday* reported “many” former players “blamed the union for not looking out for them during previous collective bargaining.” See Jim Baumbach, *Life After Football*, *Newsday* (Jan. 22, 2015), <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.

aq Former Player 1: “They might have some of the top players, but they don’t have every NFL player in mind and it’s very obvious.”

ar We reiterate that our interviews were intended to be informational but not representative of all players’ views, and should be read with that limitation in mind.

as Current Player 4 did praise the NFL for offering “a number of different programs in the offseason for players.”

Multiple contract advisors attributed the lack of enforcement to the NFLPA's relatively small legal staff. One contract advisor that we spoke with expressed the belief that "the NFLPA is severely understaffed," while another explained that in his opinion the NFLPA does a "terrible job" of policing club medical staff and enforcing player health and safety provisions of the CBA because, in part, it is "absolutely not" adequately staffed. He recommended the NFLPA have an attorney in every city where there is an NFL club to constantly monitor the club and its medical staff. Similarly, another contract advisor said it would help "100 percent" if the NFLPA hired more attorneys focused on health issues.^{at}

In addition to enforcement, questions have been raised concerning potential conflicts of interest between the NFLPA and the players. By way of background, the NFLPA routinely negotiates (or attempts to negotiate) settlements of multiple players' grievances, for appeals for Commissioner discipline, and for appeals under the Policy and Program of Substances of Abuse ("Substance Abuse Policy") and the Policy on Performance-Enhancing Substances ("PES Policy"). For example, when the parties agreed to a revised Substance Abuse Policy and PES Policy in September 2014, they also agreed to amended discipline for six players.³²⁹ Additionally, as part of the 2011 CBA, the NFL and NFLPA agreed to reduced discipline for four players involved in the "StarCaps" case, discussed above.³³⁰ Moreover, the 2014 PES Policy specifically created an "Appeals Settlement Committee" consisting of the NFL Commissioner and NFLPA Executive Director (or their designees) that has "the authority to resolve any appeal under th[e] [Steroid] Policy, which resolution shall be final and binding." Importantly, the Appeals Settlement Committee does not mention requiring the potentially suspended player's input or preference concerning a possible settlement.

Some have suggested that these settlements raise concerns that the NFLPA might favorably settle one player's case at the expense of another player's, or that the NFLPA

advances other bargaining agendas at the expense of potential settlements for players. For example, the conflict of interest issue was raised in 1996 by former Pro Bowl wide receiver Sterling Sharpe in an unsuccessful lawsuit against the NFLPA,^{au} and again by Honorable Helen G. Berrigan of the United States District Court for the Eastern District of Louisiana in 2012. In response to the "bounty" allegations from the NFL, discussed at length in Chapter 9: Coaches, the NFLPA and three of the players alleged to have been involved filed a lawsuit against the NFL in the Eastern District of Louisiana.^{av} The NFLPA and all three players were represented by the NFLPA's longtime outside counsel Jeffrey Kessler of Winston Strawn LLP (formerly of Dewey & LeBoeuf and Weil, Gotshal & Manges LLP). Judge Berrigan expressed concern that Kessler had a conflict of interest by representing both the NFLPA and the players and ordered Kessler to show cause why he and his firm should not be disqualified.³³¹ It would seem that Berrigan was concerned that Kessler's firm would be advocating for the interests of the NFLPA, including a potential settlement, which might not have corresponded with the interests of the players.

Kessler and the NFLPA responded by explaining that Kessler "has represented the NFLPA along with thousands of NFL players for more than 20 years in various disputes against the NFL," including "[m]ore than a hundred arbitrations . . . filed each year, plus occasional court cases."³³² Additionally, the NFLPA argued that, "[a]s a union, [it] is the exclusive collective bargaining representative of NFL players, and as such has the authority under federal labor laws to negotiate and resolve disputes on behalf of its members, both in negotiations with management and in the arbitral process."³³³

Ultimately, Judge Berrigan did not issue any reaction to the NFLPA's response and did not disqualify Kessler and his firm.

at A 2008 report prepared by the Congressional Research Service also questioned the NFLPA's ability to address player health matters at that time: "The subject of MTBI research and guidelines, in particular, raises several questions regarding whether the players association has sufficient capacity and authority to participate effectively in matters involving safety and health issues. For example, while members of the MTBI Committee have been involved in an ongoing dialogue with other professionals in the field of neurology (as documented above), it appears that the NFLPA has not commented publicly on any of the issues, such as the possible long-term effects of concussions and the possibility that multiple mild traumatic brain injuries could result in CTE." L. Elaine Halchin, Cong. Research Serv., RL34439, NFL Players: Disabilities, Benefits, and Related Issues (2008) available at http://digitalcommons.ilr.cornell.edu/key_workplace/525, archived at <http://perma.cc/FT92-ECEL>.

au In 1994, Sharpe suffered a career-ending injury and filed a grievance against his Club, the Green Bay Packers, seeking payment for portions of his contract. Sharpe sued the NFLPA alleging it had breached its duty of fair representation by agreeing with the NFL that Sharpe's grievance would not be expedited and would not be treated as an Injury Grievance, creating the impression with the arbitrator that the NFLPA did not believe in the legitimacy of Sharpe's case. The United States District Court for the District of Columbia dismissed Sharpe's claim as premature, since no arbitration decision had yet been rendered. *Sharpe v. Nat'l Football League Players Ass'n*, 941 F. Supp. 8 (D.D.C. 1996). Sharpe later voluntarily dismissed the case. Oscar Dixon, *Sharpe, Dent Suits Dismissed By Court*, USA Today, Jun. 30, 1995, available at 1995 WLNR 2566365.

av Christopher R. Deubert, an author of this Report, and the firm at which he formerly practiced, Peter R. Ginsberg Law, LLC, represented former New Orleans Saints player Jonathan Vilma in the "Bounty"-related legal proceedings, but was uninvolved in the issue discussed here.

(K) Enforcement of the NFLPA's Legal and Ethical Obligations^{aw}

A player's only recourse against the NFLPA is a civil lawsuit. While other claims might exist depending on the particular circumstances, lawsuits by union members against the union are generally framed as alleged breaches of the duty of fair representation. However, such claims are generally difficult to prove and have been rarely brought against the NFLPA. In addition to the *Sharpe* case mentioned above, research has only revealed two other lawsuits in which players alleged the NFLPA violated its duty of fair representation.

In *Chuy v. Nat'l Football League Players Ass'n*,³³⁴ former player Donald Chuy alleged the NFLPA breached its duty of fair representation when it refused to process Chuy's Injury Grievance against his former club (the club refused to pay Chuy after he was injured during the 1969 season). The United States District Court for the Eastern District of Pennsylvania denied the NFLPA's motion to dismiss, holding that Chuy stated a viable claim.^{ax}

The NFLPA made no public statement regarding the merits of the Concussion Litigation, provided no legal advice or guidance to players, and made no statement regarding the proposed or eventual settlement in the Concussion Litigation.

Former player James Peterson was less successful in his breach of the duty of fair representation claim against the NFLPA. In his case,³³⁵ the United States Court of Appeals for the Ninth Circuit affirmed the vacatur^{ay} of a jury verdict in Peterson's favor. Peterson alleged that, in 1977, the NFLPA and two of its lawyers failed to timely file an Injury Grievance on Peterson's behalf despite handling

the matter for Peterson. The Ninth Circuit held that the NFLPA's conduct was not arbitrary, discriminatory, or in bad faith sufficient to state a claim. The court explained that, generally, acts of negligence by union officials will not state a claim for breach of the duty of fair representation.

The most significant lawsuit concerning the NFLPA's health obligations was brought in 2014. In *Smith v. Nat'l Football League Players Ass'n*,³³⁶ former NFL players sued the NFLPA alleging that it had intentionally and fraudulently failed to protect them from the risk of concussions during their careers. The lawsuit was brought by some of the same attorneys involved in the Concussion Litigation against the NFL and substantially duplicated the allegations in that lawsuit. The NFLPA responded by having the case removed from Missouri state court to the United States District Court for the Eastern District of Missouri and asserting the same defense as the NFL in the Concussion Litigation – that the players' claims were preempted by the LMRA. Additionally, the NFLPA argued that the players' claims were preempted by the NLRA, *i.e.*, that the plaintiffs' claims had to be brought as breach of the duty of fair representation claims.

The NFLPA's defense in the *Smith* case was the first time the NFLPA had expressed publicly any opinion about concussion-related claims by former players. Ultimately, the court sided with the NFLPA on all counts, *i.e.*, agreed that the players' claims were preempted by the LMRA and the NLRA, and denied the plaintiffs' motion to remand the case to state court.³³⁷ After denying the motion to remand, the court granted the NFLPA's motion to dismiss the case, again finding that the players' claims were preempted.³³⁸

This case is particularly important not only because it highlights the sometimes fractious relationship between the NFLPA and former players, but also because it reveals a potential structural tension the NFLPA's self-interest and its responsibility to players. The NFLPA made no public statement regarding the merits of the Concussion Litigation against the NFL, provided no legal advice or guidance to players deciding whether to join the class action or not, offered no guidance on legal strategies most likely to be successful against the NFL, and made no statement regarding the proposed or eventual settlement in the Concussion Litigation and its adequacy.³³⁹ Some commentators opined that the NFLPA abstained from expressing any opinion about the Concussion Litigation for fear that it would highlight the NFLPA's own actions or inactions concerning concussions:

aw Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

ax The result of the lawsuit is unclear.

ay "Vacatur" refers to the judicial "act of annulling or setting aside." Black's Law Dictionary (9th ed. 2009). In this case, the United States District Court for the Southern District of California set aside a jury verdict in Peterson's favor, a decision affirmed by the Ninth Circuit.

*The NFLPA has kept its head low throughout the concussion litigation, in large part because none of the plaintiffs had sued the players' union—but any, some, or all of them could have sued.*³⁴⁰

*At a time when some are lamenting the fact that the settlement of the concussion lawsuits will prevent the public from knowing what the NFL knew and when the NFL knew it, those same questions will never be answered regarding the NFLPA. What did the NFLPA know, when did the NFLPA know it, and why didn't the NFLPA do a better job of protecting its men? [. . .] The simple fact is that, under the late Gene Upshaw, the NFLPA was a major part of the problem.*³⁴¹

A final case worth mentioning concerns the NFLPA's Financial Advisor program (discussed at length in Chapter 13: Financial Advisors). In *Atwater v. Nat'l Football League Players Ass'n*,³⁴² six former players sued the NFLPA for losses they suffered by investing with NFLPA-registered financial advisors. The Court granted the NFLPA summary judgment,^{az} holding that the players' claims were preempted by the LMRA.^{ba}

az Summary judgment is “[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law.” Black’s Law Dictionary (9th ed. 2009).

ba Similarly, in June 2015, former NFL player Richard Goodman sued the NFLPA alleging that it was negligent and breached its fiduciary duties in regulating Goodman’s former contract advisor, causing Goodman financial damages. See Complaint, *Goodman v. Nat'l Football League Players Ass'n*, No. 15011396 (Fla. Cir. Ct. June 30, 2015). Less than two weeks after it was filed, Goodman and the NFLPA settled the lawsuit on confidential terms. E-mail with Darren Heitner, Heitner Legal, P.L.L.C., Counsel for Goodman (Aug. 25, 2015).



(L) Recommendations Concerning The NFL and NFLPA

The NFL and NFLPA are clearly in a position to protect and promote player health. There is also no doubt that both parties have made significant progress on this front in recent years, and that the NFL and NFLPA offer many benefits and programs intended to help current and former players. Nevertheless, there are still many important changes the NFL and NFLPA can make that will further advance player health and likely the game of football in the process.

Before explaining our recommendations for the NFL and NFLPA, it is important to review a key principle of labor law. The NLRA obligates employers and unions to collectively bargain “in good faith with respect to wages, hours, and other terms and conditions of employment.”³⁴³ Within this obligation, there is ongoing legal debate as to which issues are mandatory subjects of bargaining and which are merely permissible subjects of bargaining, *i.e.*, which subjects the NLRA requires the parties to negotiate, and which the parties are not required to negotiate but may.³⁴⁴ Some of our recommendations concern mandatory subjects of bargaining while others likely do not. We recognize the NFL and NFLPA might reasonably disagree about which issues are mandatory subjects of bargaining and thus do not intend to suggest that each of the below recommendations must be collectively bargained. We encourage collaboration between the parties but nonetheless urge progress first and foremost, including where that progress can be made unilaterally.

Additionally, it is again important to remember that the NFLPA’s legal duties are to current players, not former players. This is true even though the NFLPA has negotiated increased benefits and additional programs for former players many times. Indeed, beyond the NFLPA’s legal duties, we recognize that many former players rely on the NFLPA for information and assistance. Nevertheless, for reasons discussed in the Introduction, Section H: Scope of the Report, our recommendations focus on current players.

Finally, there are also recommendations directly concerning the NFL and NFLPA that are made in other chapters:

- Chapter 1: Players— Recommendation 1:1-G: Players should not sign any document presented to them by the NFL, an NFL club, or employee of an NFL club without discussing the document with their contract advisor, the NFLPA, their financial advisor, and/or other counsel, as appropriate.
- Chapter 2: Club Doctors— Recommendation 2:1-A: The current arrangement in which club (*i.e.*, “team”) medical staff, including doctors, athletic trainers, and others, have responsibilities both to players and to the club presents an inherent conflict of interest. To address this problem and help ensure that players receive medical care that is as free from conflict as possible, division of responsibilities between two distinct groups of medical professionals is needed. Player care and treatment should be provided by one set of medical professionals (called the “Players’ Medical Staff”), appointed by a joint committee with representation from both the NFL and NFLPA, and evaluation of players for business purposes should be done by separate medical personnel (the “Club Evaluation Doctor”).
- Chapter 2: Club Doctors— Recommendation 2:1-H: The NFL’s Medical Sponsorship Policy should prohibit doctors or other medical service providers (MSPs) from providing consideration of any kind for the right to provide medical services to the club, exclusively or non-exclusively.
- Chapter 9: Coaches— Recommendation 9:1-B: The most important ethical principles concerning coaches’ practices concerning player health should be incorporated into the CBA.
- Chapter 13: Financial Advisors— Recommendation 13:1-A: Players should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors.
- Chapter 13: Financial Advisors— Recommendation 13:2-A: The NFLPA and NFL should consider holding regular courses on financial issues for players.
- Chapter 13: Financial Advisors— Recommendation 13:2-B: The NFL and NFLPA should consider amending the player payment schedule so that players, by default, are paid over a 12-month period.

Recommendations Concerning The NFL and NFLPA – continued

- Chapter 14: Family Members—Recommendation 14:1-A: Family members should be cognizant of the gaps in their knowledge concerning the realities of an NFL career, and the NFL and NFLPA should offer programs or materials to help them become better health advocates.

Goal 1: To make player health a priority.

Principles Advanced: Respect; Health Primacy; Empowered Autonomy; Transparency; Managing Conflicts of Interest; Collaboration and Engagement; and, Justice.

Recommendation 7:1-A: The NFL and NFLPA should not make player health a subject of adversarial collective bargaining.

As discussed throughout this Report, collective bargaining is the principal method by which changes are made to NFL player health policies. Pursuant to federal labor law, this will and should continue to be the case. However, we do not believe that collective bargaining over player health issues should be an *adversarial* process.

We acknowledge the realities of labor negotiations and do not mean to naively suggest that the one party accept at face value every player health proposal the other might make. Nevertheless, if as part of its research or otherwise the NFL knows a policy or practice should change, it should do so without waiting for the next round of bargaining or by forcing the NFLPA to concede on some other issue. Indeed, for the NFL to demand a quid pro quo in exchange for improving player health policies or practices would be ethically problematic. For player health to be maximized, it is important that the NFL view the issue as an independent obligation of its own, rather than an issue to be forced upon it. Similarly, the NFLPA should not delay on addressing player health issues in order to advance other collective bargaining issues. We hope the NFL and NFLPA have adopted and will in the future adopt this attitude toward collective bargaining.

Relatedly, the NFL should also more substantially engage with current players about player health issues, including incorporating their input on some of the NFL's committees.

Recommendation 7:1-B: The NFL and NFLPA should continue to undertake and support efforts to scientifically and reliably establish the health risks and benefits of playing professional football.^{bb}

The MTBI Committee's work is widely considered to have been flawed and incorrect in many ways. Since overhauling that Committee in 2009, the NFL has committed funds to several external organizations primarily to study traumatic brain injury, including but not limited to providing \$1 million to Boston University in 2010³⁴⁵ and \$30 million to the National Institutes of Health (NIH) in 2012, \$6 million of which, according to the NFL, was eventually awarded to Boston University.^{346, bc} In total, the NFL stated that “over the past six years the NFL has dedicated more than \$93 million in funds for scientific and medical research.”³⁴⁷ Research concerning brain injuries is very important. In addition, as we have

bb Dr. Elizabeth Nabel, the NFL's Chief Health and Medical Adviser, has also recommended that the NFL continue to fund medical research concerning player health. See Ben Tinker, *CNN exclusive: NFL's first medical adviser sits down with Dr. Sanjay Gupta*, CNN (Aug. 4, 2015), <http://www.cnn.com/2015/08/04/health/nfl-health-chief-interview/>, archived at <http://perma.cc/CR8S-898C>.

bc The funds to NIH might also be used for studying health conditions other than brain injuries, but the focus of the study is clearly on brain injuries. See *The National Football League Commits \$30 Million Donation to the Foundation for the National Institutes of Health to Support Medical Research*, Nat'l Insts. of Health (Sept. 5, 2012), <http://www.nih.gov/news/health/sep2012/od-05.htm>, archived at <http://perma.cc/LR65-9CYR>.

Recommendations Concerning The NFL and NFLPA – continued

emphasized in this Report, it is important to focus on the health of the whole player for the whole lifetime, which means also supporting research in other health domains. Without knowing the actual results of a football career, it is difficult to craft policies and practices that can maximize player health. On this point, the NFL has funded studies derived from data collected from medical screenings of 3,599 former players through the Player Care Foundation³⁴⁸ and the NFLPA has awarded funding to Harvard University for The Football Players Health Study at Harvard University. Research on these issues should continue.

We also emphasize the importance of studying and better articulating the benefits of playing professional football. On this point, we agree with the NFL:

Football is a sport that truly unites people. Our players feel connected to their team, their community and their fans. They are taking part in a cultural institution in this country that provides inspiration and joy to millions of people. While those are not financial benefits, those are benefits that provide our players with tremendous personal satisfaction and value, and should not be overlooked[.]³⁴⁹

Better understanding of both the risks and benefits of playing professional football will help to empower players in making choices about football and their health.

Recommendation 7:1-C: The NFL, and to the extent possible, the NFLPA, should: (a) continue to improve its robust collection of aggregate injury data; (b) continue to have qualified professionals analyze the injury data; and, (c) make the data publicly available for re-analysis.

As explained in Chapter 1: Players, the NFL Injury Surveillance System (NFLISS) allows for the accumulation of current information about the nature, duration, and cause of player injuries. Also as stated in Chapter 1, we rely on NFLISS data in this Report because it provides the best available data concerning player injuries, although we cannot independently verify the data's accuracy. We acknowledge that the NFL's past injury reporting and data analysis have been publicly criticized as incomplete, biased, or otherwise problematic, although we are not aware of any criticism of the NFLISS specifically.³⁵⁰ Without resolving the debate concerning the NFL's collection and use of injury data, we nonetheless stress the importance of accurate, comprehensive, and mandatory injury data collection—and meaningful disciplinary action for responsible parties (e.g., club medical staff) who fail to accurately record injury data.

If accurately collected, these datasets have the potential to improve player health through analysis by qualified experts, so long as they are made available to them. In particular, analysis can be performed to determine, among other things, the effects of rule changes, practice habits, scheduling, new equipment, and certain treatments, while also identifying promising or discouraging trends and injury types in need of additional focus.³⁵¹ Notably, the NFL already conducts this type of analysis through Quintiles, as explained in Chapter 1: Players.^{bd} However, the NFL does not publicly release its injury data (nor does any other major professional league as far as we are aware). The NFL does release some data at its annual Health & Safety Press Conference at the Super Bowl. However, the data released at the Press Conference are minimal compared to the data available and the analyses performed by Quintiles. Also as explained in Chapter 1: Players, the NFL and NFLPA denied our request to incorporate additional data from the 2015 Quintiles report into this Report, for reasons with which we disagree. It is regrettable that both the NFL and NFLPA are not providing players with all data and information concerning player health that is in their possession.

^{bd} The Football Players Health Study is also collecting data about former NFL players, their injury histories, and other factors that can help better elucidate the risks faced by players.

Recommendations Concerning The NFL and NFLPA – continued

For the data collected to have the potential meaningful applications mentioned above, it must be made available in a form as close to its entirety as possible. Such disclosure would permit academics, journalists, fans, and others to scrutinize and analyze the data in any number of ways, likely elucidating statistical events, trends and figures that have the opportunity to improve player health, as well as simply providing independent verification of any analysis done by Quintiles for added public trust. To be clear we are recommending the release of more *aggregate* data, not data that could lead to identification of the injuries of any particular player or cause problems concerning gambling (*see* Chapter 18: Fans).

Publicly releasing injury data, nevertheless, comes with complications that we must acknowledge. While more transparency in injury reporting is necessary, the nuances of such data can easily be lost on those without proper training. Sports injury prevention priorities in public health can be swayed by public opinion and heavily influenced by those with the most media coverage. Making injury data publically available may allow those with the media access to dictate the agenda regardless of the actual implications of the data. As a result, it may be harder for injury trends that may be more hazardous, but less visible in the media, to get the attention they need, even when the data clearly state their importance. Thoughtful, balanced, peer-review results may have difficulty competing against those statistics which garner the most media attention. For this and other reasons, in Chapter 17: The Media, we recommended that “[t]he media should be accurate, balanced, and comprehensive in its reporting on player health issues.” The medical, scientific and legal issues concerning player health are extremely complicated, which demands that the media take care to avoid making assertions that are not supported or that do not account for the intricacies and nuance of medicine, science and the law.

In light of these concerns, one possible intermediate solution is to create a committee of experts that can review requests for data and determine whether or not the usage of the data is appropriate and will advance player health. Indeed, the Datalys Center for Sports Injury Research and Prevention performs this role concerning access to NCAA student-athlete injury data.³⁵² Moreover, such committees have also been formed in the clinical research setting.³⁵³

Recommendation 7:1-D: The NFL and NFLPA should publicly release de-identified, aggregate data from the Accountability and Care Committee’s player surveys concerning the adequacy of players’ medical care.

As discussed earlier, as part of the 2011 CBA, the NFL and NFLPA created a joint Accountability and Care Committee (ACC), which is to “provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players[.]”³⁵⁴ Among the ACC’s responsibilities is to “conduct a confidential player survey at least once every two years to solicit the players’ input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analysis of the results of such surveys.” Despite the provisions of the CBA, the first survey was not conducted until 2015.³⁵⁵ Moreover, no results of the survey have been made public.

We believe de-identified aggregate data from the results from the 2015 survey and all subsequent surveys should be made public, or at least made available to appropriate outside researchers. As discussed at length in Chapter 2: Club Doctors and Chapter 3: Athletic Trainers, there are serious questions concerning the relationship between club medical staff and players, including the possibility that at least some players do not trust the club medical staff—a serious concern for the efficacy of the patient-doctor relationship. Independent research on these issues is important, as it can allow qualified experts to analyze the data and identify potential areas of improvement. Nevertheless, as evidenced by the challenges in our own work, engaging players and club medical staff (including NFL permission) to participate in a research study is extremely difficult. The NFL and NFLPA have these data sets and thus can make them public to facilitate additional research.

Recommendations Concerning The NFL and NFLPA – continued

This recommendation is reiterated in a forthcoming Special Report from The Hastings Center Report, to be published in December 2016.

The NFL denied our request for this data, citing a confidentiality agreement between the NFL and NFLPA. The NFL explained

[u]nder the terms of the confidentiality agreement, the results of the survey were provided to only certain, specifically-named individuals at the League and the Players Association and to certain individuals at each club, who are bound by the terms of the agreement. The results were collected, tabulated and analyzed by the survey company which then met with the NFL and NFLPA to discuss the results. Representatives of many of the clubs, the NFL and the NFLPA have also met to discuss the results of the survey and to share best practices regarding player medical care as part of their ongoing efforts in this realm. These best practices will be further discussed when the representatives of the NFL and NFLPA (including the NFLPA's Medical Director) visit training camps to meet with club medical staffs this summer, as they do every year.

For the reasons stated above, we believe it is important that this data be analyzed beyond a small group of people at the NFL, NFLPA and NFL clubs.

Recommendation 7:1-E: Players diagnosed with a concussion should be placed on a short-term injured reserve list whereby the player does not count against the Active/Inactive 53-man roster until he is cleared to play by the Concussion Protocol (see Appendix A).

For each game, NFL clubs must divide their 53-man rosters into 46 active players, those eligible to play in the game, and 7 inactive players, those who cannot play in the game.³⁵⁶ There is no limitation on how often a player can be declared inactive. While concussed players can be declared inactive for one or more games, we believe concussions present a unique situation that requires a unique approach.

According to the leading experts, 80 to 90 percent of concussions are resolved within 7 to 10 days.³⁵⁷ Thus, concussion symptoms persist for longer than 10 days for approximately 10 to 20 percent of athletes. In addition, a variety of factors can modify the concussion recovery period, such as the loss of consciousness, past concussion history, medications, and the player's style of play.³⁵⁸ Consequently, a player's recovery time from a concussion can easily range from no games to several. The uncertain recovery times create pressure on the player, club, and club doctor. Each roster spot is valuable and clubs constantly add and drop players to ensure they have the roster that gives them the greatest chance to win each game day. As a result of the uncertain recovery times, clubs might debate whether they need to replace the player for that week or longer. The club doctor and player might also then feel pressure for the player to return to play as soon as possible. By exempting a concussed player from the 53-man roster, the club has the opportunity to sign a short-term replacement player in the event the concussed player is unable to play. At the same time, the player and club doctor would have some of the return-to-play pressure removed.³⁵⁹

In fact, MLB already has such a policy. MLB has a 7-day Disabled List (as compared to its normal 15 and 60 day Disabled Lists) "solely for the placement of players who suffer a concussion."³⁶⁰

Why treat concussions differently than other injuries in this respect? This is a fair question to which there are a few plausible responses. First, in terms of the perception of the game by fans, concussions have clearly received more attention than any of the other injuries NFL players might experience and thus the future of the game depends more critically on adequately protecting players who suffer from them. Second, concussions are harder to diagnose than other injuries, such that there may be a period of uncertainty in which it would be appropriate to err on the side of caution.³⁶¹ Third, both players and medical professionals have more difficulty anticipating the long-term effects of concussions as compared

Recommendations Concerning The NFL and NFLPA – continued

to other injuries, given current scientific uncertainties concerning brain injury.³⁶² Fourth, and perhaps most importantly, it is harder to determine the appropriate recovery times for concussions as compared to other injuries.³⁶³ These reasons all support a recommendation to exclude concussed players from a club’s Active/Inactive roster, but we recognize that the key feature of players potentially feeling or facing pressure to return before full recovery may be shared across any injury a player may experience. Thus, it may also be reasonable to consider extending this recommendation beyond concussions.^{be}

In reviewing a draft of this Report, the NFL argued that “[t]he current NFL roster rules actually provide greater flexibility” than is recommended here.³⁶⁴ The NFL explained that because “[t]here is no limitation on how long a player may be carried on the 53-man roster throughout the season without being ‘activated,’ . . . a player who is concussed routinely is carried on his club’s 53-man roster without being activated until he is cleared.”³⁶⁵ However, for the reasons explained above, we believe concussions should be treated differently. All 53 spots on the roster are precious to both the club and the players. The uncertainty surrounding recovery from a concussion presents unique pressures that can be lessened with the approach recommended here.

Recommendation 7:1-F: The NFL and NFLPA should research the consequences and feasibility of guaranteeing more of players’ compensation as a way to protect player health.

Guaranteed compensation in the NFL is a complicated issue, and we are not making a recommendation that NFL player contracts be fully guaranteed, as is generally the case in MLB, the NBA and, to a lesser extent, the NHL. Many people, particularly some players, feel that fully guaranteeing a player’s contract is a fair trade for the health risks players undertake, a notion consistent with our ethical principle of Respect. More important for our purposes here, focused on protecting and promoting player health, is that, if a player’s contract were fully guaranteed, he would likely feel less pressure to play through injuries in an effort to continually prove himself to the club,³⁶⁶ a notion consistent with our ethical principle of Health Primacy.^{bf} Relatedly, job and income insecurity likely cause stress and psychological harm for some players. However, we have concerns about the possibility of unintended consequences, as well as the feasibility, of such a recommendation to fully guarantee player compensation.

To understand these concerns, a brief explanation of guaranteed compensation in the NFL is important. Generally, NFL clubs are permitted to terminate a player’s contract without any further financial obligation to the player for five reasons:

- (1) the player “has failed to establish or maintain [his] excellent physical condition to the satisfaction of the Club physician”;
- (2) the player has “failed to make a full and complete disclosure of [his] physical or mental condition during a physical examination”;
- (3) “[i]n the judgment of the Club, [the player’s] skill or performance has been unsatisfactory as compared with that of other players competing for positions on the Club’s roster”;
- (4) the player has “engaged in personal conduct which, in the reasonable judgment of the Club, adversely reflects on the Club”; and,
- (5) “[i]n the Club’s opinion, [the player is] reasonably anticipated to make less of a contribution to the Club’s ability to compete on the playing field than another player or players whom the Club intends to sign or attempts to sign, or already on the roster of the Club, and for whom the Club needs Room.”³⁶⁷

be We recognize that this new injured reserve list is subject to gaming by clubs, whereby a club might designate a player as concussed in order to add another player and effectively expand the roster. We do not view this this concern to be sufficient to outweigh the health benefits of the proposal. Moreover, all injury lists are subject to some risk of being gamed in this manner, and thus the issue is not unique to what we propose.

bf In reviewing a draft of the Chapter 14: Family Members, the wife of a former NFL player stated: “if you don’t have any guarantees in your contract and you are a game or practice away from being released/fired, you are less likely to take on the role of a change agent[.]”

Recommendations Concerning The NFL and NFLPA – continued

Players and their contract advisors seek to curtail the clubs' termination rights as to individual players by negotiating for some of the player's compensation to be guaranteed. Guaranteed compensation takes a wide variety of forms (most notably in signing bonuses),³⁶⁸ but generally players and their contract advisors seek to guarantee the player's contract even where he is terminated for "injury," "skill" or "Salary Cap." An "injury" guarantee will protect against the first reason listed above for which clubs can generally terminate a player's contract; a "skill" guarantee will protect against the third reason, and a "Salary Cap" guarantee will protect against the fifth reason. A player might have all or just some seasons of his contract guaranteed for skill, injury and/or Salary Cap. In addition, there are other mechanisms in the CBA that can effectively guarantee some or all of a player's salary, including Injury Protection^{bg} and Termination Pay.^{bh}

Generally, players and their contract advisors seek to obtain as much guaranteed money as possible in contract negotiations. Guaranteed compensation provides the player with a secure income that is otherwise typically threatened by injury. However, there are times when a player might not want to sign the contract that offers him the most money, guaranteed or unguaranteed. Younger players might eschew the last year or two of a contract and the money that comes with it in favor of a shorter contract. In doing so, the player is hoping or expecting that he will be able to complete the shorter contract, re-enter the free agency market and sign another contract. Such decisions are obviously risky—the player's career might end for skill or health reasons under the shorter contract and the player will never have another chance at another contract. However, if the player is healthy, securing a second free agent contract can be lucrative.

From a club's perspective, guaranteed compensation is something to be avoided. Guaranteeing all or a portion of a player's contract commits the club to a player financially, regardless of whether the player performs poorly under the contract or suffers a career threatening injury. Nevertheless, clubs often agree to guarantee compensation to players to persuade them to join or stay with the club.

Changes to the Salary Cap rules as part of the 2011 CBA potentially increased the use of guaranteed money. Technically, whether a player's compensation is guaranteed has no effect on the Salary Cap—a club is limited to a certain amount of player compensation costs regardless of whether that amount is guaranteed or unguaranteed. Importantly, the amount of player salary that is counted against a club's Salary Cap does not necessarily reflect the amount actually being paid to players. As a result of the Salary Cap's accounting rules, in any given year a significant portion of a club's Salary Cap allocation might be consumed by charges that do not actually reflect a payment being made from the club to players. However, the 2011 CBA addressed this discrepancy by adding a requirement that clubs spend a certain amount of the Salary Cap in cash, that is, actual payments to the players, regardless of the accounting rules. Probably the easiest way for a club to ensure that it spends a sufficient amount in cash is to pay lump sum signing bonuses. Signing bonuses are the most traditional form of guaranteed compensation.

The website spotrac.com provides the most reliable publicly available data on player contracts. Using data from spotrac.com during week 2 of the 2015 regular season, approximately 44 percent of all contracted compensation was guaranteed. Importantly, this statistic represented the aggregate of player contracts, but does not necessarily reflect any single player's contract. On that front, approximately 70 percent of players had at least some guaranteed compensation in their contract and the average amount of guaranteed compensation in an NFL player contract was \$3.4 million. Additionally, 251 players had a contract that included at least \$10 million in guaranteed compensation and 740 players had a contract that included at least \$1 million in guaranteed compensation.

In recent years, the percentage of an NFL player's contract that is guaranteed appears to have risen. Although the scope of the guarantees is sometimes debated,³⁶⁹ it is not uncommon for marquee players to sign contracts that guarantee 50

^{bg} Where a player is injured in one season, fails the preseason physical the next season because of that injury, and is terminated by the club as a result, the player is entitled to 50 percent of his salary for that season up to a maximum of \$1.1 million in the 2015 season. If the player is still physically unable to play two seasons after the injury, he is entitled to 30 percent of his salary up to a maximum of \$525,000 in 2015. A player is only entitled to Injury Protection once in his career. See 2011 CBA, Art. 45.

^{bh} A player with at least four years of experience who has his contract terminated after the first game of the season is entitled to the remainder of his salary for that season once in his career. 2011 CBA, Art. 30.

Recommendations Concerning The NFL and NFLPA – continued

percent or more of their compensation.³⁷⁰ Moreover, the 2011 CBA significantly curtailed rookie compensation, cutting the amount top draft picks earned by more than 50 percent.³⁷¹ In exchange, however, many first round draft picks' contracts are now fully guaranteed.³⁷²

The NFLPA has also expressed mixed views about the existence of guaranteed contracts. In a 2002 editorial in *The Washington Post*, then-NFLPA Executive Director Gene Upshaw acknowledged that the possibility of guaranteed contracts “is severely undermined by the risk of a career-ending injury” and touted the benefits available to players as an alternative.³⁷³ Then, in two reports issued by the NFLPA in or about 2002 and 2007 respectively, the NFLPA asserted that NFL player compensation is, in fact, largely guaranteed by explaining that more than half of all compensation paid to players is guaranteed.³⁷⁴ However, importantly, this statistic does not mean that half of all compensation contracted was guaranteed—indeed, as discussed above, approximately 44 percent of all contracted compensation is guaranteed. Players are often paid guaranteed money (*e.g.*, a signing bonus or roster bonus) in the first or second year of the contract only to have the base salaries (the unguaranteed portions) in the later years of the contract go unpaid because the player's contract was terminated.

With this background in mind, there are several reasons why fully guaranteed compensation might not be beneficial to players collectively. First, while fully guaranteed contracts might be good for the players that receive them, it could result in many players not receiving any contract at all. If clubs were forced to retain a player of diminishing skill because his contract was guaranteed, a younger or less proven player might never get the opportunity to sign with the club.³⁷⁵ Relatedly, clubs might continue to provide playing opportunities to the players with larger contracts in order to justify those contracts, preventing younger players from establishing themselves as starting or star players and earning higher salaries. It is also likely that under a system of guaranteed compensation, player salaries would decrease (at least in the short-term), particularly the salaries of the highest paid players and players who are less certain to add value to a roster, as clubs would be more cautious about taking on the financial liabilities, especially given the Salary Cap in place in the NFL. Similarly, clubs also may seek to minimize their financial liabilities by reducing roster sizes, which might cost marginal players their jobs, while again reducing opportunities for young or unproven players to join a club.

Clearly this is a complex issue, with the potential for substantial unintended consequences. Thus, we recognize the likely health value of guaranteed contracts, while simultaneously recognizing that it may not be the right solution for all players. Importantly, as discussed above, players who value a contractual guarantee over potentially higher but uncertain compensation may negotiate for that protection individually, as many currently do. Moreover, we expect that other recommendations made throughout this Report, including key recommendations related to the medical professionals who care for players, will make great strides toward protecting and promoting player health such that guaranteed compensation will be less critical for that purpose.

There are also logistical challenges to implementing fully guaranteed contracts. The finances and operations of the NFL and its clubs are greatly intertwined with the fact that NFL contracts have never been fully guaranteed. Since 1993, NFL clubs have had to comply with a strict Salary Cap that necessarily influences the types of contracts clubs are willing to offer, including the possibility of guaranteed compensation. Fully guaranteed contracts would be a fundamental and monumental alteration to the current business of the NFL that, at a minimum, would require a gradual phasing in process.^{bi}

It is possible that a rate of guaranteed contracts less than 100 percent but more than the current 44 percent is also optimal. Given the varying factors to be weighed and considered, it is not clear percentage of guaranteed compensation would maximize player health for the most NFL players.

bi For example, one rule that would likely have to be removed is the NFL's requirement that clubs deposit into a separate account the present value, less \$2 million, of guaranteed compensation to be paid in future years. 2011 CBA, Art. 26 § 9. Peer reviewer and former NFL club executive Andrew Brandt believes clubs “hide behind” the funding rule to avoid guaranteeing player compensation, and have been largely successful in doing so. Andrew Brandt, Supplemental Peer Review Response (Nov. 6, 2015).

Recommendations Concerning The NFL and NFLPA – continued

Ultimately, we recommend further research into this question, including player and club perspectives, economic and actuarial analysis, and comprehensive consideration of the relevant trade-offs, ramifications, and potential externalities. In the meantime, we note that the trend toward greater use of contractual guarantees can help promote player health and allow individual negotiation by players based on their own goals and priorities.

Goal 2: To ensure that there are effective enforcement mechanisms when players' rights related to health are violated.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 7:2-A: The CBA should be amended to provide for meaningful fines for any club or person found to have violated Sections 1 through 6 of Article 39 of the CBA.

Sections 1 through 6 of Article 39 contain a multitude of rules for clubs and club medical providers concerning player healthcare (*see* Appendix F). However, Article 39 does not contain any enforcement mechanisms. While the NFLPA or players could bring a Non-Injury Grievance or request an investigation before the Joint Committee (discussed in greater detail in Chapter 2: Club Doctors and Chapter 8: NFL Clubs), these processes are more likely to result in remedial and not financial action, particularly if no player has suffered distinct damage from the violation.³⁷⁶ Additionally, Recommendation 2:2-A in the Club Doctors Chapter proposed a system of arbitration for resolving disputes between players and club doctors, *e.g.*, claims of medical malpractice. While this recommendation offers possible remedial benefit to players, it should not be viewed as the exclusive enforcement mechanism against club doctors and other employees. Clubs and club medical providers should be penalized for violating the player healthcare provisions regardless of whether their bad acts result in clear and compensable harm to a player.^{bj} Indeed, the CBA contains many provisions that permit fines without evidence of actual harm.³⁷⁷ If Article 39 is to be maximally effective, it should contain a fine system sufficient to deter violations and punish violators.³⁷⁸

There is precedent for our recommendation. Prior to the 2016 season, the NFL and NFLPA agreed to a disciplinary scheme and process for violations of the Concussion Protocol.³⁷⁹ Under the agreement, both the NFL and NFLPA have the power to submit potential violations of the Concussion Protocol to a third-party arbitrator for evaluation.³⁸⁰ The arbitrator then will issue a report to the Commissioner who can issue fines or strip the club of draft picks depending on the severity of the violation.³⁸¹ The Commissioner nevertheless retains “absolute discretion” to determine the penalties.³⁸² Article 39, like the Concussion Protocol, is deserving of meaningful discipline in the event of noncompliance.

Recommendation 7:2-B: The statute of limitations on filing Non-Injury Grievances, at least insofar as they are health-related, should be extended.^{bk}

bj An instructive example occurred during the 2015 NFL season. During week 11, St. Louis Rams quarterback Case Keenum sustained a head injury and noticeably had trouble walking after a play. A Rams trainer went on to the field to check on Keenum but did not remove Keenum from the game to undergo a concussion evaluation. Keenum was later diagnosed with a concussion. The NFL investigated the incident and the Rams' apparent mishandling of the Concussion Protocol but did not impose any discipline against the Rams or their medical staff. *See* Mike Florio, *Report: Rams won't be penalized for concussion debacle*, ProFootballTalk (Nov. 29, 2015, 8:12 AM), <http://profootballtalk.nbcsports.com/2015/11/29/report-rams-wont-be-penalized-for-keenum-concussion-debacle/>, archived at <http://perma.cc/WR62-VQT2>; Darin Gantt, *NFL has conference call to remind all teams of concussion protocol*, ProFootballTalk (Nov. 25, 2015, 12:09 PM), <http://profootballtalk.nbcsports.com/2015/11/25/nfl-has-conference-call-to-remind-all-teams-of-concussion-protocol/>, archived at <http://perma.cc/TS3D-M4S3>. Weeks later, it was announced that clubs would be disciplined (including fines or suspensions) for future violations of injury protocols. Darin Gantt, *NFL to fine, suspend teams who don't follow injury protocols*, ProFootballTalk (Dec. 17, 2015, 6:00 AM), <http://profootballtalk.nbcsports.com/2015/12/17/nfl-to-fine-suspend-teams-who-dont-follow-injury-protocols/>, archived at <https://perma.cc/8CH3-77F9>.

bk The focus of this Report is on player health issues and thus we do not specifically address Non-Injury Grievances outside of the health context.

Recommendations Concerning The NFL and NFLPA – continued

The rights afforded to players under the CBA are only meaningful if there is meaningful enforcement. Nevertheless, there are at most a few health-related Non-Injury Grievances each year. This may be a result of few problems actually occurring, but it may alternatively reflect player concern about losing their job or status with the club. In particular, a player may fear that filing a Non-Injury Grievance would jeopardize the player’s career, therefore causing him to forego the opportunity to pursue viable claims.^{bl} Discussions with contract advisors confirmed that filing a Non-Injury Grievance is generally not considered a viable option because of the likely effect on the player.

Currently, players have 50 days “from the date of the occurrence or non-occurrence upon which the grievance is based . . . or from the date on which the facts of the matter became known or reasonably should have been known” to file a Non-Injury Grievance.^{bm} Setting a statute of limitations always requires trading-off protecting the injured party against the other side’s interests in preserving evidence. There are tough judgment calls to be made in some cases, but the statute of limitations in this case is clearly too short to be fair. This statute of limitations is far shorter than the two- or three-year statute of limitations typical to negligence or medical malpractice actions under most states laws.³⁸³ Moreover, unless the player has left the club very close to the date of the action or omission that gave rise to the grievance, the player is unlikely to pursue a timely grievance.

We propose that the statute of limitations for Non-Injury Grievances be the latest of: (1) one year from the date of the occurrence or non-occurrence upon which the grievance is based; (2) one year from the date on which the facts of the matter became known or reasonably should have been known; or, (3) 90 days from the date of the player’s separation^{bn} from the club, provided the Non-Injury Grievance is filed within three years from the date of the occurrence or non-occurrence upon which the grievance is based.

The problem with the current short statutes of limitations on grievances is evident in the Concussion Litigation. The NFL’s principal defense in the Concussion Litigation was that the players’ claims were preempted by the LMRA—in other words, that the players’ claims were required to be brought as grievances under the CBA and not in court. Had the NFL succeeded (the case was ultimately settled) and the players faced arbitration, they would have had great difficulty due to the short statute of limitations on Non-Injury Grievances, which would likely have barred their claims.³⁸⁴ If the NFL’s position is that these kinds of claims are preempted and should instead be arbitrated, it must allow for a fair Non-Injury Grievance process, including a fairer statute of limitations. The proposed statute of limitations would provide players a meaningful opportunity to consider their options and pursue claims for wrongs committed in arbitration without jeopardizing their often tenuous careers.

Goal 3: To improve player access to and understanding of their health rights and benefits.

Principles Advanced: Respect; Empowered Autonomy; Transparency; Collaboration and Engagement; and, Justice.

Recommendation 7:3-A: The NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them.

bl Current Player 8: “You don’t have the gall to stand against your franchise and say “They mistreated me.” . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]” While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

bm 2011 CBA, Art. 43 § 3. Other American professional sports leagues have similar statutes of limitations: the NBA provides 30 days, 2011 NBA CBA, Art. XXXI; MLB provides 45 days, 2012 MLB CBA, Art. XI; and, the NHL provides 60 days, 2013 NHL CBA, Art. 17. However, the CFL permits players one year to initiate grievance. 2014 CFL CBA, § 4.02.

bn Separation would include the club terminating the player’s contract, the expiration of the player’s contract or the player’s filing of retirement papers with the NFL.

Recommendations Concerning The NFL and NFLPA – continued

As discussed above and detailed in Appendices C and D, the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare and career-related guidance. However, it appears that many players are not taking full advantage of these programs.^{bo}

The NFL and NFLPA both make some efforts to address this problem.

In comments provided to us, the NFL explained that “[t]he NFL Retirement Plan now sends out one mailing that summarizes all potential benefits. There is also one telephone number that will direct a player to the appropriate resource. Finally, retired players may access all of the relevant information at www.MyGoalLine.com.”³⁸⁵

As for the NFLPA, at the conclusion of each season, the NFLPA provides the contract advisors an “End of Season Player Checklist.” The Checklist is a multi-page document summarizing many of the players’ important rights, benefits, and opportunities, such as obtaining medical records, obtaining second medical opinions, filing for workers’ compensation, Injury Protection or disability benefits, understanding their insurance options, understanding off-season compliance with the Policies on Performance-Enhancing Substances and Substances of Abuse, and preparing for life after football by engaging the benefits and programs offered by the NFL and NFLPA. Contract advisors are required to provide the Checklist to all of their clients and certify in writing to the NFLPA that they have discussed the contents with their clients. In short, the Checklist is an excellent document and the NFLPA should be commended for its creation and use. Similarly, the NFLPA has on its website a Benefits Book, summarizing the various benefit plans. Nevertheless, it is unclear if these documents are ever provided directly to the player.

Each preseason every player should be given a manual that lists and explains all of the different programs and benefits for which they are eligible, either through the NFL, NFLPA, or otherwise. Players should receive the manual again whenever their contract is terminated and again at or near the conclusion of the season. Providing the manual near the conclusion of the season is important because many useful programs and seminars are conducted during the offseason. We further recommend that this manual be a joint creation of the NFL and NFLPA, and that an electronic copy be provided to every contract advisor and financial advisor so they can advise their clients accordingly.

The NFL already does create a document along these lines, entitled the Player Engagement Resource Guide, which lists and describes current and former player programs and resources.³⁸⁶

The above-mentioned efforts to inform players about these programs and benefits are steps in the right direction. However, they do not appear to have been fully successful, a problem with which many employers struggle. In interviews we conducted, current and former players were generally unclear and unsure about what information they had received. Although this is also a responsibility of the players, there is room for additional ideas and efforts in this area by the NFL and NFLPA.

We believe the NFL and NFLPA should make all benefit and retirement plans publicly available on their websites. Information about NFL player benefits is made available to players by the NFL and NFLPA through the website mygoalline.com, and to contract advisors and financial advisors through the NFLPA’s website. However, players can only access mygoalline.com with a username and password, the full plan documents are not readily available to contract advisors and financial advisors, and neither the NFL nor the NFLPA websites otherwise make publicly available information about any of the various benefit and retirement programs that are available to NFL players. These plans should be readily available so that current, former, and future players, player family members, and other trusted advisors can review them to assist players. Public access will also allow academics, government officials, and others with an interest in the topic to review the plans and potentially make recommendations that would improve the plans and players’ health.

bo Indeed, in a 2014 interview, Troy Vincent, a former Pro Bowl cornerback and former President of the NFLPA who is now the NFL’s Executive Vice President of Football Operations, explained that the NFL’s Player Care Foundation offers former players comprehensive medical examinations free of charge but that “the lines are empty.” Jim Baumbach, *Life After Football*, Newsday, Jan. 25, 2015, available at 2015 WLNR 2381142.

Recommendations Concerning The NFL and NFLPA – continued

Finally, bare provision of information and documents to the players is not sufficient. Although players are ultimately responsible for taking advantage of benefits available to them, we know from behavioral science that too much information can be overwhelming^{bp} and that certain approaches are more likely to result in comprehension and action. The NFL and NFLPA must work together (including potentially with experts in behavioral science) to ensure that the information being provided to the players is understandable, digestible, and actionable and that the players are actually processing the information. This will likely require substantial investments in education along with attempts to monitor whether players understand what they are being told. For example, quizzes after providing information, as are sometimes used in clinical trial informed consent, are one method of ensuring players are taking the information provided to them seriously.

Recommendation 7:3-B: The NFL and NFLPA should undertake a comprehensive actuarial and choice architecture analysis of the various benefit and retirement programs to ensure they are maximally beneficial to players.

Choice architecture refers to the ways in which choices are presented to consumers.³⁸⁷ A common and relevant choice architecture example is constructing retirement plans such that employees are automatically enrolled in them but allowed to opt out if they so choose, which has the effect of “nudging” individuals into more sensible amounts of retirement savings.³⁸⁸ According to Aon Hewitt, one of the world’s leading human resources consulting firms, 61.7 percent of firms automatically enroll employees in retirement plans.³⁸⁹ In addition to auto-enrollment, there are several other relevant choice architecture constructs, including claims processes, required documentation, payment schedules, notifications and assumptions about age, marital and dependent status, income, and other information. A comprehensive analysis of how the NFL and NFLPA benefit and retirement programs are configured from a choice architecture perspective will help ensure that the maximum number of players are receiving the benefits to which they are entitled and in a manner that is most helpful to them.

Recommendation 7:3-C: The purpose of certain health-related committees should be clarified and their powers expanded.

As is discussed in the Enforcement section of various stakeholder chapters, players generally have three options within the confines of the CBA concerning healthcare-related problems they can file: (1) a Non-Injury Grievance; (2) a complaint with the ACC; or (3) a complaint with the Joint Committee. While a Non-Injury Grievance can provide a player the opportunity to be compensated for a wide variety of wrongs, the Joint Committee and ACC are both supposed to be responsible for player health matters, including the possibility of conducting investigations. However, the authority of these Committees is unclear.

The Joint Committee has the authority to initiate an investigation run by neutral doctors, but the Joint Committee is only obligated to “act[] upon” the doctors’ recommendations, which is somewhat vague. It is unclear what it means for the Joint Committee to “act[] upon” the recommendations and there is nothing binding the NFL or the clubs to “act[] upon” the doctors’ recommendations.

The ACC is even weaker than the Joint Committee. The ACC merely refers complaints to the NFL and the club involved and the NFL and the club are then free to “determine an appropriate response.”

^{bp} Current Player 10: “Unfortunately, advice from agents and especially the NFLPA in a long meeting with lots of information falls on deaf ears most times. Players don’t care about this information until it pertains to them.”

Recommendations Concerning The NFL and NFLPA – continued

At least one of the committees should have the ability to conduct a thorough investigation and/or hold a hearing and make binding their findings and recommendations. If the responsible parties fail to comply with the recommendations, they should be meaningfully fined until there is compliance.

The purpose of the committees should also be clarified to differentiate them from a Non-Injury Grievance. The current advantage of the committees from the players' perspective is that complaints to the committees are not subject to the strict 50-day statute of limitations for Non-Injury Grievances. Additionally, the committees consist generally of persons working in the medical field as opposed to the lawyer presiding over a Non-Injury Grievance. Although the arbitrator might consider expert medical testimony in deciding a Non-Injury Grievance, the committees might offer expertise or recommendations befitting their qualifications before matters reach the point of a Non-Injury Grievance.

Any change to the committees should also take into consideration other recommendations made herein, including the creation of a Medical Committee jointly selected by the NFL and NFLPA to hire, review, and terminate club doctors, as outlined in Chapter 2: Club Doctors, Recommendation 2:1-A. Our proposed Medical Committee may have overlapping areas of expertise and responsibilities as the committees discussed in this recommendation.

By reorganizing and clarifying the roles and authority of the committees, they will be more effective for all parties involved.

Goal 4: To hold players accountable for their own acts affecting their health and the health of other players.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 7:4-A: The NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously.

As discussed in Chapter 1: Players, Section C: Current Practices, at least some players have sought to avoid undergoing the Concussion Protocol after suffering a suspected concussion. It is possible that players' non-cooperation is sometimes a result of the concussion suffered and diminished capacity. However, other players who do so either do not fully understand the risks of playing with a concussion or are so committed to playing and winning that they will continue to play no matter the possible health consequences. It is our understanding that both the NFL and NFLPA are providing players with information about the risks of concussions. Nevertheless, steps should be taken by the NFL and NFLPA, among others, to resolve issues concerning players' cooperation with the Concussion Protocol.

While the Concussion Protocol is generally helpful for ensuring players do not play with suspected or actual head injuries, it only works if players cooperate.^{bq} Consequently, it is important that the NFL and NFLPA continue to educate players on the risks of concussions and the importance of the Concussion Protocol for both their short- and long-term health.

^{bq} A positive example occurred during the 2015 season when Pittsburgh Steelers quarterback Ben Roethlisberger self-reported concussion symptoms during the fourth quarter of a close game. Mike Florio, *Roethlisberger self-reported concussion symptoms*, ProFootballTalk (Nov. 29, 2015, 10:15 PM), <http://profootballtalk.nbcsports.com/2015/11/29/roethlisberger-self-reported-concussion-symptoms/>, archived at <http://perma.cc/52EZ-D2W9>.

Recommendations Concerning The NFL and NFLPA – continued

If players do not cooperate with the Concussion Protocol even after substantial effort has been made to educate them on its importance, it may be in the interests of player health to adopt stronger deterrent mechanisms, including fines and/or suspensions.

Recommendation 7:4-B: The NFL and NFLPA should agree to a disciplinary system, including fines and/or suspensions, for players who target another player’s injury or threaten or discuss doing so.

Prior to the 2015 Super Bowl, New England Patriots cornerback Brandon Browner said he would encourage his teammates to target and try to hit the injured shoulder of Seattle Seahawks safety Earl Thomas and the injured elbow of Seahawks cornerback Richard Sherman.³⁹⁰ Similarly, in the 2012 NFC Championship game, New York Giants special teams players Jacquian Williams and Devin Thomas discussed targeting San Francisco 49ers kick returner Kyle Williams due to his history of concussions.³⁹¹ Generally, the NFL does not fine and/or suspend players unless they have violated the Playing Rules in an egregious way. However, when such threats are made, the NFL should not need to wait until the Playing Rules have been broken or a player is actually injured before taking action. The discussion or encouragement of targeting players’ injuries increases the likelihood of players taking actions that unnecessarily harm other players and thus should not be tolerated. On this point, the threat to player health is too real not to act proactively.

i) NFLPA-Specific Recommendations

The below recommendations are NFLPA-specific. In other words, they are either within the NFLPA’s unique control or potentially adverse to the NFL’s interests.

Before getting to these recommendations, there are additional recommendations concerning the NFLPA that are made in other chapters:

- Chapter 1: Players — Recommendation 1:1-A: With assistance from contract advisors, the NFL, the NFLPA, and others, players should familiarize themselves with their rights and obligations related to health and other benefits, and should avail themselves of applicable benefits.
- Chapter 6: Personal Doctors — Recommendation 6:1-A: The NFLPA and clubs should take steps to facilitate players’ usage of personal doctors.

Additionally, because the NFLPA regulates contract advisors and financial advisors, all recommendations made in those chapters also concern the NFLPA. NFLPA-specific recommendations are listed here.

Goal 5: For the NFLPA to take additional affirmative steps to hold accountable those stakeholders who do not meet their legal and ethical obligations concerning player health.

Principles Advanced: Respect; Health Primacy; Transparency; Managing Conflicts of Interest; and, Justice.

Recommendation 7:5-A: The NFLPA should consider investing greater resources in investigating and enforcing player health issues, including Article 39 of the 2011 CBA.

Recommendations Concerning The NFL and NFLPA – continued

The 2011 CBA contains many provisions and rules concerning player health and club and club doctors' obligations related thereto. Article 39 of the CBA houses many of these obligations. However, as discussed above, questions have been raised by some stakeholders we interviewed about the NFLPA's ability to investigate and enforce player health provisions through grievances. One possibility is for the NFLPA to hire additional attorneys with a focus on investigating and litigating player health, safety and welfare matters.

Goal 6: To provide current and former players with the resources necessary to maximize their health.

Principles Advanced: Health Primacy; Empowered Autonomy; and, Collaboration and Engagement.

Recommendation 7:6-A: The NFLPA should continue to assist former players to the extent such assistance is consistent with the NFLPA's obligations to current players.

As discussed above, the NFLPA's principal obligations are to current players, not former players. This legal reality creates tension between the NFLPA and former players. In recent years, the NFLPA has made efforts to smooth this tension by negotiating benefits and creating programs that help former players. It is admirable of the current players that they effectively agreed to give up a portion of their potential income to help the players that came before them. The NFLPA should continue to try and balance these, at times, incongruent interests. To do so, the NFLPA can remind current players of the sacrifices made by former players and the different circumstances under which they played. The NFLPA works to advance the interests of current players, many of whom quickly become former players. Thus, the NFLPA should try to continue and help those men as much as it can.

Endnotes

- 1 American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).
- 2 See 26 U.S.C. § 501(c)(6) (2012) (specifying "professional football leagues" as tax exempt).
- 3 Drew Harwell and Will Hobson, *The NFL is dropping its tax-exempt status. Why that ends up helping them out ends up helping them out*. Wash. Post, Apr. 28, 2015, <http://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/>, archived at <http://perma.cc/XH58-QCKG>.
- 4 See Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (listing each of the 32 different entities as defendants in lawsuit).
- 5 See 2012 NFL Constitution and Bylaws, Art. II, § 2.1 (the purpose of the NFL is "[t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States.").
- 6 See 2012 NFL Constitution and Bylaws, Art. VIII, § 8.1.
- 7 See *id.* at § 8.4(b).
- 8 See *id.* at § 8.4(a).
- 9 See *id.* at § 8.10.
- 10 See *id.* at § 8.9.
- 11 See *id.* at § 8.13(A).
- 12 See *id.* at § 8.3.
- 13 See 2012 NFL Constitution and Bylaws, Art. III (discussing eligibility of members). The NFL's rule has withstood legal challenges. See Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994) (reversing judgment of \$51 million for former New England Patriots owner Billy Sullivan and remanding for a new trial). In 1998, Sullivan settled the case for \$11.5 million, leaving the NFL's policy in effect. See Frank Litsky, *Billy Sullivan, 86, Founder Of Football Patriots, Dies*, N.Y. Times, Feb. 24, 1998, <http://www.nytimes.com/1998/02/24/sports/billy-sullivan-86-founder-of-football-patriots-dies.html>, archived at <http://perma.cc/8V2F-Y8NU>. See also Drew D. Kause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust Law to Preserve Traditional Ownership – Implications Arising from William H. Sullivan's Antitrust Suit*, 2 Seton Hall J. Sports L. 175 (1992).
- 14 See 2012 NFL Constitution and Bylaws, Art. VIII (describing the process for hiring the Commissioner and the Commissioner's responsibilities and authority).
- 15 See Lindsay H. Jones, *NFL Owners Have Lots to Tackle at Annual Meeting*, USA Today, Mar. 23, 2014, <http://www.usatoday.com/story/sports/nfl/2014/03/23/nfl-owners-meetings/6804693/>, archived at <http://perma.cc/FY7A-BGZK> (discussing agenda for March 2014 meeting including potential rules changes, selection of Super Bowl hosts, disciplining Colts' owner Jim Irsay for a DUI, and, determining the schedule); Monique N Jones, *Recap: NFL Commissioner Roger Goodell Recaps Owners Meetings*, USA Today, Oct. 9, 2014, <http://www.usatoday.com/story/sports/nfl/teams/2014/10/08/roger-goodell-news-conference-owners-meetings/16938197>, archived at <http://perma.cc/MLQ9-C86M> (discussing agenda for October 2014 meeting including the sale of the Buffalo Bills, a new drug program, Commissioner discipline and the NFL's personal conduct policy, domestic violence issues, and, the possibility of a club moving to Los Angeles).
- 16 Ben Volin, *Still No Timetable on 'Deflategate' Report*, Bos. Globe, Mar. 25, 2015, available at 2015 WLNR 8888394.
- 17 See Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* 98 (2015) ("Some . . . owners see their teams simply as ATM machines, and players as interchangeable parts.")
- 18 See Rob Huizenga, *You're Okay, It's Just a Bruise* 124 (1994) (The Raiders orthopedist, Dr. Robert Rosenfeld, explaining to Huizenga "AI doesn't like us to use stretchers . . . [t]he team gets demoralized and plays less aggressively when they see a teammate getting carted off the field on a stretcher."); *id.* at 150, 166 (Davis pressuring players to take pain-killing injections); *id.* at 239 (Davis pressuring Club doctors not to tell players about the risks of playing football or the full extent of their injuries); *id.* at 76 (A Raiders' questionnaire to college athletic trainers asking: "Is the athlete injury prone?" "Does he recover quickly?" "Will he play when he's ailing?").
- 19 Carlton Thompson, *Raiders, Davis Takes a Hit from Former Internist: Huizenga's Book Details Some Questionable Medical Practices*, Hous. Chronicle, Oct. 15, 1995, available at 1995 WLNR 5230160.
- 20 Todd Archer, *Jerry: Romo Injury Not Season-ending*, ESPN (Oct. 29, 2014, 1:29 PM), http://espn.go.com/dallas/nfl/story/_/id/11784154/dallas-cowboys-owner-jerry-jones-says-qb-tony-romo-play-sunday-arizona-cardinals, archived at <http://perma.cc/RQ2F-HUDM>.
- 21 Mark Purdy, *Purdy: John York enjoys San Francisco 49ers' return to the Super Bowl from the background*, San Jose Mercury-News, Jan. 22, 2013, http://www.mercurynews.com/ci_22429014/purdy-john-york-enjoys-san-francisco-49ers-return, archived at <http://perma.cc/7LGM-4YKV>.
- 22 See Paul Gutierrez, *NFL health chair says game 'safer,'* ESPN, (Mar. 23, 2015), http://espn.go.com/nfl/story/_/id/12548062/john-york-nfl-health-safety-advisory-committee-cites-culture-change, archived at <http://perma.cc/WTE9-QQUM>; David Fucillo, *John York discusses concussions, recent 49ers retirement*, SB Nation (Jun. 17, 2015), <http://www.ninersnation.com/2015/6/17/8797057/john-york-discusses-concussions-recent-49ers-retirements>, archived at <http://perma.cc/NM2A-YW3Q>.
- 23 See Samer Kalaf, *The Colts' New Rule Proposal: Touchdown Drives Worth Up To Nine Points*, Deadspin (Mar. 18, 2015, 3:33 PM), <http://deadspin.com/the-colts-new-rule-proposal-touchdown-drives-worth-up-1692203684>, archived at <http://perma.cc/UHV8-EFVY> (providing NFL's internal summary document of proposed rule changes and describing 2015 Competition Committee as Atlanta Falcons President Rich McKay, St. Louis Rams Head Coach Jeff Fisher, Dallas Cowboys Chief Operating Officer Stephen Jones, Cincinnati Bengals Head Coach Marvin Lewis, New York Giants Owner John Mara, Green Bay Packers President Mark Murphy, Baltimore Ravens General Manager Ozzie Newsome, Houston Texans General Manager Rick Smith and Pittsburgh Steelers Head Coach Mike Tomlin).
- 24 CBA, Art. 50, § 2.
- 25 Michael David Smith, *Five Rules Changes Get NFL Owners' Approval at League Meeting*, ProFootballTalk (Mar. 26, 2014, 10:11 AM), <http://profootballtalk.nbcsports.com/2014/03/26/five-rules-changes-pass-as-nfl-owners-vote-at-league-meeting/>, archived at <http://perma.cc/6Z49-4J3J>.
- 26 See Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 344 (2013) [hereinafter, "*League of Denial*"] (describing how the NFL agreed to move the yard line from where kickoffs take place from the 30 yard line to the 35 yard line at the insistence of Kevin Guskiewicz, a University of North Carolina scientist and concussion expert).
- 27 CBA, Art. 50, § 1(c).
- 28 NFL Comments and Corrections (June 24, 2016).
- 29 See 26 U.S.C. § 501(c)(5) (listing labor organizations as those exempted from taxation). An additional aspect of the NFLPA's operations also bears mentioning. In 1994, the NFLPA formed a Virginia for-profit entity known as the National Football League Players Association, Incorporated, or "Players, Inc." Players, Inc. is responsible for group licensing of NFL player rights. In 2013, each NFL player received \$8,800 in royalties from Players, Inc. See NFLPA Department of Labor Form LM-2 Labor Organization Annual Report (2013). See also *Adderley v. Nat'l Football*

- League Players Ass'n, 07-cv-943, 2008 WL 3287030 (N.D. Cal. Aug. 6, 2008) (denying NFLPA's motion to dismiss lawsuit by former players concerning Players, Inc. royalties); David Elfin, NFLPA settles lawsuit with Adderly for \$26.5M, Wash. Times, Jun. 6, 2009, *available at* 2009 WLNR 10883474; Grant v. Nat'l Football League Players Ass'n, 11-cv-3118, 2012 WL 1870974 (C.D. Cal. May 22, 2012) (rejecting former players' claims that NFLPA breached its fiduciary duty to them by having failed to seek licensing opportunities for them and by alleging having failed to distribute royalty income accurately), *aff'd* 566 Fed.Appx. 569 (9th Cir. 2014).
- 30 U.S.C. § 159(a).
- 31 *Eller v. Nat'l Football League Players Ass'n*, 872 F. Supp. 2d 823, 834 (D. Minn. 2012).
- 32 *See Department Contacts*, Nat'l Football League Players Ass'n, <https://www.nflplayers.com/about-us/Department--Contacts/> (last visited Aug. 7, 2015) (listing NFLPA employees in the following departments: Executive; Benefits; Communications; Finance and Asset Management; Former Player Services; Human Resources; Information Systems; Legal; Player Affairs and Development; Salary Cap and Agent Administration; Security and Operations; and Players, Inc.).
- 33 NFL Players Association Constitution, Art. 3 (2007), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/NFLPA%20Constitution%20-%20March%202007.pdf, *archived at* <https://perma.cc/HAF5-24E8?type=pdf> ("NFLPA Constitution").
- 34 NFLPA Constitution, § 4.01(b).
- 35 NFLPA Constitution, § 1.03.
- 36 NFLPA Constitution, Art. 3.
- 37 NFLPA Constitution, § 5.01.
- 38 NFLPA Constitution, §§ 4.01–02.
- 39 NFLPA Constitution, § 5.02.
- 40 NFLPA Constitution, § 4.01(a). "A person is not eligible for election or re-election as an Executive Officer [, including President,] unless he has been on the roster of an NFL Club during the previous twelve (12) months." NFLPA Constitution, § 4.03. There has been speculation that NFL Clubs intentionally refuse to sign NFLPA Presidents. *See, e.g.*, Mike Florio, *NFLPA president gets another NFL gig*, ProFootballTalk (Jul. 29, 2014, 10:31 AM), <http://profootballtalk.nbcsports.com/2014/07/29/nflpa-president-gets-another-nfl-gig/>, *archived at* <http://perma.cc/RF2Q-D3C6>.
- 41 NFLPA Constitution, § 4.06.
- 42 NFLPA Constitution, § 4.01.
- 43 Bob Carter, *Rozelle Made NFL What It Is Today*, ESPN, http://espn.go.com/classic/biography/s/rozelle_pete.html (last visited Aug. 7, 2015), *archived at* <http://perma.cc/9NS6-D4R2>.
- 44 *History*, Nat'l Football League Players Ass'n, <https://www.nflpa.com/about/history> (last visited Aug. 7, 2015), *archived at* <https://perma.cc/3D2R-8EQG?type=pdf> [hereinafter "NFLPA History"].
- 45 *Id.*
- 46 CBA, Art. VII.
- 47 CBA, Art. VII, § 2(f). By the conclusion of Rozelle's tenure, medical insurance coverage increased to a maximum of \$1 million. 1982 CBA, Art. XXXIV.
- 48 CBA, Art. XI, § 4.
- 49 CBA, Art. XI, § 5.
- 50 NFLPA History *supra* n. 44.
- 51 Players deemed to have suffered "substantial partial or total disablement as determined by the Retirement Board which is deemed to be permanent" eligible for \$200/month in benefits for the duration of the disability. 1970 CBA, Art. VI § 2(c)(2). When Rozelle retired as Commissioner in 1989, the benefits were \$4,000/month for football-related injuries and \$750/month for non-football related injuries. 1982 CBA, Art. XXXIV, § 8.
- 52 CBA, Art. VI, § 4. The amounts of coverage were not identified. When Rozelle retired, a player could obtain a \$50,000 life insurance policy plus \$10,000 of coverage for each Credited Season up to \$100,000. 1982 CBA, Art. XXXIII, § 1.
- 53 CBA, Art. VI, § 4.
- 54 NFLPA History *supra* n. 44.
- 55 *See* Glenn M. Wong, *Essentials of Sports Law*, § 11.3 (4th ed. 2010) (providing summary of NFL-NFLPA labor history).
- 56 *Id.*
- 57 CBA, Art. XI.
- 58 *Id.* at § 1.
- 59 *Id.* at § 3.
- 60 *See* Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA Ent. L. Rev. 179, 187 (2009) (describing the various legal proceedings leading to free agency in those sports).
- 61 *See* Wong, *supra* n. 55.
- 62 *Id.*
- 63 Bart Barnes, *Garvey: Players May Seek 65% of NFL Gross Income, NFLPA Will Seek Base Salary Scales*, Wash. Post, Nov. 25, 1981, *available at* 1981 WLNR 488341.
- 64 CBA, Art. XXI, § 1.
- 65 *Id.*
- 66 *Id.*
- 67 CBA, Art. XXXI, § 2.
- 68 CBA, Art. XXXI, § 6.
- 69 CBA, Art. XXXI, § 3.
- 70 CBA, Art. XXXI, § 4.
- 71 CBA, Art. XXXII, § 2.
- 72 NFLPA History, *supra* n. 44.
- 73 *See* Bart Barnes, *Players Adamant About Drug Test*, Wash. Post, July 15, 1982, *available at* 1982 WLNR 594666; Ken Denlinger, *Teamwork is the Solution*, Wash. Post, July 2, 1982, *available at* 1982 WLNR 587496; Bart Barnes, *Rozelle, Garvey: Different Views on Drug Abuse*, Wash. Post, June 19, 1982, *available at* 1982 WLNR 569668.
- 74 *See A Brief History of the Drug War*, DrugPolicy.org, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/39W2-7PM5>; *II. America's Drug Use Profile—Cocaine Abuse: We Are Still Paying The Price For The 1980s*, Office of National Drug Control Policy, <https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/ii-e.html> (last visited Aug. 7, 2015), *archived at* <https://perma.cc/4X77-45E5> (discussing significant increases in cocaine usage during the 1980s).
- 75 *See Cocaine And A Super Bowl Team: The Last Straw: Drugs In The NFL: A Chronology*, L.A. Times, Jan. 29, 1986, http://articles.latimes.com/1986-01-29/sports/sp-1319_1_cocaine, *archived at* <http://perma.cc/FGW9-QF9U> (discussing drug-related incidents and policies in the NFL from 1972–86); Frank Litsky, *Player Tells of Wide Drug Use in the N.F.L.*, N.Y. Times, Jun. 10, 1982, <http://www.nytimes.com/1982/06/10/sports/player-tells-of-wide-drug-use-in-nfl.html>, *archived at* <http://perma.cc/E9GA-V6JK> (discussing allegations by former player that cocaine usage was rampant throughout the NFL); David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?* 2 Marq. Sports. L.J. 1 (1991).
- 76 Barnes, *supra* note 73, at 1982 WLNR 569668.
- 77 *Id.* at 1982 WLNR 594666.
- 78 *See* Sisson, *supra* note 75, at 3–10 (discussing evolution of drug testing in the NFL during the 1980s).
- 79 CBA, Art. XXXI, § 7.
- 80 *See* Sisson, *supra* note 75, at 3–10 (discussing evolution of drug testing in the NFL during the 1980s).

- 81 *Id.*
- 82 NFLPA History, *supra* n. 44.
- 83 See Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1, 9–12 (2012) (discussing NFL-NFLPA labor relations between 1987 and 1993).
- 84 *Id.*
- 85 See *id.* at 6–13; NFLPA History.
- 86 Gary Pomerantz, *Arbitrator Rejects NFL Drug Testing*, Wash. Post, Oct. 28, 1986, available at 1986 WLNR 1907666
- 87 Christine Brennan, *NFL to Institute Year-Round, Random Testing for Steroids*, Wash. Post, Mar. 15, 1990, available at 1990 WLNR 4588145
- 88 Bob Carter, *Rozelle Made NFL What It Is Today*, ESPN.com, http://espn.go.com/classic/biography/s/rozelle_pete.html (last visited Aug. 7, 2015), archived at <http://perma.cc/9NS6-D4R2>.
- 89 Paul Tagliabue, Covington & Burling, LLP, <http://www.cov.com/ptagliabue/> (last visited Aug. 7, 2015), archived at <http://perma.cc/P8QR-CCHA>.
- 90 See Marty York, *Price Tag of \$80 Million NFL Version of Hard Times*, Globe & Mail (Toronto, ON), Mar. 22, 1984, available at 1984 WLNR 830899.
- 91 See Prentis Rogers, *CBS Drops Another \$1 Billion into the NFL's Coffers*, Atlanta J-Const. (GA), Mar. 8, 1990, available at 1990 WLNR 2057314 (discussing CBS' agreement to pay more than \$1 billion for a four year deal; NBC paying between \$700 and \$900 million for a multi-year deal and club television revenues equaling \$32 million per year); Michael Janofsky, *\$1.4 Billion Deal Adds Cable to N.F.L. Picture*, N.Y. Times, Mar. 16, 1987, available at 1987 WLNR 995997 (on file with author) (discussing ESPN's agreement to pay \$1.42 billion to television NFL games over a three-year period).
- 92 See NFLPA History *supra* note 44; Deubert, *supra* note 83.
- 93 Deubert, *supra* note 83.
- 94 Leonard Shapiro, *NFL Players Making More Money, Living Longer, Report Says*, Wash. Post, Jan. 28, 1994, available at 1994 WLNR 5690724; Paul Needell, *There Is Life After Football Study: NFL Players Don't Die Young*, N.J. Star-Ledger, Sept. 29, 2002, available at 2002 WLNR 12895808; Alan Greenberg, *Case of Ticker Shock: Down the Road, that Hulking Lineman is Likely to Have a Heart in Sad Shape*, Hartford Courant, June 17, 2001, available at 2001 WLNR 10659744.
- 95 *Id.*
- 96 See *Heart Health Concerns for NFL Players*, Nat'l Inst. Occupational Health-Safety, Mar. 2012 (discussing methodology and results of 1994 study), available at http://www.cdc.gov/niosh/pgms/worknotify/pdfs/NFL_Notification_01.pdf, archived at <https://perma.cc/LCT5-K9UD?type=pdf>; *NFL Mortality Study*, Nat'l Inst. Occupational Health-Safety, Jan. 1994 (same), available at <http://www.cdc.gov/niosh/pdfs/nffactsheet.pdf>, archived at <https://perma.cc/PW3S-HXT2?type=pdf>.
- 97 *NFL Mortality Study*, Nat'l Inst. Occupational Health-Safety, *supra* note 96.
- 98 *Id.*
- 99 *Id.*
- 100 CBA, Art. XLVIII-A.
- 101 Thomas Heath and Leonard Shapiro, *For NFL Players, There Are No Guarantees: Contracts Illustrate Issues With Union*, Wash. Post, Dec 15, 2002, available at 2002 WLNR 15313660.
- 102 *Id.*
- 103 See Jarrett Bell, *Grading Scale One Hurdle to Spotting Trend*, USA Today, Feb. 17, 1995, available at 1995 WLNR 2568233; Steve Jacobson, *Concussion Issue Must Be Tackled*, Newsday, Nov. 30, 1994, available at 1994 WLNR 475550.
- 104 *League of Denial*, Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 24 (2013).
- 105 Gary Mihoces, *Documentary: For Years, NFL Ignored Concussion Evidence*, USA Today, Oct. 7, 2013, <http://www.usatoday.com/story/sports/nfl/2013/10/07/frontline-documentary-nfl-concussions/2939747/>, archived at <http://perma.cc/N8H2-WMWV>.
- 106 *League of Denial*, *supra* note 104, at 71–73.
- 107 *Id.* at 75.
- 108 See *id.* at 131 (discussing Pellman's appointment as Chairman of the MTBI Committee).
- 109 *Id.*
- 110 *Id.* at 127–28.
- 111 *Id.* at 131.
- 112 *Id.*
- 113 *Id.* at 126.
- 114 *Id.* at 131.
- 115 Kevin Guskiewicz, *Senior Associate Dean for Natural Sciences*, Univ. of N.C., <http://college.unc.edu/administrationcontacts/guskiewicznaturalsciences/> (last visited Aug. 7, 2015), archived at <http://perma.cc/JN4T-KP4M>.
- 116 CBA, Art. XLVIII-B.
- 117 CBA, Art. XXXV.
- 118 *League of Denial*, *supra* note 104, at 131.
- 119 *Id.* at 132.
- 120 *Id.* at 138–39. The test, known as IMPACT, became widely used in all levels of sports and thus very profitable for Lovell. *Id.* at 183. The MTBI Committee even promoted its usage. *Id.*
- 121 *Id.* at 142–44.
- 122 *Id.*
- 123 See *id.* at 180 (mentioning that the MTBI Committee published a total of 16 articles in *Neurosurgery*); *id.* at 276 (discussing the MTBI Committee's sixteenth paper in June 2009).
- 124 *Id.* at 139.
- 125 *Id.*
- 126 See *id.* at 180 (mentioning that the MTBI Committee published a total of 16 articles in *Neurosurgery*); *id.* at 276 (discussing the MTBI Committee's sixteenth paper in June 2009).
- 127 *Id.* at 144; 166; 174; 276.
- 128 *Id.* at 167.
- 129 *Id.* at 144; 167.
- 130 *Id.* at 146 (discussing Cantu's role as the sports section editor of *Neurosurgery*).
- 131 *Id.*; *id.* at 172.
- 132 *Id.* at 171–72.
- 133 *Id.*
- 134 See *id.* at 188–89 (discussing Omalu's article).
- 135 *Id.* at 9–10; 151–61.
- 136 *Id.*; *id.* at 163.
- 137 *Id.* at 164.
- 138 *Id.* at 189.
- 139 *Id.* at 189–91.
- 140 CBA, Art. XLVIII-C.
- 141 CBA, Art. XLVIII-D.
- 142 Ken Murray, *Tagliabue to Retire as NFL's Chief in July; He Made Baltimore Wait for a New Team*, Balt. Sun, Mar. 21, 2006, available at 2006 WLNR 4664231.
- 143 *Id.*; Rick Gosselin, *Goodell's No Rookie When It Comes To The NFL*, Dallas Morning News, Aug. 8, 2006, available at 2006 WLNR 13712449.
- 144 The players included former Pittsburgh Steelers lineman Terry Long who committed suicide in July 2005, Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 193–96 (2013), and Andre Waters, a former Philadelphia Eagles and Arizona Cardinals safety who committed suicide in November 2006, *id.* at 201–04.

- 145 *League of Denial*, *supra* note 104, at 217–18.
- 146 *Id.* at 168.
- 147 Gary Mihoces, *Issues Debated on Concussions, Doctors Disagree at NFL Meeting*, USA Today, Jun. 20, 2007, available at 2007 WLNR 11537008; *League of Denial*, *supra* note 104, at 219 (describing concussion summit as “designed to get the new commissioner up to speed”).
- 148 *League of Denial*, *supra* note 104, at 219–28 (describing meeting).
- 149 *Id.* at 228.
- 150 *Id.*
- 151 *Id.* (“‘Keep doing what you’re doing,’ he told Guskiewicz.”)
- 152 See Harvey Araton, *Stealth Killer Puts Doctor On Mission With N.F.L.*, N.Y. Times, May 8, 2007, <http://www.nytimes.com/2007/05/08/sports/football/08araton.html>, archived at <http://perma.cc/Y4EU-FRYW>; Jodie Valade, *NFL Glories Come With A Price: A Career In Football Rewards Almost All Former Players With A Lifetime of Pain And Few Options To Deal With It*, Cleveland Plain Dealer, Aug. 17, 2003, available at 2003 WLNR 517073; Jeannine Stein, *This Sport Stays In Contact, Ailments Haunt NFL Retirees*, Chicago Trib., Jun. 15, 2003, available at 2003 WLNR 15259601.
- 153 Bob Raissman, *NFL’s Secret Shame: Players Association Turn Backs On Down-and-Outsiders*, N.Y. Daily News, Jan. 21, 2007, available at 2007 WLNR 1263471. Upshaw’s comments run counter to the NFLPA Constitution which includes Retired Members among its membership and also “recogniz[es] that retired players still have a stake in the actions of the NFLPA.” NFLPA Constitution.
- 154 Pierce E. Scranton, Jr., *Playing Hurt: Treating and Evaluating the Warriors of the NFL* 145 (2001).
- 155 John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN (May 20, 2008, 10:10 PM), <http://sports.espn.go.com/nfl/news/story?id=3404596>, archived at <http://perma.cc/MZ2C-9AYZ>.
- 156 William C. Rhoden, *Remembering Player, Friend And Enemy*, N.Y. Times, Aug. 22, 2008, <http://www.nytimes.com/2008/08/22/sports/football/22rhoden.html>, archived at <http://perma.cc/FJ9N-EVSL>.
- 157 Mike Florio, *De Smith Declares “War” Against the Owners*, ProFootballTalk (Jan. 23, 2011, 12:21 PM), <http://profootballtalk.nbcsports.com/2011/01/23/de-smith-declares-war-against-the-owners/>, archived at <http://perma.cc/3QVF-6NJB>.
- 158 Mike Florio, *De Smith’s Contract Expires in March 2012*, ProFootballTalk (Jun. 13, 2011, 11:41 AM), <http://profootballtalk.nbcsports.com/2011/06/13/de-smiths-contract-expires-in-march-2012/>, archived at <http://perma.cc/KH5W-Z472>.
- 159 *Hearing On: Legal Issues Relating to Football Head Injuries*, Hearing Before the H. Comm. on the Judiciary, 111th Cong. (Oct. 28, 2009 and Jan. 4, 2010), available at <http://judiciary.house.gov/index.cfm/hearings?ID=38827733-BF15-230A-9520-EA74C061B19D>, archived at <http://perma.cc/3H3U-6A4B?type=live>.
- 160 *Id.* at 29.
- 161 *Id.* at 29–36.
- 162 *Id.*
- 163 *Id.* at 34.
- 164 *Football Players Head Injuries Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of DeMaurice Smith Executive Director, National Football Players Ass’n) available at http://judiciary.house.gov/_files/hearings/pdf/Smith091028.pdf, archived at <https://perma.cc/3F3T-T6PZ?type=pdf>; see also Alan Schwarz, *N.F.L. Union Says It Shares Blame On Head Injuries*, N.Y. Times, Nov. 1, 2009, <http://www.nytimes.com/2009/11/01/sports/football/01union.html>, archived at 2009 WLNR 21793818.
- 165 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 266–71 (2013) (discussing meeting).
- 166 *Id.*
- 167 *Id.* at 267 (mentioning Davis’ presence); *id.* at 235 (discussing Davies’ background).
- 168 *Id.* at 235.
- 169 See *id.* at 235–39 (discussing Davies’ review and findings).
- 170 *Id.* at 279.
- 171 *Id.* at 283–88.
- 172 *Id.* at 286–88.
- 173 *Id.* at 286.
- 174 *Id.* at 344.
- 175 NFL Comments and Corrections (June 24, 2016), citing Alan Schwarz, *Concussion Committee Breaks with Predecessor*, N.Y. Times, June 1, 2010, http://www.nytimes.com/2010/06/02/sports/football/02concussion.html?_r=1, archived at <https://perma.cc/E43W-V46E>.
- 176 *Id.*
- 177 See *id.* at 210 (2013) (discussing Colt neurological consultant Hank Feuer and Cynthia Arfken, an associate professor at Wayne State University, stating there was no basis for the MTBI Committee’s finding, in its seventh paper, that “it might be safe for college/high school football players to be cleared to return to play on the same day as [a concussion].”); *id.* at 178–79 (discussing Mark Lovell’s disavowing responsibility for certain of the MTBI Committee’s research).
- 178 See Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1 (2012).
- 179 *Id.*
- 180 CBA, Art. 45.
- 181 CBA, Art. 61.
- 182 CBA, Art. 21.
- 183 CBA, Art. 24.
- 184 CBA, Art. 39, § 1(a).
- 185 CBA, Art. 39, § 1(a).
- 186 CBA, Art. 39, § 1(b).
- 187 CBA, Art. 39, § 1(e).
- 188 CBA, Art. 39, § 1(c).
- 189 CBA, Art. 39, § 1(d).
- 190 CBA, Art. 57.
- 191 CBA, Art. 65.
- 192 CBA, Art. 12, § 5.
- 193 See Emily Kaplan, *The Games Go On, And So Does Life*, MMQB (Dec. 26, 2013), <http://mmqb.si.com/2013/12/26/nfl-nflpa-the-trust-player-retirement-benefits/>, archived at <http://perma.cc/Z2LH-V8PM> (discussing creation of the Trust); *Frequently Asked Questions*, Trust, <http://playertrust.com/frequently-asked-questions> (last visited Aug. 7, 2015), archived at <http://perma.cc/7NLC-HDTB> (describing The Trust and its purpose).
- 194 CBA, Art. 12, § 5.
- 195 Mark Maske, *NFL Donating \$30 Million to NIH for Brain Injury Research*, Wash. Post, Sept. 5, 2012, <http://www.washingtonpost.com/blogs/football-insider/wp/2012/09/05/nfl-donating-30-million-to-nih-for-brain-injury-research/>, archived at <http://perma.cc/EKJ9-KR5Y>.
- 196 Class Action Complaint, *Eller v. Nat’l Football League Players Ass’n*, (D. Minn. 2011) (No. 11-cv-2623), ECF No. 1.
- 197 Class Action Complaint, *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639), ECF No. 57.
- 198 Stipulation of Dismissal, *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639), ECF No. 199; see also Mike Florio, *Carl Eller Case is Dismissed*, ProFootballTalk, Aug. 24, 2011, <http://profootballtalk.nbcsports.com/2011/08/24/carl-eller-case-is-dismissed/>, archived at <http://perma.cc/G2DT-XSVL>.
- 199 Class Action Complaint, *Eller v. Nat’l Football League Players Ass’n*, *supra* note 196 at ¶ 136.
- 200 *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp. 2d 823 (D. Minn. 2012), *aff’d* 731 F.3d 752 (8th Cir. 2013).
- 201 See *id.*

- 202 *Duke Provides Infection Control Steps to Keep Pro Football Players Healthy*, Duke Med. News & Comm., <https://pdc.dukemedicine.org/news/duke-provides-infection-control-steps-keep-pro-football-players-healthy>, (last visited Mar. 15, 2016), *archived at* <https://perma.cc/FSY4-KKSC>.
- 203 *Id.*
- 204 *See Heart Health Concerns for NFL Players*, Nat'l Inst. Occupational Health-Safety, Mar. 2012 (discussing methodology and results of 1994 study), *available at* http://www.cdc.gov/niosh/pgms/worknotify/pdfs/NFL_Notification_01.pdf, *archived at* <https://perma.cc/LCT5-K9UD?type=pdf>.
- 205 Everett J. Lehman et al., *Neurodegenerative causes of death among retired National Football League players*, *Neurology* 2012;79:1970–74.
- 206 *See id.*
- 207 *Id.*
- 208 *Id.*
- 209 Class Action Complaint, *Ballard v. Nat'l Football League Players Ass'n*, (E.D.Mo. 2014) (No. 14-cv-01267).
- 210 *NFL Names Dr. Elizabeth Nabel First Chief Health And Medical Advisor*, NFL Communications (Feb. 9, 2015), <http://nflcommunications.com/2015/02/09/nfl-names-dr-elizabeth-nabel-first-chief-health-and-medical-advisor/>, *archived at* <http://perma.cc/V9RV-DSKV>.
- 211 NFL Comments and Corrections (June 24, 2016).
- 212 Nathaniel Vinton, *NFL hiring chief medical officer as controversial Dr. Elliot Pellman, who downplayed concussions, retires*, N.Y. Daily News, July 20, 2016, <http://www.nydailynews.com/sports/football/controversial-doc-behind-nfl-concussion-policies-retires-article-1.2718836>, *archived at* <https://perma.cc/FGR6-HW8Z>.
- 213 NFL Comments and Corrections (June 24, 2016).
- 214 NFL Comments and Corrections (June 24, 2016).
- 215 CBA, Art. 50, § 1(a).
- 216 CBA, Art. 39, § 3(a).
- 217 *Id.*
- 218 This information was provided by the NFLPA; *see also Synernet Staff Visits NFL Headquarters*, Synernet (Feb. 11, 2015), <http://www.synernet.net/news/news.aspx>, *archived at* <https://perma.cc/E4UC-WNWP>.
- 219 Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 PM), <http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/>, *archived at* <https://perma.cc/P5NZ-XVS4>.
- 220 The NFL currently has television broadcasting agreements with ESPN, NBC, CBS, FOX, NFL Network and DirecTV. In addition, the NFL has a radio broadcasting agreement with Westwood One. In total, the broadcasting agreements bring in approximately \$7 billion in annual revenue to the NFL. Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, *Forbes* (Feb. 14, 2011, 6:13PM), <http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/>, *archived at* <https://perma.cc/B64R-2GHV?type=pdf>.
- 221 NFL Ventures is responsible for negotiating all of the league's major sponsorship, marketing, and media rights deals. NFL Ventures, which Commissioner Goodell ran before becoming Commissioner, includes four wholly-owned subsidiaries: NFL Enterprises, NFL Properties, NFL Productions, and NFL International. *See Tommy Craggs, Exclusive: Leaked Documents Show Operating Profits for NFL Ventures Rose 29 Percent Last Year*, *Deadspin* (July 15, 2011, 1:10 PM), <http://deadspin.com/5821386/audited-financials-operating-profit-for-nfl-ventures-lp-rose-from-999-million-to-13-billion-last-year>, *archived at* <https://perma.cc/N9KB-7KGP?type=source>.
- 222 NFL Network is the league-owned and operated television network devoted full-time to the NFL, including broadcasting select Thursday night games. For more information, *see* www.nfl.com/nflnetwork.
- 223 NFL Properties is responsible for licensing, sponsorship, and marketing. NFL Properties was the subject of *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010). NFL Properties was created by the 32 individual clubs to collectively market and license the clubs' individual intellectual property, such as names, colors, logos, and trademarks. In 2000, the clubs—through NFL Properties—granted Reebok an exclusive license to produce and sell trademarked headwear for the 32 clubs. American Needle, a former licensee and creator of NFL appareled headwear, could no longer create headwear with NFL logos and trademarks. American Needle challenged the exclusive license as an illegal restraint of trade by the 32 NFL clubs. The Northern District of Illinois granted the NFL summary judgment after finding that NFL Properties constituted a single entity for antitrust purposes, and therefore there was no contract, combination, or conspiracy to restrain trade. *See Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007). The Seventh Circuit affirmed. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736 (7th Cir. 2008). The Supreme Court reversed. *Am. Needle*, 560 U.S. 183. While the Court noted that NFL clubs “depend upon a degree of cooperation for economic survival,” the necessity of cooperation does not transform concerted action into the independent action of a single-entity. *Id.* at 198. Furthermore, that “even if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.” *Id.* at n.7.
- 224 NFL Enterprises is responsible for advertising, publicizing, promoting, marketing, and selling broadcasts of NFL games.
- 225 NFL Productions, also known as NFL Films, is the league-owned film company that for more than 50 years has produced award-winning films about the NFL. For more information *see* www.nflfilms.com.
- 226 NFL Digital is responsible for the league's technology and new media ventures, including www.nfl.com and NFL Mobile.
- 227 CBA, Art. 12, § 6.
- 228 CBA, Art. 12, § 1, § 6.
- 229 Mark Leibovich, *Roger Goodell's Unstoppable Football Machine*, N.Y. Times, Feb. 3, 2016, http://www.nytimes.com/2016/02/07/magazine/roger-goodells-unstoppable-football-machine.html?_r=0, *archived at* <https://perma.cc/Y7L5-A99L>.
- 230 CBA, Art. 12, § 6(c)(i).
- 231 CBA, Art. 1.
- 232 CBA, Art. 12, § 2.
- 233 CBA, Art. 12, § 6(c)(v).
- 234 Substance Abuse Policy, § 1.3.
- 235 Substance Abuse Policy, § 1.3.1.
- 236 *Id.*
- 237 *See generally* 2014 Substance Abuse Policy, § 1.
- 238 *See* 2014 Substance Abuse Policy, § 1.4 – 1.5.
- 239 *See generally* 2014 Steroid Policy.
- 240 Steroid Policy, § 6.
- 241 *Id.* at § 3.1
- 242 *Id.* at § 7.
- 243 *See* 26 U.S.C. § 4980H.
- 244 Courts have considered whether the NFL is an employer of NFL players with mixed results. In *Williams v. Nat'l Football League*, a Minnesota trial court determined that the NFL was a joint employer of two members of the Minnesota Vikings for purposes of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA). Articulating the Minnesota Supreme Court's five-part test to determine whether an employment relationship exists, the court found that the NFL controlled the drug testing process, controlled the means and manner of performance and the location of team play, controlled the mode of payment to players, controlled the materials and tools used by players, and controlled the right to discipline and discharge players. Taken together, these factors supported the conclusion that the NFL is an employer for the purposes of DATWA and that DATWA applied in that case. 27-cv-08-29778, 2010 WL 1793130 (Minn. Dist.Ct. May 6, 2010). Conversely, in *Brown v. Nat'l Football League*, the United States District Court for the Southern District of New York found that the NFL was not

a former player's employer. In *Brown*, a former NFL player brought a personal injury action in state court against the NFL, seeking damages for a career-ending eye injury he sustained during a game when a referee threw a penalty flag that struck the player in the eye. The Court observed, “[a]t the time of his injury, Brown worked not for the NFL, but for the Cleveland Browns Football Company, a Delaware limited partnership and an entirely separate entity which happens to be a member of the NFL.” 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002).

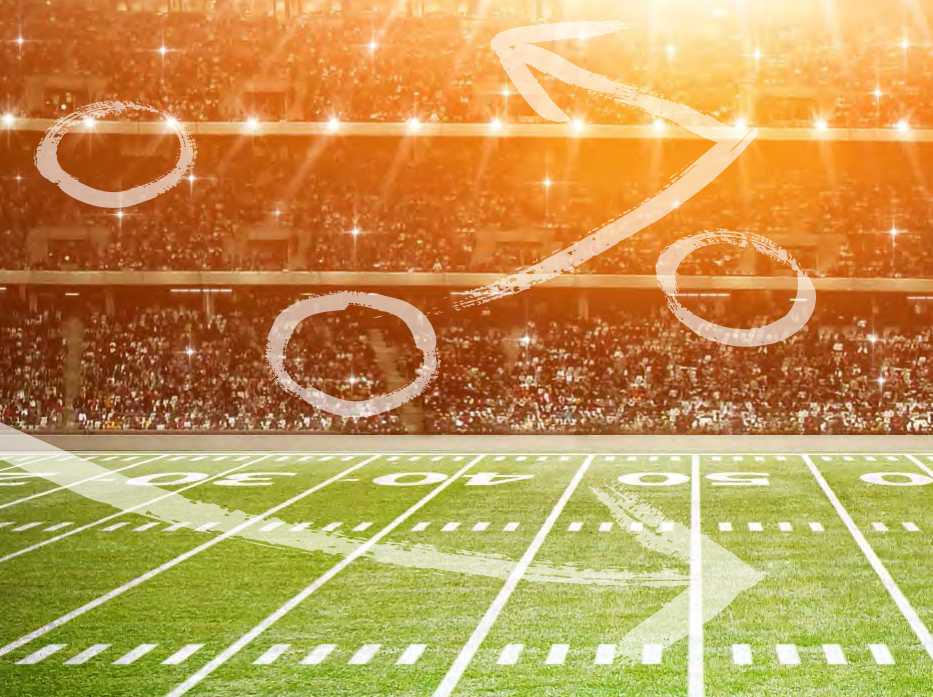
- 245 See 29 U.S.C. § 651, et seq.
- 246 See 42 U.S.C. § 12101, et seq.
- 247 Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, Univ. Penn. L. Rev. (forthcoming 2017).
- 248 See Complaint, *Maxwell v. Nat'l Football League*, BC465842 (Cal. Sup. Ct. July 19, 2011), Dkt. No. 1.
- 249 See *Plaintiffs/Former Players*, NFL Concussion Litig., http://nflconcussionlitigation.com/?page_id=274 (last visited Aug. 7, 2015) (stating that as of June 1, 2013, there were more than 4,800 named player-plaintiffs in 242 concussion-related lawsuits).
- 250 See 28 U.S.C. § 1407 (describing grounds and process for transferring and consolidating multidistrict litigation).
- 251 Plaintiffs' Amended Master Administrative Long-Form Complaint, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D. Pa. July 17, 2012), ECF No. 2642.
- 252 See generally Docket, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D. Pa. July 17, 2012) (including many case transfer orders).
- 253 See *id.*
- 254 See Plaintiffs' Amended Master Administrative Long-Form Complaint at ¶ 6, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D. Pa. July 17, 2012), ECF No. 2642 (“to provide players with . . . information that protect them as much as possible from short-term and long-term health risks”); ¶ 90 (“to provide truthful information to NFL players regarding risks to their health”); ¶ 91 (“to keep the players informed of safety information they needed to know”); ¶ 99 (“to keep NFL players informed of neurological risks, to inform NFL players truthfully, and not to mislead NFL players about the risks of permanent neurological damage that can occur from MTBI incurred while playing football”); ¶ 222 (“to educate [the public] as to the risks of concussions due to the League’s unique position of influence”); ¶ 248 (“to advise Plaintiffs of the[e] heightened risk” “that the repeated traumatic head impacts the Plaintiffs endured while playing NFL football were likely to expose them to excess risk to neurodegenerative disorders and diseases, including but not limited to CTE, Alzheimer’s disease or similar cognitive-impairing conditions”); ¶ 304 (“to disclose accurate information to the Plaintiffs”); ¶ 324 (“to inform and advise players and teams of the foreseeable harm that can arise from such things as the use of leather helmets, the need to wear hard plastic helmets to reduce head wounds and internal injury (1943) and the grabbing of an opponent’s facemask—to minimize or avoid head and neck injuries (1956/1962”).
- 255 See *id.* at ¶ 6 (“to provide players with rules . . . that protect them as much as possible from short-term and long-term health risks”); ¶ 90 (“to act in the best interests of the health and safety of NFL players”); ¶ 90 (“to take all reasonable steps necessary to ensure the safety of players”); ¶ 91 (“to make the game of professional football safer for the players”); ¶ 103 (“to govern player conduct on and off the field”); ¶ 323 (“to supervise how the game of football was played in the United States”); and, ¶ 324 (“to provide a safe environment for players and because of its superior knowledge of the risks of injury to players”).
- 256 See *id.* at ¶ 17 (“to investigate, study, and truthfully report the medical risks associated with MTBI [(mild traumatic brain injuries)] in football”); ¶ 106 (“to provide truthful scientific research and information about the risks of concussive and sub-concussive injuries to NFL players”); ¶ 150 (“to use reasonable care in the study of concussions and post-concussion syndrome in NFL players; the study of any kind of brain trauma relevant to the sport of football; the use of information developed; and the publication of data and/or pronouncements from the MTBI Committee”); ¶¶ 340, 358 (“to exercise reasonable care in the MTBI Committee’s work and the NFL and its agents’ public statements about the substance of the Committee’s work”); ¶ 372 (“to retain and employ persons within the MTBI Committee who were professionally competent to study and render opinions on the relationship between repetitive head impacts in football and brain injury and to ensure that those whom it hired had no conflict of interest and that each had the professional and personal qualifications to conduct those studies and render opinions that were scientifically rigorous, valid, defensible, and honest”); ¶ 378 (“not to allow those incompetent persons it had hired within the MTBI Committee to continue to conduct incompetent and falsified studies and render incompetent opinions on the relationship between repetitive head impacts in football and brain injury.”)
- 257 See Class Action Settlement Agreement (As Amended), In re Nat'l Football League Players' Concussion Injury Litigation, 12-md-2323 (Feb. 13, 2015), ECF No. 6481-1.
- 258 In re Nat'l Football League Players' Concussion Injury Litigation, 307 F.R.D. 351, 393 (E.D. Pa. 2015).
- 259 In re Nat'l Football League Players' Concussion Injury Litigation, 2016 WL 1552205 (3d Cir. Apr. 18, 2016).
- 260 Mike Florio, *Apparently, not all former players dropped their objection to the concussion settlement*, ProFootballTalk (Aug. 31, 2016, 12:05 PM), <http://profootballtalk.nbcsports.com/2016/08/31/apparently-not-all-former-players-dropped-their-objection-to-the-concussion-settlement/>, archived at <https://perma.cc/R34V-3C8H>.
- 261 This information was provided by the NFL prior to the 2016 season.
- 262 CBA, Art. 39, § 1(d); this information was also provided by the NFLPA.
- 263 CBA, Art. 50, § 2.
- 264 *Transcript – 2016 Injury Data Results Conference Call*, NFL Communications, Jan. 29, 2016, <https://nflcommunications.com/Pages/Transcript---2016-Injury-Data-Results-Conference-Call.aspx>, archived at <https://perma.cc/RKC6-352G>.
- 265 The NFL provided us with a copy of the poster.
- 266 Former New York Giants running back Charles Way is the Director of the NFL’s Player Engagement Department. Michael Eisen, *Charles Way Named Head of NFL’s Player Engagement Department*, Giants.com (Jul. 2, 2014), <http://www.giants.com/news-and-blogs/article-1/Charles-Way-named-head-of-NFLs-Player-Engagement-Department/d98165b5-1b82-4243-a3d0-5746aae812e1>, archived at <http://perma.cc/QBN8-7Z2M>.
- 267 See *Player Care Foundation*, NFL Player Care Found., <http://www.nflplayercare.com/> (last visited Aug. 7, 2015), archived at <http://perma.cc/93M6-XCN2>.
- 268 Nat'l Football League, 2015 Player Health & Safety Report 30 (2015), <http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf>, archived at <https://perma.cc/Y4BN-TUP7?type=pdf>.
- 269 See Jim Baumbach, *Life After Football*, Newsday (Jan. 22, 2015), <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.
- 270 See Jim Baumbach, *Life After Football*, Newsday (Jan. 22, 2015), <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.
- 271 For example, Injury Grievances, which occur when, at the time a player’s contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator. 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.
- 272 See 2011 CBA, Art. 43, § 1.
- 273 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator’s authority, including to grant a “money award”).

- 274 CBA, Art. 43, § 2.
- 275 The Non-Injury Grievance arbitrator has the authority to determine whether a complaint against a doctor fit within his or her jurisdiction under Article 43. *See* 2011 CBA, Art. 43, § 1 (discussing scope of Non-Injury Grievance arbitrator's jurisdiction).
- 276 U.S.C. § 185.
- 277 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 278 *Williams v. Nat'l Football League*, 582 F.3d 863, 870–72 (8th Cir. 2009). The case was subsequently remanded to Minnesota state court for resolution of the Williamses' state law claims on the merits. *Williams v. Nat'l Football League*, 10-cv-613, 2010 WL 760701 (D. Minn. Mar. 4, 2010). The case proceeded to trial after certain parts of the Williamses' statutory claims were dismissed on summary judgment. *Williams v. Nat'l Football League*, 27-cv-08-29778, 2010 WL 547537 (Minn. Dist. Ct. Feb. 18, 2010). At trial the court determined that the Williamses were not harmed by the NFL's state law violations and thus denied their request for a permanent injunction and dissolved a prior temporary restraining order. *Williams v. Nat'l Football League*, 27-cv-08-29778, 2010 WL 1793130 (Minn. Dist. Ct. May 6, 2010); *aff'd on different grounds*, *Williams v. Nat'l Football League*, 794 N.W.2d 391 (2011). As part of 2011 CBA, the NFL agreed to reduce the players' suspensions from four games to two. *See* Mike Florio, *StarCaps Suspensions Finally Are Finalized*, ProFootballTalk (Sept. 2, 2011, 5:07 PM), <http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/>, archived at <http://perma.cc/BRR8-RPPL>.
- 279 *Williams*, 582 F.3d 863.
- 280 *Id.* at 878, quoting *Lueck*, 471 U.S. at 211–12.
- 281 *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654 F. Supp. 2d 960,972 (D. Minn. 2009).
- 282 F. Supp. 2d 894 (S.D. Ohio 2007).
- 283 *Id.* at 898.
- 284 *See* *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746 (Minn. 2005).
- 285 *See* *Stringer v. Minnesota Vikings Football Club, LLC*, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).
- 286 *Id.* at 909.
- 287 *Id.* at 912.
- 288 *NFL, Stringer's Widow Settle Lawsuit*, ESPN (Jan. 26, 2009, 4:25 PM ET), <http://sports.espn.go.com/nfl/news/story?id=3861331>, archived at <http://perma.cc/UM7H-HD45>. Following Stringer's death, the NFL now issues an annual memorandum to NFL Clubs warning them about the risks of players overheating during training camp. *See, e.g.*, Memorandum from NFL Injury and Safety Panel (Elliott Hershman, M.D., Chairman), to General Managers, Head Coaches, Team Physicians, and Team Athletic Trainers re: 2014 Training Camps – Adverse Weather Conditions (July 11, 2014) (on file with author). In addition, a preseason training camp presentation to players includes materials from the Korey Stringer Institute on the risks of overheating. The NFL provided us with a copy of the preseason training camp presentation.
- 289 *See* Order Denying Plaintiffs' Motion to Remand, *Maxwell v. Nat'l Football League*, 11-CV-08394 (C.D. Cal. Dec. 8, 2011); Order Denying Plaintiffs' Motion to Remand, *Pear v. Nat'l Football League*, 11-CV-08395, Dec. 8, 2011 (C.D. Cal. Dec. 8, 2011.), ECF No. 61; Order Denying Plaintiffs' Motion to Remand, *Barnes v. Nat'l Football League*, 11-CV-08396, Dec. 8, 2011 (C.D. Cal. Dec. 8, 2011), ECF No. 58.
- 290 *Duerson v. Nat'l Football League*, 12-cv-2513, 2012 WL 1658353, *6 (N.D. Ill. May 11, 2012).
- 291 *Green v. Arizona Cardinals Football Club LLC*, 21 F.Supp.3d 1020 (E.D. Mo. May 14, 2014).
- 292 Mike Florio, *NFL Suffers Major Setback in Concussion Cases*, ProFootballTalk (May 14, 2014, 9:28 PM), <http://profootballtalk.nbcsports.com/2014/05/14/nfl-suffers-major-setback-in-concussion-case/>, archived at <http://perma.cc/3VQD-DCH9>.
- 293 *See* Transfer Order, *In re: Nat'l Football League Players' Concussion Injury Litigation*, 15-cv-1903 (E.D. Mo. Apr. 11, 2016), ECF No. 38.
- 294 *See* Complaint, *Dent v. Nat'l Football League*, 14-cv-2324 (N.D. Cal. May 20, 2014), ECF No. 1.
- 295 *Id.* at ¶ 15. In addition to state law claims sounding in fraud and negligence, the plaintiffs alleged the NFL violated several statutes. For example, the plaintiffs allege that the NFL violated: “the Controlled Substances Act’s requirements governing the acquisition, storage, provision and administration of, and recordkeeping concerning, Schedule II, III and IV controlled substances”; the Food, Drug, and Cosmetic Act’s “requirements for prescriptions, warnings about known and possible side effects, and proper labeling, among other violations”; and, “state laws governing the acquisition, storage and dispensation of prescription medications.” *Id.* at ¶¶ 354–57.
- 296 *Dent v. Nat'l Football League*, 14-cv-2324, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014). *See also* *Nelson v. Nat'l Hockey League*, 20 F.Supp.3d 650 (N.D. Ill. Feb. 20, 2014) (claims by estate of deceased NHL player that NHL negligently failed to monitor the player's use of addictive medications and head trauma preempted by CBA).
- 297 *Dent v. Nat'l Football League*, 14-cv-2324, 2014 WL 7205048, *12 (N.D. Cal. Dec. 17, 2014) (“In ruling against the novel claims asserted herein, this order does not minimize the underlying societal issue. In such a rough-and-tumble sport as professional football, player injuries loom as a serious and inevitable evil. Proper care of these injuries is likewise a paramount need. The main point of this order is that the league has addressed these serious concerns in a serious way – by imposing duties on the clubs via collective bargaining and placing a long line of health-and-safety duties on the team owners themselves. These benefits may not have been perfect but they have been uniform across all clubs and not left to the vagaries of state common law. They are backed up by the enforcement power of the union itself and the players' right to enforce these benefits. Given the regime in place after decades of collective bargaining over the scope of these duties, it would be impossible to fashion and to apply new and supplemental state common law duties on the league without taking into account the adequacy and scope of the CBA duties already set in place. That being so, plaintiffs' common law claims are preempted by Section 301 of the Labor Management Relations Act of 1947. The motion to dismiss all of plaintiffs' claims based on preemption grounds under Section 301 is Granted.”)
- 298 NFLPA Constitution, § 2.00.
- 299 *See* NFLPA Department of Labor Form LM-2 Labor Organization Annual Report (2013), p. 27.
- 300 CBA, Preamble.
- 301 *See* NFLPA Constitution, § 2.06 (discussing suspension of a member's membership for failure to pay dues regardless of type of membership); *see also* NFLPA Constitution, § 2.11 (providing all retired players with two years of membership in the NFLPA at no cost). The NFLPA Constitution never discusses what it means to an “associate” member.
- 302 *See* NFLPA Constitution, § 2.06 (discussing suspension of a member's membership for failure to pay dues regardless of type of membership).
- 303 CBA, Art. 47, § 2.
- 304 CBA, Art. 47, § 1.
- 305 CBA, Art. 47, § 6.
- 306 *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n. 22 (1984) (“Because a union so selected is the exclusive representative of all employees in a bargaining unit, the union bears a concomitant duty to represent the interests of each and every employee in that unit fairly”); *see also* *Gilpin v. Am. Fed'n of State, Cnty, and Mun. Emps, AFL-CIO*, 875 F.2d 1310, 1311 (7th Cir. 1989) (“A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who don't belong to the union.”)
- 307 *See, e.g.*, *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985) (reviewing player's claim for a breach of the NFLPA's duty of fair representation); *Sharpe v. Nat'l Football League Players Ass'n*, 941 F.Supp. 8 (D.D.C. 1996) (same); *Chuy v. Nat'l Football League Players Ass'n*, 495 F.Supp. 137 (E.D. Pa. 1980) (same).
- 308 *Vaca v. Sipes*, 386 U.S. 171, 207 (1967).

- 309 Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); *see also* Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004) (discussing NFLPA's discretion in setting policy concerning NFL players).
- 310 *See, e.g.*, Wooddell v. Int'l Broth. of Elec. Workers, Local 71, 502 U.S. 93 (1991) (reinstating plaintiff union-members breach of union constitution claim).
- 311 Merk v. Jewel Co., 848 F.2d 761, 766 (7th Cir. 1988) ("because the 2,000 former workers are not statutory 'employees', the Union does not represent them. The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them 'fairly.'"); Anderson v. Alpha Portland Indus., 727 F.2d 177, 181 (8th Cir. 1984) (union did not have a duty to fairly represent former members who had retired even though the union had negotiated a collective bargaining agreement providing for retirement benefits); Cooper v. Gen. Motors Corp., 651 F.2d 249 (5th Cir.1981) (union did not owe supervisors who were former members of the union a duty of fair representation with regard to their seniority rights); McCormick v. Aircraft Mechanics Fraternal Ass'n, 225 F. Supp. 2d 1131, 1135 (D.Minn. 2002) (denying former union members' claim for breach of the duty and fair representation and explaining that "courts have repeatedly rejected the notion that a union has a duty to fairly represent its former members").
- 312 Black's Law Dictionary, "Duty" (9th ed. 2009).
- 313 *See, e.g.*, Grant v. Nat'l Football League Players Ass'n, 11-cv-3118, 2012 WL 1870974, *2-6 (C.D.Cal. May 22, 2012) (examining relationship between retired player and NFLPA to see if fiduciary relationship existed); Parrish v. Nat'l Football League Players Ass'n, 07-cv-943, 2007 WL 3456988, *6-7 (N.D. Cal. Nov. 14, 2007) (same).
- 314 *See* Bell v. DaimlerChrysler Corp., 547 F.3d 796, 804 (7th Cir. 2008) (discussing history of cases recognizing "that a union owes a fiduciary duty to represent its members fairly").
- 315 *See* Grant *supra* 313 at 110; Eller v. Nat'l Football League Players Ass'n, 872 F. Supp. 2d 823 (D.Minn. 2012), *aff'd* 731 F.2d 752 (8th Cir. 2013) (NFLPA Executive Director DeMaurice Smith's public statement "that the NFLPA owes a fiduciary duty to retired NFL players" did not create any legal obligations for the NFLPA); *see also* Soar v. Nat'l Football League Players Ass'n, 438 F.Supp. 337, 345 (D.R.I. 1975) (NFLPA did not violate purported fiduciary duty to seek pension benefits on behalf of retired players).
- 316 *See* Emily Kaplan, *The Games Go On, And So Does Life*, MMQB (Dec. 26, 2013), <http://mmqb.si.com/2013/12/26/nfl-nflpa-the-trust-player-retirement-benefits/>, *archived at* <http://perma.cc/Z2LH-V8PM> (discussing creation of the Trust); *Frequently Asked Questions*, Trust, <http://playerstrust.com/frequently-asked-questions> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/7NLC-HDTB> (describing The Trust and its purpose).
- 317 Gene Upshaw Player Assistance Trust Fund, <https://www.yourpaf.com/gupat/#.VuhhvnOrLIU> (last visited Mar. 15, 2016), *archived at* <https://perma.cc/S9T8-RYHF>.
- 318 *About NFLPA—Department Contacts*, NFLPA, <https://www.nflpa.com/about/departments-contacts> (last visited May 18, 2016), *archived at* <https://perma.cc/HK96-DQKA>.
- 319 This information was provided by the NFLPA.
- 320 *Id.*
- 321 *Id.*
- 322 NFLPA Mackey-White Committee Charter, ¶ 2.
- 323 *Id.*
- 324 This information was provided by the NFLPA.
- 325 The 30 Major League Baseball Clubs each have a 40-man roster, *see* 2012–16 Basic Agreement between MLB and MLBPA, Art. XX, § A, resulting in 1,200 MLB players. Generally, each of the 30 NBA Clubs has a 15-man roster, *see* Constitution and Bylaws of the National Basketball Association, Bylaws § 6, resulting in 450 NBA players. Each of the 30 NHL clubs has a 23-man roster, *see* Collective Bargaining Agreement between National Hockey League and National Hockey League Players' Association (Feb. 15, 2013), § 16.4, resulting in 690 NHL players.
- 326 *See What is Average NFL Player's Career Length? Longer Than You Might Think, Commissioner Goodell Says*, NFL.com (Apr. 18, 2011), <http://nflcommunications.com/2011/04/18/what-is-average-nfl-player%E2%80%99s-career-length-longer-than-you-might-think-commissioner-goodell-says/>, *archived at* <http://perma.cc/PX5U-9SFK> (discussing dispute between NFLPA's assertion that the average career is 3.5 years and the NFL's assertion that the average career is 6 years); *Average NFL Career Length*, Sharp Football Analysis (Apr. 30, 2014), <http://www.sharpfootballanalysis.com/blog/?p=2133>, *archived at* <http://perma.cc/KR58-R8DA> (discussing disagreement between NFLPA and NFL and determining that the average drafted player plays about 5 years). The average career in the NBA is about 4.8 years according to the National Basketball Players Association, *see* Susan Koenig, *Financial Planning for the Pros*, Registered Rep. 34, Apr. 1, 2010, *available at* 2010 WLNR 26366417; the average career in MLB is about 5.6 years, *see* William D. Witnauer, Richard G. Rogers & Jarron M. Saint Onge, *Major League Baseball Career Length in the 20th Century*, 26 Popul. Res. Policy Rev., 371–386 (2007), *available at* <http://link.springer.com/article/10.1007/s1113-007-9038-5/fulltext.html>, *archived at* <http://perma.cc/U9E-HCHL>; and the average career in the NHL is about 5.6 years, *see* *Average Length of an NHL Player Career*, QuantHockey.com, <http://www.quanthockey.com/Distributions/CareerLengthGP.php> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/9Q22-BNLF>.
- 327 This information was provided by the NFLPA.
- 328 *Id.*
- 329 *See Joint NFL NFLPA Statement on Wide-Ranging Changes to Drug Programs* Nat'l Football League Communications, <http://nflcommunications.com/2014/09/19/joint-nfl-nflpa-statement-on-wide-ranging-changes-to-drug-programs/> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/7JNE-GY4R>. Wes Welker of the Denver Broncos, Eric Herman of the New York Giants, Orlando Scandrick of the Dallas Cowboys and Stedman Bailey of the St. Louis Rams, each formerly serving four game suspensions, were permitted to return to their teams immediately. Josh Gordon of the Cleveland Browns and free agent LaVon Brazill were eligible to return after 10 games. Mark Daniels, *Drug-Policy Tweaks Could Affect Pats*, Providence Journal (RI), Sept. 17, 2014, *available at* 2014 WLNR 25824590.
- 330 *See* Mike Florio, *StarCaps Suspensions Finally are Finalized*, ProFootballTalk (Sept. 2, 2011, 5:07 PM), <http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/>, *archived at* <http://perma.cc/BRR8-RPPL>.
- 331 Order, Vilma v. Goodell, 12-cv-1283 (E.D.La. Sep. 5, 2012), ECF No. 121.
- 332 Submission of the NFLPA and the Players in Response to the Court's Order Concerning Joint Representation, Vilma v. Goodell, 12-cv-1283 (E.D.La. Sep. 5, 2012), ECF No. 122.
- 333 *Id.* at 4, *citing* Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).
- 334 F.Supp. 137 (E.D.Pa. 1980). Research did not reveal the outcome of the lawsuit after the court denied the NFLPA's motion to dismiss.
- 335 F.2d 1244 (9th Cir. 1985). *See also* Boogaard v. Nat'l Hockey League Players' Ass'n, 12-cv-9128, 2013 WL 1164301 (C.D.Cal. Mar. 20, 2013) (Dismissing duty of fair representation claim against NHLPA and finding NHLPA had no duty to advise estate of deceased player as to the statute of limitations on a duty of fair representation claim).
- 336 -cv-1559, 2014 WL 6776306 (E.D.Mo. Dec. 2, 2014).
- 337 *Id.*
- 338 Ballard v. Nat'l Football League Players Ass'n, 123 F. Supp.3d 1161 (E.D. Mo. 2015).
- 339 *See Quotes from NFLPA Press Conference*, NFLPA (Feb. 4, 2016), <https://www.nflpa.com/news/all-news/quotes-from-nflpa-sb50-press-conference>, *archived at* <https://perma.cc/2GZH-FQ37> (NFLPA Executive Director DeMaurice Smith commenting on the Concussion Litigation: "we don't represent the people in the concussion settlement . . . we're not a part of it. [I am] not in a position to advise or give legal advice to people about whether they opted into the settlement or not.")

- 340 Mike Florio, *NFLPA Issues Brief Statement On Settlement of Concussion Lawsuits*, ProFootballTalk (Aug. 29, 2013, 3:41 PM), <http://profootballtalk.nbcsports.com/2013/08/29/nflpa-issues-brief-statement-on-settlement-of-concussion-lawsuits/>, archived at <http://perma.cc/2NKD-MKKY>; Mike Florio, *NFLPA Addresses Its Failure to be Mentioned in League of Denial*, ProFootballTalk (Oct. 13, 2013, 8:59 AM), <http://profootballtalk.nbcsports.com/2013/10/13/nflpa-addresses-its-failure-to-be-mentioned-in-league-of-denial/>, archived at <http://perma.cc/3JWG-SZCF>; see also Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* xxii (2015) (quoting former player Sean Morey as stating “Every player that ever played the game, every player that plays the game today, is being betrayed by their union. Because they’re dismissing this issue [football causing serious brain trauma] because they don’t want to incur additional liability, and they’re trying to protect themselves.”).
- 341 Mike Florio, *NFLPA Addresses Its Failure to be Mentioned in League of Denial*, ProFootballTalk (Oct. 13, 2013, 8:59 AM), <http://profootballtalk.nbcsports.com/2013/10/13/nflpa-addresses-its-failure-to-be-mentioned-in-league-of-denial/>, archived at <http://perma.cc/3JWG-SZCF>.
- 342 F.3d 1170 (11th Cir. 2010).
- 343 U.S.C. § 158(d).
- 344 See *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488 (1979) (discussing what issues are mandatory subjects of collective bargaining); *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, Chemical Division, 404 U.S. 157 (1971).
- 345 *NFL Gives \$1 Million to Boston University for Study of Brain Injuries*, Nat’l Football League (Updated Jul. 26, 2012, 8:42 PM), <http://www.nfl.com/news/story/09000d5d817a2623/article/nfl-gives-1-million-to-boston-university-for-study-of-brain-injuries>, archived at <http://perma.cc/D5LZ-NYMM>.
- 346 NFL Comments and Corrections (June 24, 2016).
- 347 *Id.*
- 348 See Nat’l Football League, *2015 Player Health & Safety Report 30* (2015), <http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf>, archived at <https://perma.cc/Y4BN-TUP7?type=pdf>.
- 349 NFL Comments and Corrections (June 24, 2016).
- 350 Alan Schwarz, Walt Bogdanich, and Jacqueline Williams, *N.F.L.’s Flawed Concussion Research and Ties to Tobacco Industry*, N.Y. Times, Mar. 26, 2016, <http://www.nytimes.com/2016/03/25/sports/football/nfl-concussion-research-tobacco.html>, archived at <https://perma.cc/NM4N-SW4Q>. See also *NFL response to New York Times’ concussion research story*, NFL.com (Mar. 24, 2016, 4:11 PM), <http://www.nfl.com/news/story/0ap3000000647389/article/nfl-response-to-new-york-times-concussion-research-story>, archived at <https://perma.cc/Z3XE-8FQ6>.
- 351 For examples of such studies in high school and college sports, see Barry P. Boden et al., *Catastrophic Injuries in Pole Vaulters, A Prospective 9-Year Follow-up Study*, 40 Am. J. Sports Med. 1488 (2012); Frederick O. Mueller and Robert C. Cantu, *Catastrophic injuries and fatalities in high school and college sports, fall 1982-spring 1988*, 22 Med. & Sci. in Sports & Exercise 737 (1990).
- 352 See *The Datalys Center for Sports Injury Research and Prevention*, NCAA, <http://www.ncaa.org/health-and-safety/medical-conditions/datalys-center-sports-injury-research-and-prevention> (last visited Aug. 3, 2016), archived at <https://perma.cc/2M75-B24L>.
- 353 See, e.g., *Data transparency*, GlaxoSmithKline, <http://www.gsk.com/en-gb/behind-the-science/innovation/data-transparency> (last visited June 20, 2016), archived at <https://perma.cc/M5HN-NLHN>; *Frequently Asked Questions*, the YODA Project, <http://yoda.yale.edu/frequently-asked-questions-faqs#Data> (last visited June 20, 2016), archived at <https://perma.cc/2Z98-R7HC>.
- 354 CBA, Art. 39, § 3(a).
- 355 Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 AM), <http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/>, archived at <http://perma.cc/GE9A-RMRC>.
- 356 NFL CBA, Art. 25, § 4.
- 357 See Paul McCrory et al., *Consensus statement on concussion in sport: the 4th Int’l Conference on Concussion in Sport held in Zurich, November 2012*, 47 Br. J. Sports Med. 250, 251 (2013).
- 358 *Id.* at 253.
- 359 Columnist Mike Freeman has made a similar recommendation. See Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* 230–31 (2015) (“Make players sit for at least one game after a concussion, no matter if they pass concussion protocol tests or not. These tests are not infallible, and while sitting one game isn’t a perfect solution, it helps prevent players from circumnavigating the system post-concussion.”)
- 360 MLB CBA, Att. 36, ¶ 2.
- 361 See Paul McCrory et al., *Consensus statement on concussion in sport: the 4th Int’l Conference on Concussion in Sport held in Zurich, November 2012*, 47 Br. J. Sports Med. 250, 250–58 (2013) (discussing the challenges of and best practices for diagnosing concussions).
- 362 See *id.* at 254 (discussing the possibility of long-term problems for athletes that have suffered concussions).
- 363 See *id.* at 252–58 (discussing generally the challenges of determining when an athlete has recovered from a concussion).
- 364 Letter from Larry Ferazani, NFL, to authors (July 18, 2016).
- 365 *Id.*
- 366 See Sally Jenkins, *NFL’s concussion priorities: Dodging blame, making players responsible*, Wash. Post, Dec. 3, 2015, https://www.washingtonpost.com/sports/redskins/nfls-concussion-priorities-dodging-blame-making-players-responsible/2015/12/03/1b8752f8-99d2-11e5-94f0-9eeaff906ef3_story.html, archived at <https://perma.cc/JT6P-JX44> (“The heart of the NFL’s concussion problem is not that players hide symptoms; it’s a compensation structure that forces them to play hurt, or get cut.”)
- 367 CBA, App. H: Notice of Termination; see also 2011 CBA, Art. 4, § 5(d); 2011 CBA, App. A: NFL Player Contract, ¶¶ 8, 11. “‘Room’ means the extent to which a Team’s then-current Team Salary is less than the Salary Cap.” 2011 CBA, Art. 1.
- 368 See Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA Ent. L. Rev. 179, 193–95 (2009) (describing the various forms of guaranteed compensation in the NFL).
- 369 See Mike Florio, *The Full Kaepernick Contract Details*, ProFootballTalk (Jun. 5, 2014, 12:46 AM), <http://profootballtalk.nbcsports.com/2014/06/05/the-full-kaepernick-contract-details/>, archived at <http://perma.cc/BM65-VHRR> (discussing details of Colin Kaepernick’s 2014 contract with the San Francisco 49ers. Despite reports that Kaepernick had received \$61 million guaranteed, only about \$13 million was guaranteed against skill, injury and Salary Cap).
- 370 See Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1 (2012) (discussing the movement towards more guaranteed compensation). In 2012, Peyton Manning signed a five-year deal with the Denver Broncos for \$96 million, \$58 million of which was guaranteed. Mike Kliš and Jeff Legwold, *Peyton Manning’s \$96 Million Deal With Broncos Includes Neck Injury Clause*, Denver Post, (Mar. 20, 2012), http://www.denverpost.com/ci_20213659/peyton-mannings-deal-broncos-5-years-96-million, archived at <http://perma.cc/3NPD-MJDW>. In 2014, J.J. Watt signed a six-year deal with the Houston Texans for \$100 million, \$51.8 million of which was guaranteed. *Texans Give J.J. Watt \$100M Deal*, ESPN.com (Sept. 2, 2014), http://espn.go.com/nfl/story/_/id/11451373/jj-watt-houston-texans-reach-agreement-6-year-100-million-deal, archived at <http://perma.cc/HRE6-TNKX>. And, in 2015, Ndamukong Suh signed a six-year deal with the Miami Dolphins for \$114 million, \$60 million of which was guaranteed. Josh Alper, *Dolphins Make It*

- Official With Ndamukong Suh*, ProFootballTalk (Mar. 11, 2015, 4:14 PM), <http://profootballtalk.nbcsports.com/2015/03/11/dolphins-make-it-official-with-ndamukong-suh/>, archived at <http://perma.cc/8BPH-R5T5>.
- 371 See Deubert *supra* note 370 at 52–61 (discussing changes to rookie compensation scheme).
- 372 *Id.*
- 373 Gene Upshaw, *NFLPA's Upshaw Responds*, Wash. Post, Dec. 22, 2002, available at 2002 WLNR 15865309.
- 374 NFLPA, *A New Look at Guaranteed Contracts in the NFL* (circa 2002) (on file with authors) (“Over half of all salary earned by NFL players now is guaranteed”); NFLPA, *Guaranteed Contracts in Professional Team Sports: How Does the NFL Compare?* (circa 2007) (on file with authors) (“at least 52% of all compensation in the NFL is, in fact, ‘guaranteed’ to players.”)
- 375 Mike Florio, *Fully-guaranteed contracts could cause problems for teams, players*, ProFootballTalk (May 29, 2015, 9:55 AM), <http://profootballtalk.nbcsports.com/2015/05/29/fully-guaranteed-contracts-could-cause-problems-for-teams-players/>, archived at <http://perma.cc/GE9E-YSME> (discussing potential problems with guaranteed contracts in the NFL).
- 376 See 2011 CBA Art. 43, § 8 (empowering Non-Injury Grievance arbitrator to issue an “a money award, order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of [the CBA] or any other applicable document, or an advisory opinion pursuant to Article 50, Section 1(c).”); 2011 CBA Art. 50, § 1(d) (Joint Committee obligated to “address and correct” issues identified by investigating neutral physicians).
- 377 See, e.g., 2011 CBA, Art. 14, § 6 (permitting fines of \$500,000 on players, Contract Advisors and Club officials and \$6,500,000 on Clubs found to have violated the Rookie Compensation Pool); 2011 CBA, Art. 18, § 3 (permitting fines of \$375,000 on any person or Club that falsely certifies certain information); 2011 CBA, Art. 21, § 8(d)(i) (requiring fines of \$100,000 for head coaches that have violated offseason workout rules the first time); 2011 CBA, Art. 42, § 1(a) (permitting Clubs to fine players for a variety of items, including being overweight, missing practice and violating curfew); 2011 CBA, Art. 48, § 3 (imposing fine of \$30,000 on any Club that negotiates a player contract with a Contract Advisor not certified by the NFLPA).
- 378 The various fines discussed above are generally the result of findings by either the Commissioner or an arbitrator. Similarly, fines for Article 39 violations could be subject to a finding of violation by the Non-Injury Grievance arbitrator pursuant to Article 43.
- 379 Mike Florio, *NFL, NFLPA unveil new concussion protocol enforcement policy*, ProFootballTalk (July 25, 2016, 5:01 PM), <http://profootballtalk.nbcsports.com/2016/07/25/nfl-nflpa-unveil-new-concussion-protocol-enforcement-policy/>, archived at <https://perma.cc/2U94-JU92>.
- 380 *Id.*
- 381 *Id.*
- 382 *Id.*
- 383 See *Medical Malpractice Statute of Limitations by State*, Rocket Lawyer, <https://www.rocketlawyer.com/article/medical-malpractice-statute-of-limitations-by-state.rl> (last visited Aug. 7, 2015), archived at <https://perma.cc/9VFH-METW> (providing medical malpractice statute of limitations in each state); *Chart: Statutes of Limitations in All 50 States*, NOLO.com, <http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html> (last visited Aug. 7, 2015), archived at <http://perma.cc/MZ62-H475> (providing negligence statute of limitations in each state).
- 384 Throughout the litigation, news articles routinely and erroneously—either explicitly or implicitly—claimed that if the players’ concussion-related claims were dismissed in court, they’d have the ability to pursue their claims in arbitration. See, e.g., Michael Sokolove, *How One Lawyer’s Crusade Could Change Football Forever*, N.Y. Times (Mag.), Nov. 6, 2014, http://www.nytimes.com/2014/11/09/magazine/how-one-lawyers-crusade-could-change-football-forever.html?_r=0, archived at <https://perma.cc/4DJ6-XMQV?type=pdf> (“a ruling for the league would have forced the players into mediation or arbitration and most likely only modest payouts”); Peter Keating, *An Unsettling Deal On Concussions*, ESPN Magazine, Nov. 18, 2014, available at http://espn.go.com/nfl/story/_/id/11899196/pnfl-concussion-settlement-bob-stern-objection-p, archived at <http://perma.cc/ML28-MQW6> (“in August 2012, the NFL moved to dismiss their cases entirely, arguing that the league’s labor deal, not the courts, should resolve injury disputes”).
- 385 NFL Comments and Corrections (June 24, 2016).
- 386 The NFL provided us with a copy of the Player Engagement Resource Guide.
- 387 See Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 Yale L.J. 1826, 1834 (2013).
- 388 See Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 3 (2013).
- 389 Marlene Satter, *Employers Auto Enrolling at Company Match*, BenefitsPro.com (Jan. 21, 2015), <http://www.benefitspro.com/2015/01/21/employers-auto-enrolling-at-company-match>, archived at <http://perma.cc/33VA-X6F6>.
- 390 Josh Alper, *Brandon Browner on Earl Thomas, Richard Sherman: Hit That Shoulder, Hit That Elbow*, ProFootballTalk (Jan. 26, 2015, 3:15 PM), <http://profootballtalk.nbcsports.com/2015/01/26/brandon-browner-on-earl-thomas-richard-sherman-hit-that-shoulder-hit-that-elbow/>, archived at <http://perma.cc/DBL9-65CD>.
- 391 Mike Florio, *Concussions Take on a Strategic Component*, ProFootballTalk (Jan. 23, 2012, 10:09 PM), <http://profootballtalk.nbcsports.com/2012/01/23/concussions-take-on-a-strategic-component/>, archived at <http://perma.cc/9FD8-Q98C>.



Chapter 8

NFL Clubs



The NFL is an unincorporated association of 32 member clubs.⁹⁷ It serves as a centralized body for obligations and undertakings shared by the member clubs. Nevertheless, each member club is a separate and distinct legal entity,⁹⁸ with its own legal obligations separate and distinct from club owners and employees. This chapter focuses on NFL clubs as individual entities, rather than the clubs' employees, many of whom are discussed in other chapters. Additionally, the role of NFL club owners is discussed in Chapter 7: The NFL and NFLPA.

NFL clubs are the players' employers and hire many of the stakeholders discussed in this report. In this respect, NFL clubs play a powerful role in dictating the culture concerning player health.

(A) Background

NFL clubs are important stakeholders in player health. They are powerful organizations that employ many people with direct day-to-day interaction concerning player health issues. Club owners typically hire a general manager who then hires the coaching and football operations staff. The general manager and other executives are also likely involved with the hiring of the medical staff. Like all organizations, there is thus likely to develop a specific culture surrounding important issues, which will vary from club to club. In football, the club's attitude towards player health can have a significant impact.

NFL clubs are the players' employers and hire many of the stakeholders discussed in this report. In this respect, NFL clubs play a powerful role in dictating the culture concerning player health.

(B) Current Legal Obligations^a

The 2011 CBA contains multiple provisions governing clubs' health obligations to its players:^b

1. **Medical Care Generally:** "Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry."¹
2. **Physically Unable to Perform (PUP) List:** Any player who is placed on the PUP List as a result of a football-related injury "will be paid his full Paragraph 5 Salary while on such list."² In practice, this provision differentiates the PUP List from the Non-Football Injury ("NFI") List. A player is placed on the NFI List when he suffers an injury outside of football and clubs are not required to pay players their Paragraph 5 Salary while they are on the NFI List.
3. **Club Physicians:** Clubs must retain a board-certified orthopedic surgeon and at least one physician board-certified in

internal medicine, family medicine, or emergency medicine. All physicians also must have a Certificate of Added Qualification in Sports Medicine.³ In addition, clubs are required to retain consultants in the neurological, cardiovascular, nutritional, and neuropsychological fields.⁴

4. **Physicians at Games:** "All home teams shall retain at least one [Rapid Sequence Intubation] RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies."⁵
5. **Club Athletic Trainers:** "All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer."⁶
6. **Second Medical Opinion:** Clubs are obligated to pay for a player's consultation with a physician for a second medical opinion provided the player first consults with the club physician and the club physician is provided a report of the second physician's examination and diagnosis.⁷
7. **Player's Right to a Surgeon of His Choice:** Players have the right to choose the surgeon who will perform a surgery and the club must pay for the surgery provided the player first consulted with the club physician.⁸
8. **Workers' Compensation:** Clubs are required to provide workers' compensation coverage or comparable benefits to its players.⁹
9. **Injury Protection:** If a player is physically unable to play in the season following a season in which he was injured but remains under contract with the club, clubs are required to pay an amount equal to 50 percent of the player's Paragraph 5 salary in the subsequent season, up to a range of \$1–1.2 million.¹⁰
 - a) Players can also earn "Extended Injury Protection" benefits up to a range of \$500–575,000 for the second season after the season in which the player was injured.¹¹

In addition to their obligations under the CBA, NFL clubs also have statutory obligations to provide health insurance to NFL players. Starting in 2015, the 2010 Patient Protection and Affordable Care Act (ACA) obligates employers who employ an average of at least 50 full-time employees

a The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

b The club obligations discussed herein are separate and apart from those of the NFL as a centralized entity.

on business days to provide some basic level of health insurance to its employees or pay a financial penalty.¹² NFL clubs certainly employ more than 50 people (NFL clubs have 53 players, not including players placed on Injured Reserve, and a host of other employees)¹³ and thus are obligated by the ACA to provide basic health insurance to their players.

Additionally, it is possible that NFL clubs are obligated to take certain measures concerning employee health and safety as a result of the Occupational Safety and Health Act¹⁴ or a similar state or federal regulatory scheme. However, research has not revealed the application of any such scheme to the NFL in practice, and we thus avoid a theoretical analysis here. The application of the Occupational Safety and Health Act is the subject of future work by the Law & Ethics Initiative of The Football Players Health Study.

However, one statutory employee-benefit mechanism with which NFL clubs do have regular interactions is workers' compensation laws. Before we discuss the current ethical codes and current practices of the clubs, we discuss in detail the application of workers' compensation laws to NFL clubs.

1) WORKERS' COMPENSATION

Workers' compensation benefits and statutes have been contentious issues in the NFL.

“Workers' compensation laws provide protections and benefits for employees who are injured in the course of their employment. In the typical case, the workers' compensation regime grants tort immunity to employers in exchange for the regime's protections and benefits to the employee.”¹⁵ Since the first CBA in 1968, NFL clubs have been obligated to make the necessary arrangements to provide workers' compensation benefits to their players. If the state in which the club operates does not have workers' compensation or specifically excludes professional athletes from workers' compensation coverage, the CBAs have required those clubs to “guarantee equivalent benefits to its players.”¹⁶

As a preliminary matter, it is important to point out that workers' compensation laws, systems and benefits vary widely among the states. Below, we try to provide a general description of workers' compensation rights and their relevance to NFL players.

Workers' compensation provides two important benefits to workers: monetary compensation; and, coverage for medical care. We discuss each of these benefits in turn.

Workers' compensation payments typically depend on the employee's level of injury or disability and the extent to which the injury or disability affects the employee's ability to continue working. Generally, workers receive “around one-half to two-thirds of the employee's average weekly wage.”¹⁷ In addition, the amount of benefits is subject to maximums which are usually tied to the state's average weekly wage,¹⁸ and are generally between \$500 and \$1,000.¹⁹ The benefits continue so long as the employee is disabled or unable to work. Additionally, the amount a player receives in workers' compensation reduces the amount the club is obligated to pay the player for certain other CBA-provided benefits.²⁰

Medical care coverage is an important benefit available to players through workers' compensation. If a player is injured during the season, he is entitled to medical care from the club “during the season of injury only[.]”²¹ Consequently, if a player suffers an injury that causes him to have ongoing or recurring healthcare needs (such as surgeries) well beyond the season of injury (and for perhaps the rest of his life), the club will have no obligation to pay for such care. Workers' compensation fills that gap. Workers' compensation statutes generally require the employer (really the employer's insurance carrier) to pay for reasonable and necessary medical expenses that are the result of an injury suffered at the workplace in perpetuity. More importantly, the worker does not have to pay for any part of the care.

Players must be diligent in protecting their rights. Even if a player suffers an injury and believes it has healed well, the player cannot know if the injury will resurface or cause problems later in life. Thus, the player must protect his rights by filing for workers' compensation benefits within the applicable statute of limitations, generally between one and three years. The workers' compensation claim is then adjudicated by a panel or board commissioned by the state. If the player is successful in his claim, he will be entitled to future medical care concerning the injury, even if no further care is needed at the time.

The trade-off for workers' compensation benefits from an employee's perspective is that the laws generally bar any civil lawsuit against the employer or other employees. Workers' compensation statutes provide compensation for workers injured at work (without having to prove the employer was at fault) and thus generally preclude lawsuits based on the co-workers' negligence.²² This preemption applies with regard to the negligence of any co-worker, regardless of hierarchy or reporting structure. So, for example, as is discussed in detail in Chapter 9: Coaches, players generally cannot sue coaches for negligence due to workers' compensation statutes.

The clubs contract with insurance companies to pay for workers' compensation benefits. It is believed that clubs pay approximately \$1.2 to \$1.5 million in workers' compensation insurance premiums each year. Once a player files for workers' compensation benefits, the insurance carrier will be responsible for handling the litigation as well as paying any benefits.

In recent years, California received a flood of NFL player workers' compensation claims because of some unique (but now amended) statutory provisions.

First, California's workers' compensation law extended broadly to cover employees of non-California employers who were injured while in California temporarily on behalf of their employers.²³ Section 3600.5 of California's Labor Code previously dictated that if an employee "who has been hired or is regularly employed in the state receives personal injury by accident arising out of and in the course of such employment outside of this state, he . . . shall be entitled to [workers'] compensation" benefits under California law.²⁴ "The California Workers' Compensation Board has taken a wide view of the phrase 'regularly employed' that has allowed NFL players to be covered under the broad umbrella of workers' compensation rights in the state."²⁵

Second, California permitted employees to recover for "cumulative" injuries. A cumulative injury is an injury that is "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment."²⁶ Recent controversy concerning NFL player injuries has centered on head, neck, and neurological conditions. These types of injuries generally have been diagnosed and recognized as injuries that did not occur as the result of any specific play or incident but instead are the cumulative result of decades of playing football.²⁷ Thus, California's cumulative injury designation appeared to perfectly suit the recent claims by current and former NFL players.

Third, the statute of limitations on an employee's workers' compensation claim in California did not begin to run until the employer formally notified the employee of his or her rights under California's workers' compensation laws.²⁸ "NFL teams, either believing that they had adequately taken care of their players' medical conditions at the time, or hoping to avoid workers' compensation claims, or simply being unaware of the possibility of such claims, historically had not informed their players of their rights under California's regime."²⁹

Likely as a result of California's liberal workers' compensation laws, between 2006 and 2013, 3,400 former NFL players filed for workers' compensation in California alleging head or brain injuries.³⁰ The NFL estimated that the average California workers' compensation claim cost the club \$215,000 to resolve, though it is unclear whether this figure refers to payments to players, or also includes legal fees.³¹ Additionally, more than two-thirds of all California workers' compensation claims made by professional athletes and which cited cumulative trauma were made by players who never played for a California club.³²

The NFL, not surprisingly, pushed for changes to California's workers' compensation scheme. In 1997, the NFL unsuccessfully sponsored legislation that would have limited California's workers' compensation benefits to athletes who lived in the state and would have prevented athletes from collecting benefits for cumulative injuries.³³ The NFL seemingly pursued this legislation despite the fact that the 1993 CBA imposed a moratorium on lobbying related to workers' compensation that was not lifted until June 1, 1999.³⁴

Having failed to change the law, NFL clubs then began to contract around the law by inserting a provision into player contracts that require players to file their workers' compensation claims in the club's home state and under the law of the club's home state.³⁵ The NFL has prevailed in its efforts to enforce these provisions.³⁶

These successes did not stop the NFL from pursuing amendments to California's workers' compensation laws.

In early 2012, only months after the execution of the most recent CBA, the NFL renewed its efforts to have California's workers' compensation statutes amended.³⁷ After extensive lobbying from the NFL and to a lesser extent the NFLPA on the opposite side of the issue,³⁸ on October 8, 2013, California Governor Jerry Brown signed into law amendments to California's workers' compensation statutes that affected all claims filed on or after January 1, 2014.

This legislation amended California's workers' compensation statute in two significant ways.

First, athletes who did not play for California teams can no longer file claims under California's workers' compensation laws if the athlete's employer "has furnished workers' compensation insurance coverage or its equivalent under the laws of a state other than California."³⁹ Since the CBA requires clubs to obtain workers' compensation insurance coverage or its equivalent, the amended legislation effectively precludes out-of-state players from filing for benefits in California.

Second, even players who played for California-based teams must meet certain criteria to file for workers' compensation in California. The player must have: (a) played for a California-based team for at least two seasons or 20% of his or her career; and (b) "worked for fewer than seven seasons for any team or teams other than a California-based team."⁴⁰ This second provision, had it been in place when they played, would have effectively precluded some of California's most high-profile athletes from filing for workers' compensation.^c

The legislation easily passed despite questions as to whether the bill provided any clear benefit to the state. By curtailing potentially thousands of annual workers' compensation claims, the state saves the administrative costs related to adjudicating workers' compensation claims. Nevertheless, some critics argued that the NFL was able to get the bill passed by erroneously suggesting the state in some way was responsible for paying the players' workers' compensation benefits.⁴¹ As the bill's author Assemblyman Henry Perea admitted, clubs – and not the state – pay for the benefits.^{42,d}

Moreover, the NFLPA has argued that in fact the players pay for the benefits.⁴³ The NFL-NFLPA CBA sets a "Player Cost Amount," effectively an upper limit on the total salary and benefits NFL clubs can expend on players. The CBA also permits a Salary Cap, limiting the total amount clubs can spend on players and effectively curtailing player salaries. The Salary Cap is determined by deducting player benefits from the Player Cost Amount.⁴⁴ Thus, the more clubs pay in benefits, the less they pay in salary. Workers' compensation payments (including to former players) and premiums are among the benefits deducted from the Player Cost Amount to set the Salary Cap.⁴⁵ Players, through the CBA, have thus accepted less salary in exchange for increased benefits, including workers' compensation benefits.

c For instance, Wayne Gretzky, widely considered the greatest hockey player of all-time, could not file for worker's compensation under this rule even though he spent 7.5 of years of his 21 year career with the Los Angeles Kings. Terrell Owens, one of the most-accomplished 49ers wide receiver of all-time would also be precluded, having followed his first six years in San Francisco with seven years with other NFL clubs. Lastly, Barry Bonds, arguably one of the greatest baseball players ever (and certainly one of the most controversial), is ineligible for workers' compensation benefits despite having hit 586 home runs for the San Francisco Giants because he also played seven years with the Pittsburgh Pirates.

d Ironically, some have also argued that the changes to California's workers' compensation statutes will increase costs to the state. Modesto Diaz, a California workers' compensation attorney specializing in representing athletes, contended that injured former athletes who are no longer eligible to receive workers' compensation payments from their teams will now have to resort to Social Security disability benefits, Medicaid, and other forms of government aid, Ken Bensinger & Marc Lifsher, *California Limits Workers' Comp Sports Injury Claims*, L.A. Times, Oct. 3, 2013, <http://articles.latimes.com/2013/oct/08/business/la-fi-workers-comp-nfl-20131009>, archived at <http://perma.cc/2JTS-83KK>, effectively shifting player health costs from the clubs to the state.

Workers' compensation statutes generally require the employer (really the employer's insurance carrier) to pay for reasonable and necessary medical expenses that are the result of an injury suffered at the workplace in perpetuity.

The NFL's workers' compensation issues did not end with California. In May 2014, Louisiana legislators introduced a bill, with the support of the New Orleans Saints, to address the method for calculating a player's workers' compensation benefits.⁴⁶ Workers' compensation benefits are determined based on the workers' salary. Louisiana Administrative Law Judges adjudicating workers' compensation claims had generally determined that an athlete's benefits should be determined by the athlete's salary at the time the athlete was injured.⁴⁷ The athletes argued that their benefits should instead be determined by considering their entire compensation for the year in which they are injured.⁴⁸

The difference in calculation methods used by the state of Louisiana is quite large. NFL player salaries are paid out during the 17-week regular season; they earn considerably less during minicamps and training camps. In 2015, all veterans—regardless of skill and regular season salary—received only \$1,800 per week during training camp,⁴⁹ whereas the minimum weekly salary for a four-year veteran during the regular season was \$43,823.53.⁵⁰ Thus, it is clear a player injured during training camp rather than the regular season will receive significantly less workers' compensation benefits.^e

The NFLPA and its players mobilized against the 2014 bill, led by Saints' star quarterback Drew Brees.⁵¹ After a few weeks of debate, the Louisiana proposed bill was tabled for further discussion among the parties on the best way to calculate the benefits.⁵²

e In reviewing this Report, the NFL explained that "[a]t least some states pay workers' comp benefits based on the contract salary, regardless of when the player gets hurt." NFL Comments and Corrections (June 24, 2016).

Other states' workers' compensation laws have athlete-specific language. For example, Pennsylvania's workers' compensation statute reduces the athlete's workers' compensation benefits by any amounts received by the athlete from the club during the time the athlete was injured, including salary, club-funded insurance, and any other benefit paid as a result of the CBA.⁵³ These types of statutes coupled with benefit maximums effectively prevent many athletes from receiving any workers' compensation benefits. Moreover, according to the NFLPA, every year NFL clubs sponsor state level legislation that seeks to curtail players' workers' compensation benefits in some way.

To assist NFL players with workers' compensation claims, the NFLPA makes available to players and their contract advisors a document describing the benefits claim process, benefits amount and statutes of limitations. Additionally, the NFLPA has recommended workers' compensation attorneys in each city in which an NFL club plays (collectively, the "Panel"). The Panel consists of approximately 60 attorneys. Because players play in many states, they are often eligible for workers' compensation benefits in many states. The advantage of the Panel is coordination and communication (with the NFLPA's assistance) that permits a player to determine which state will provide the player with the best benefits. Finally, contract advisors are prohibited from referring a player to a workers' compensation attorney who is not a member of the Panel.⁵⁴

(C) Current Ethical Codes

Research has not revealed any ethical code that governs NFL clubs as such.

(D) Current Practices

The best way to understand NFL clubs' current practices concerning player health is to examine the current practices of the relevant NFL club employees or contractors: see Chapter 2: Club Doctors; Chapter 3: Athletic Trainers; Chapter 9: Coaches; Chapter 10: Club Employees; and Chapter 11: Equipment Managers. These employees carry out the day to day tasks of the club, interact with the players, and dictate the club's culture accordingly.

(E) Enforcement of Legal and Ethical Obligations^f

The 2011 CBA provides a few options for players dissatisfied with the medical care provided by an NFL club. Nevertheless, these options, discussed below, provide questionable remedies to the players for a club's health-related obligations.

First, a player could submit a complaint to the Accountability and Care Committee (ACC), which consists of the NFL Commissioner (or his designee), the NFLPA Executive Director (or his designee), and six additional members "experienced in fields relevant to health care for professional athletes," three appointed by the Commissioner and three by the NFLPA Executive Director.⁵⁵ "[T]he complaint shall be referred to the League and the player's Club, which together shall determine an appropriate response or corrective action if found to be reasonable. The Committee shall be informed of any response or corrective action."⁵⁶ There is thus no neutral third-party adjudicatory process for addressing the player's claim or compensating the player for any wrong suffered. The remedial process is left entirely in the hands of the NFL and the club, both of which may face a significant conflict of interest and have reasons not to find that a club's medical staff acted inappropriately and to compensate the injured player accordingly.

Second, a player could commence a Non-Injury Grievance.⁸ The 2011 CBA directs certain disputes to designated arbitration mechanisms⁵⁷ and directs the remainder of any disputes involving the CBA, a player contract, NFL rules or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.⁵⁸ Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."⁵⁹ Many of the clubs' above-described legal obligations could be the subject of a Non-Injury Grievance. However, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based."⁶⁰ Additionally, it is possible

^f Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

^g The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, see 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

that under the 2011 CBA, the NFL could argue that complaints concerning medical care are designated elsewhere in the CBA and thus should not be heard by the Non-Injury Grievance arbitrator.⁶¹

In the 2011 CBA, the parties added Article 39: Players' Rights to Medical Care and Treatment (Appendix F), supplementing and amending some provisions from prior CBAs. Article 39 reaffirms some of the clubs' obligations concerning player health and the rights of players concerning their health that were expressed in past CBAs. Article 39 also added and clarified several substantive provisions.^h Nevertheless, since the execution of the 2011 CBA, there have been no Non-Injury Grievances concerning Article 39 decided on the merits,⁶² suggesting either clubs are in compliance with Article 39 or the Article has not been sufficiently enforced.

Although no Article 39 Non-Injury Grievances have been adjudicated on the merits, there was a significant grievance concerning Article 39 between the New England Patriots and former Patriots' defensive lineman Jonathan Fanene. In that matter, the NFLPA alleged that Patriots club doctor Tom Gill violated Article 39, § 1(c)'s requirement that Gill's primary duty in providing player medical care shall be to the player and that he comply with all medical ethics rules concerning his treatment of Fanene.⁶³ Prior to the 2012 season, the Patriots and Fanene agreed to a three-year

contract worth close to \$12 million, including a \$3.85 million signing bonus.⁶⁴ As part of a pre-employment questionnaire, Fanene, according to the Patriots, stated that he took no medications regularly even though he had been taking significant amounts of painkillers to mask chronic pain in his knee.⁶⁵ The Patriots terminated Fanene's contract during training camp, citing Fanene's alleged failure to disclose his medical condition,⁶⁶ and initiated a System Arbitrationⁱ to recoup \$2.5 million in signing bonus money already paid to Fanene (discussed further in Chapter 1: Players).⁶⁷ Specifically, the Patriots alleged Fanene violated his obligations to negotiate the contract in good faith.⁶⁸

The NFLPA alleged that during the 2012 training camp, Gill told Patriots owner Robert Kraft and club President Jonathan Kraft that he was "trying to put together a case" against Fanene so that the club could seek the return of the signing bonus paid. The NFLPA further alleged that, at the direction of Patriots head coach Bill Belichick, Gill intentionally delayed and ultimately refused performing surgery on Fanene so the Patriots could convince him to retire. Moreover, the NFLPA alleged that Gill fabricated and/or back-dated notes to help the Patriots' grievance against Fanene. All of these actions, according to the NFLPA, violated Article 39, § 1(c).

^h For a description of these health-related changes, see Appendix B.

ⁱ A System Arbitration is a legal process for the resolution of disputes between the NFL and the NFLPA and/or a player concerning a subset of CBA provisions that are central to the NFL's operations and which invoke antitrust and labor law concerns, including but not limited to the NFL player contract, NFL Draft, rookie compensation, free agency, and the Salary Cap. 2011 CBA, Art. 15, § 1.

There have been no Non-Injury Grievances concerning Article 39 decided on the merits, suggesting either clubs are in compliance with Article 39 or the Article has not been sufficiently enforced.



Gill generally denied the allegations and insisted that his comments were taken out of context.⁶⁹ The dueling grievances were settled in September 2013 when the Patriots let Fanene keep \$2.5 million in signing bonus money already paid but did not have to pay the \$1.35 million still owed.⁷⁰ The settlement thus prevented any precedential legal authority.^j

Prior to the 2011 CBA, there were some arbitrations against clubs concerning medical care but all of the cases revealed by our research were denied as untimely.⁷¹ In addition, each of these cases discuss that the CBA's statutes of limitations have been and are to be construed strictly by the arbitrators.

The third option for a player seeking to enforce a club's health-related obligations is to request the NFLPA to commence an investigation before the Joint Committee on Player Safety and Welfare ("Joint Committee"). The Joint Committee consists of three representatives chosen by the NFL and three chosen by the NFLPA.⁷² "The NFLPA shall have the right to commence an investigation before the Joint Committee if the NFLPA believes that the medical care of a team is not adequately taking care of player safety. Within 60 days of the initiation of an investigation, two or more neutral physicians will be selected to investigate and report to the Joint Committee on the situation. The neutral physicians shall issue a written report within 60 days of their selection, and their recommendations as to what steps shall be taken to address and correct any issues shall be acted upon by the Joint Committee."⁷³ While a complaint to the Joint Committee results in a neutral review process, the scope of that review process' authority is vague. The Joint Committee is obligated to act upon the recommendations of the neutral physicians, but it is unclear what it means for the Joint Committee to act and there is nothing obligating the NFL or any club to abide by the neutral physicians' or Joint Committee's recommendations. Moreover, there is no indication that the neutral physicians or Joint Committee could award damages to an injured player.⁷⁴

In 2012, the NFLPA commenced the first and only Joint Committee investigation.⁷⁵ The nature and results of that investigation are confidential per an agreement between the NFL and NFLPA.⁷⁶

Lawsuits against clubs are another possible avenue of relief, but prove difficult to pursue. The CBA presents the biggest obstacle against any such claim. This is because the Labor Management Relations Act (LMRA)⁷⁷ bars or "preempts" state common law^k claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA."⁷⁸ In order to assess a club's duty to an NFL player—an essential element of a negligence claim—the court would likely have to refer to and analyze the terms of the CBA, resulting in the claim's preemption.⁷⁹ In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the club), rather than through litigation.

In cases where the club doctor is an employee of the club—as opposed to an independent contractor—a player's lawsuit against the club is likely to be barred by the relevant state's workers' compensation statute. As discussed earlier, workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits based on the co-workers' negligence.⁸⁰ This has been the result in multiple cases brought by NFL players against clubs and club doctors.⁸¹

Several players have sued their clubs concerning medical issues, with mixed results. In recent years, courts generally have determined that players' claims for negligent or otherwise improper medical care are preempted.⁸² However, some cases concerning medical issues survive preemption. For example, between 2005 and 2008, six Cleveland Browns players became infected with staphylococcus ("staph"), raising concerns about the cleanliness of the Browns' facilities.⁸³ Among the infected, wide receiver Joe Jurevicius and center LeCharles Bentley filed lawsuits against the Browns.

j Gill was removed as the Patriots' Club doctor in April 2014. Liz Kowalczyk, *Troubles In Their Field*, Bos. Globe, Apr. 12, 2014, available at 2014 WLNR 9885884. The Patriots stated the change was because Gill was no longer chief of sports medicine at Massachusetts General Hospital and that the Club's doctor had "always" been the chief of sports medicine at the Hospital. *Id.* The Patriots made the change even though some reports indicated he was well-liked and trusted by the players. Bob Hohler, *Gill Denies He Sided With Team Over Player*, Bos. Globe, Dec. 13, 2014, available at 2014 WLNR 35249641.

k Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

In 2009, Jurevicius sued the Browns and Browns' doctors in Ohio state court, alleging causes of action for negligence, negligent misrepresentation, fraud, constructive fraud, breach of fiduciary duty, common law intentional tort, and statutory intentional tort against the Browns.⁸⁴ Jurevicius generally alleged that the Browns failed to take proper precautions to prevent staph infections and lied to players about what steps the Club had taken to prevent infections.⁸⁵ The Browns attempted to remove the case to federal court (and then argued that it was preempted), arguing that Jurevicius' claims were barred by the CBA.⁸⁶ In a March 31, 2010 decision, the United States District Court for the Northern District of Ohio determined that Jurevicius' negligence, negligent misrepresentation, fraud, common law intentional tort and statutory intentional tort claims were not preempted, while the constructive fraud and breach of fiduciary duty claims were. The Court generally found that the CBA did not address a club's obligations concerning facilities and thus did not need to be interpreted to resolve Jurevicius' claims.⁸⁷ The lawsuit was settled a few months after the Court's decision.⁸⁸

In 2010, Bentley sued the Browns, alleging facts and claims similar to Jurevicius'.⁸⁹ Likely because the Browns had already lost the argument that claims arising out of these facts were preempted, the Browns did not attempt to remove the case to federal court and have it dismissed on the preemption ground. Instead, the Browns filed a motion to compel Bentley's claims to the arbitration procedures outlined in the CBA.⁹⁰ In July 2011, relying on the *Jurevicius* decision, the Court of Appeals of Ohio affirmed the denial of the Browns' motion.⁹¹ Bentley and the Browns settled the case a month later.⁹²

In a very similar case, in 2015 kicker Lawrence Tynes sued the Tampa Bay Buccaneers after he contracted methicillin-resistant *Staphylococcus aureus* (MRSA) from the club's training facility. Relying in part on *Jurevicius*, the United States District Court for the Middle District of Florida ruled that Tynes' claims were not preempted.⁹³ The court found that Tynes' claims had "nothing to do with medical treatment" and that "there is nothing in the CBA regarding the condition of facilities."⁹⁴ The case was remanded to Florida state court and is ongoing as of the date of publication.

One additional case bears mentioning. In *Chuy v. Philadelphia Eagles Football Club*,⁹⁵ former Eagles lineman Don Chuy successfully recovered against the Eagles for intentional infliction of emotional distress after the Eagles' Club doctor told a reporter that Chuy suffered from a fatal disease after the 1969 season. In a 1979 opinion, the United States Court of Appeals for the Ninth Circuit affirmed the jury verdict in Chuy's favor, finding that the allegations, if true as the jury found, "constituted intolerable professional conduct."⁹⁶ Considering the age of the case, its relevance today is unclear, particularly because it is questionable whether such a claim would survive preemption.

While players do have options for seeking redress against clubs concerning player health (probably arbitration more so than litigation), practical considerations often prevent players from pursuing these options. Players are constantly concerned about losing their job or status with the club. Filing a Non-Injury Grievance against a club is a surefire way to anger the club and jeopardize the player's career.¹ Thus, players often forego pursuing viable claims.

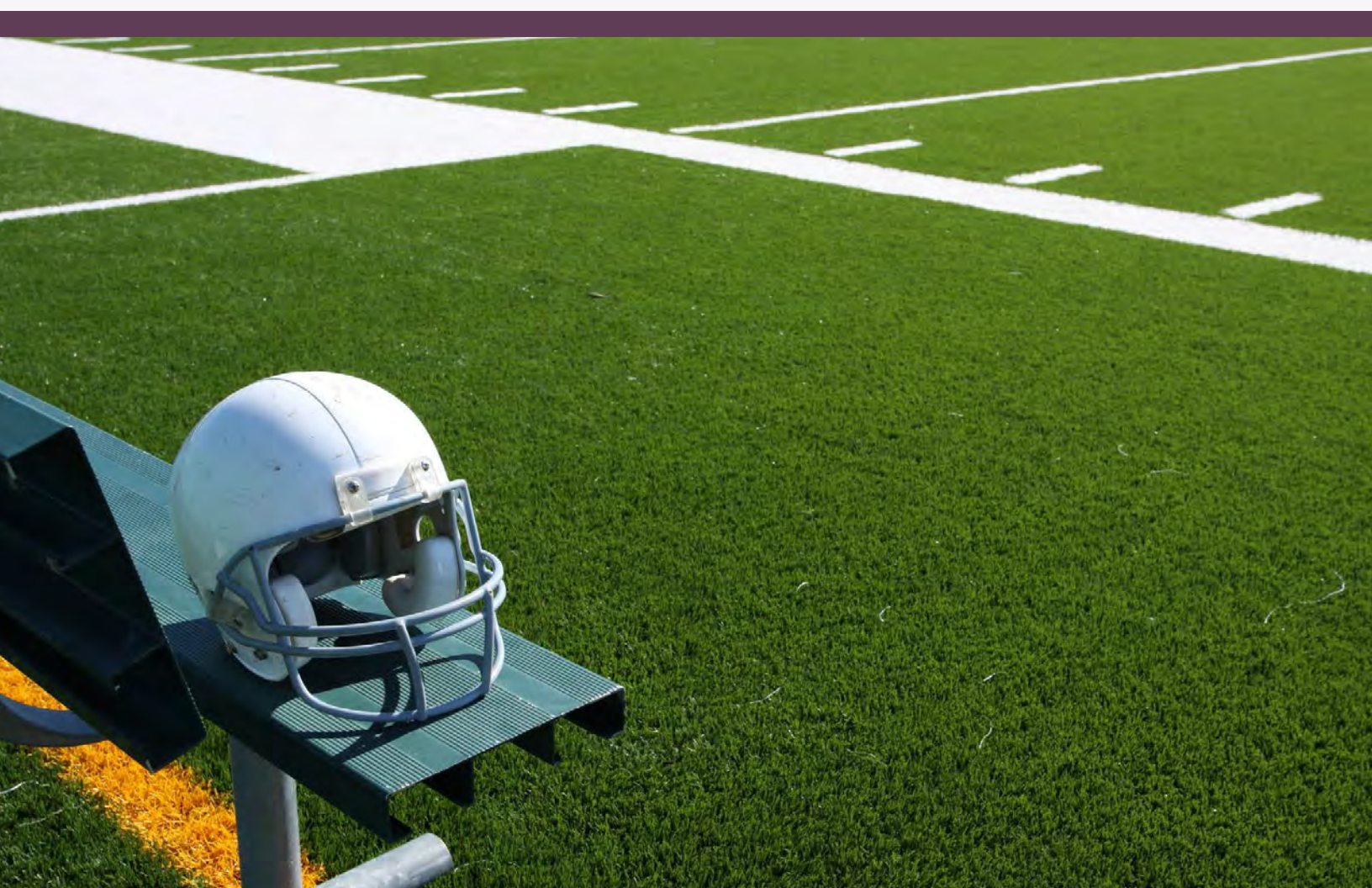
¹ Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]"

(F) Recommendations Concerning NFL Clubs

NFL clubs collectively comprise the NFL. Thus, any recommendations concerning NFL clubs would ultimately be within the scope of recommendations made concerning the NFL. Moreover, NFL clubs act only through their employees or independent contractors, including coaches, other employees, and the medical staff. Thus, any recommendation we make for the improvement of clubs would be carried out through recommendations we make concerning club employees. For these reasons, we make no separate recommendations here and instead refer to the recommendations in the chapters concerning those stakeholders for recommendations concerning NFL clubs. Nevertheless, we do stress that it is important that club owners, as the leaders of each NFL club and its employees, take seriously and personally participate in player health issues, including overseeing the response to recommendations made in this Report.

Additionally, there is one recommendation contained in another chapter that is also directly relevant to NFL clubs:

- Chapter 1: Players— Recommendation 1:1-G: Players should not sign any document presented to them by the NFL, an NFL club, or employee of an NFL club without discussing the document with their contract advisor, the NFLPA, their financial advisor, and/or other counsel, as appropriate.



Endnotes

- 1 American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).
- 2 See Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (listing each of the 32 different entities as defendants in lawsuit).
- 3 CBA, Art. 39, § 3(e).
- 4 CBA, Art. 20, § 2. It is most likely the General Manager or person with control over personnel decisions who makes the decision whether to place a player on the PUP List.
- 5 The American Board of Family Medicine issues Certificates of Added Qualifications in several areas, including Sports Medicine. See *Certificates of Added Qualifications (CAQs)*, Am. Bd. Family Med., <https://www.theabfm.org/caq/index.aspx> (last visited Aug. 7, 2015), archived at <https://perma.cc/R6JS-D2Z5>.
- 6 CBA, Art. 39, § 1. It is the American Board of Family Medicine which issues Certificates of Added Qualification in Sports Medicine. See *Sports Medicine*, Am. Bd. Family Med., <https://www.theabfm.org/caq/sports.aspx> (last visited Aug. 7, 2015), archived at <https://perma.cc/R6JS-D2Z5>.
- 7 CBA, Art. 39, § 1(e).
- 8 CBA, Art. 39, § 2.
- 9 CBA, Art. 39, § 4.
- 10 CBA, Art. 39, § 5.
- 11 CBA, Art. 41, § 1.
- 12 CBA, Art. 45.
- 13 CBA, Art. 45, § 4.
- 14 See 26 U.S.C. § 4980H.
- 15 CBA, Art. 25, § 4.
- 16 See 29 U.S.C. § 651, et seq.
- 17 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 109 (2012).
- 18 See, e.g., 2011 CBA, Art. 41, § 1.
- 19 Lex Larson, *Workers' Compensation Law*, § 1.01 (Matthew Bender 2014).
- 20 Lex Larson, *Workers' Compensation Law*, § 1.03 (Matthew Bender 2014).
- 21 Howard Berkes, *Injured Workers Suffer As 'Reforms' Limit Workers' Compensation Benefits*, Nat'l Pub. Radio (Mar. 4, 2015), <http://www.npr.org/2015/03/04/390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits>, archived at <http://perma.cc/X5WN-5TRG> (discussing states' reductions in maximum workers' compensation benefits).
- 22 See 2011 CBA, Art. 41, § 4.
- 23 CBA, App. A, ¶ 9.
- 24 See Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. 211 (2005) (discussing generally medical malpractice in the sports context and the preclusion of claims by workers' compensation statutes); John Redlingshafer, *Tonight's Matchup – Workers' Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Received When a Team Doctor Allegedly Aids in Ending Their Careers?*, 2 DePaul J. Sports L. & Contemp. Probs. 100 (2004) (same).
- 25 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 111 (2012).
- 26 *Id.*
- 27 *Id.*, citing *Injured Workers' Ins. Fund of Md. v. Workers' Comp. Appeals Bd.*, 29 Cal. Workers' Comp. Rep. 182 (2001); *Carroll v. New Orleans Saints*, No. ADJ2295331 (ANA0397551) (Workers' Comp. Appeals Bd. Jan. 24, 2011).
- 28 Cal. Labor Code § 3208.1.
- 29 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 110 (2012).
- 30 *Id.* at *110, n. 18, citing Cal. Labor Code § 3550 (2012) (requiring employers to post in a conspicuous place the name of their insurance carrier and the entity responsible for workers compensation claims); see, e.g., *Kaiser Found. Hosp. v. Workers' Comp. Appeals Bd.*, 702 P.2d 197, 201 (1985) (“[W]hen an employer fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system.”).
- 31 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 110–111 (2012).
- 32 Ken Bensinger & Marc Lifsher, *California Limits Workers' Comp Sports Injury Claims*, L.A. Times, Oct. 3, 2013, <http://articles.latimes.com/2013/oct/08/business/la-fi-workers-comp-nfl-20131009>, archived at <http://perma.cc/2JTS-83KK>.
- 33 Armand Emamdjomeh & Ken Bensinger, *NFL Workers' Comp Victory Comes at a Price*, L.A. Times, Feb. 1, 2014, <http://www.latimes.com/business/la-fi-nfl-claims-20140201-dto-htmistory.html>, archived at <http://perma.cc/JNF5-42RR>.
- 34 Bensinger, *supra* note 32.
- 35 *Id.*, citing *NFL Tackles Benefits*, L.A. Times, Apr. 11, 1997, http://articles.latimes.com/1997-04-11/business/fi-47559_1_compensation-benefits, archived at <http://perma.cc/EB2S-B54W>.
- 36 CBA, Art. LIV.
- 37 Bensinger, *supra* note 32.
- 38 See *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012); *Chicago Bears Football Club, Inc. v. Haynes*, 816 F. Supp. 2d 534 (N.D. Ill. 2011); *New Orleans Saints, LLC v. Cleveland*, No. 2:11-cv-02093 (E.D. La. Aug. 24, 2011) (Beck, Arb.); *Kansas City Chiefs Football Club, Inc. v. Allen*, No. 4:12-cv-00238 (W.D. Mo. Feb. 24, 2012) (Beck, Arb.), and *Atlanta Falcons Football Club LLC v. Nat'l Football League Players Ass'n*, No. 1:12-cv-00753 (N.D. Ga. Feb. 23, 2012) (Beck, Arb.).
- 39 See Michael Hiltzik, *California Gives a Huge Payoff to the NFL*, L.A. Times, Oct. 8, 2013, <http://articles.latimes.com/2013/oct/08/business/la-fi-mh-nfl-20131008>, archived at <http://perma.cc/6V33-FCPB> (discussing, among other things, timeline of amendments to California's workers' compensation laws).
- 40 The NFLPA issued a memorandum to agents and players about the issue. See Mike Florio, *California Overreacts to NFL Workers' Compensation Loophole*, ProFootballTalk (May 3, 2013, 10:11 AM), <http://profootballtalk.nbcsports.com/2013/05/03/california-overreacts-to-nfl-workers-compensation-loophole>, archived at <http://perma.cc/TJZ3-X2LC>. Also, star quarterbacks Tom Brady of the New England Patriots and Drew Brees of the New Orleans Saints wrote an editorial in the San Francisco Chronicle decrying the proposed legislation. Tom Brady & Drew Brees, *Injured Pro Athletes Deserve Workers' Comp*, S.F. Chronicle, June 23, 2013, <http://www.sfchronicle.com/opinion/openforum/article/injured-pro-athletes-deserve-workers-comp-4617644.php?t=7ce9302705cefdcb88>, archived at <http://perma.cc/R97F-J2TC>.
- 41 Cal. Labor Code § 3600.5(c).
- 42 Cal. Labor Code § 3600.5(d).

- 43 See Hiltzik *supra* note 39; Florio *supra* note 40.
- 44 Brady *supra* note 40.
- 45 Florio *supra* note 40.
- 46 CBA, Art. 12, § 6(c)(v).
- 47 See 2011 CBA, Art. 12, § 2(a)(iv) (listing workers' compensation benefits among "Benefits" to be deducted).
- 48 Michael David Smith, *Brees, NFLPA Speak Against Saints-supported Workers' Comp Bill*, ProFootballTalk (May 16, 2014, 7:17 PM), <http://profootballtalk.nbcsports.com/2014/05/16/drew-brees-nflpa-speak-against-saints-supported-workers-comp-bill/>, archived at <http://perma.cc/G57L-Z784>; Mike Florio, *Louisiana Workers' Compensation Fight Could Be Easily Solved*, ProFootballTalk (May 17, 2014, 12:44 PM), <http://profootballtalk.nbcsports.com/2014/05/17/louisiana-workers-compensation-fight-could-be-easily-solved/>, archived at <http://perma.cc/2BGU-Z9PP>.
- 49 Florio *supra* note 48.
- 50 *Id.*
- 51 CBA, Art. 23, § 4.
- 52 See 2011 CBA, Art. 26, § 1 (listing a four-year veteran's minimum salary for the 2015 season as \$745,000). \$745,000 divided by 17 weeks equals \$43,823.53.
- 53 *House Bill 1069 is Wrong for Louisiana*, NFL Players Ass'n (May 13, 2014), <https://www.nflpa.com/news/all-news/house-bill-1069-is-wrong-for-louisiana>, archived at <https://perma.cc/5JM3-EB8Q>.
- 54 Mike Florio, *Sponsor Pulls Controversial Louisiana Workers' Compensation Bill*, ProFootballTalk (May 27, 2014, 4:36 PM), <http://profootballtalk.nbcsports.com/2014/05/27/sponsor-pulls-controversial-louisiana-workers-compensation-bill/>, archived at <http://perma.cc/E7DT-BGE9>.
- 55 P.S. § 565.
- 56 NFLPA Regulations, § 3(B)(28).
- 57 CBA, Art. 39, § 3(a).
- 58 CBA, Art. 39, § 3(d).
- 59 For example, Injury Grievances, which occur when, at the time a player's contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.
- 60 See 2011 CBA, Art. 43, § 1.
- 61 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").
- 62 CBA, Art. 43, § 2.
- 63 The Non-Injury Grievance arbitrator has the authority to determine whether a complaint against a doctor fit within his or her jurisdiction under Article 43. See 2011 CBA, Art. 43, § 1 (discussing scope of Non-Injury Grievance arbitrator's jurisdiction).
- 64 This information was provided by the NFLPA.
- 65 Letter from Thomas J. DePaso, NFLPA General Counsel, to W. Buckley Briggs, Vice President of Labor Arbitration and Litigation, NFL Management Council re: NFLPA v. New England Patriots (June 19, 2013).
- 66 Mike Reiss and Mike Rodak, *Source: Fanene agrees to terms*, ESPNBoston.com (Mar. 14, 2012, 3:45 PM), http://espn.go.com/blog/boston/new-england-patriots/post/_/id/4719093/reports-fanene-agrees-to-terms, archived at <http://perma.cc/J777-DFFB>.
- 67 Opinion, Nat'l Football League v. Nat'l Football League Players' Ass'n In re: Jonathan Fanene, 2–3 (CBA Appeals Panel, Feb. 25, 2013).
- 68 Josh Alper, Report: Pats Cut Fanene with Failure to Disclose Physical Condition Designation, ProFootballTalk (Aug. 22, 2012, 8:47 AM), <http://profootballtalk.nbcsports.com/2012/08/22/report-pats-cut-fanene-with-failure-to-disclose-physical-condition-designation/>, archived at <http://perma.cc/G727-E7AV>.
- 69 Opinion, Nat'l Football League v. Nat'l Football League Players' Ass'n In re: Jonathan Fanene, *supra* note 67.
- 70 See 2011 CBA, Art. 4, § 8 ("any Club, any player and any player agent or contract advisor engaged in negotiations for a Player Contract . . . is under an obligation to negotiate in good faith.")
- 71 Bob Hohler, *Gill Denies He Sided With Team Over Player*, Bos. Globe, Dec. 13, 2014, available at 2014 WLNR 35249641.
- 72 Mike Reiss, *Quick-hit Thoughts Around NFL, Patriots*, ESPNBoston.com (Sept. 21, 2013, 11:15 PM), http://espn.go.com/blog/boston/new-england-patriots/post/_/id/4749358/quick-hit-thoughts-around-nfl-new-england-patriots, archived at <http://perma.cc/FR5E-SY2B>.
- 73 In *Bunch v. New York Giants*, former New York Giants fullback Jarrod Bunch commenced a Non-Injury Grievance against his former Club alleging that the Giants violated the CBA by failing to advise Bunch that he had sustained a torn MCL during a 1993 training camp scrimmage. The arbitrator dismissed Bunch's claim as outside the 45-day statute of limitations. (Creo, Arb. Dec. 10, 1997), available as Exhibit 19 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.
- In *Jeffers v. Carolina Panthers*, former Carolina Panthers wide receiver Patrick Jeffers brought suit against the Panthers and Panthers' doctor Donald D'Alessandro in North Carolina state court for medical malpractice alleging that D'Alessandro performed "high-risk surgical procedures upon Jeffers' knees without Jeffers' knowledge or consent." The North Carolina Superior Court denied the Panthers' motion to dismiss but granted the Club's motion to compel the action to arbitration. Jeffers thereafter filed a Non-Injury Grievance pursuant to the CBA. Before a hearing on the merits, the parties submitted two issues to the arbitrator: (1) whether Jeffers' claims against the Panthers were subject to arbitration; and, (2) whether Jeffers' claims were barred by the CBA's statute of limitations. The arbitrator found that Jeffers' claims against the Club were required to be brought under the CBA because the claims would require "consideration of the express and implied terms of the CBA." The arbitrator then dismissed Jeffers' claims as time-barred by the CBA's 45-day statute of limitations. (Das, Arb. Mar. 25, 2008), available as Exhibit 15 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.
- In *Wilson v. Denver Broncos*, former Denver Broncos linebacker Al Wilson commenced a Non-Injury Grievance against his former Club alleging that the Broncos violated Art. XLIV, § 1 of the 2006 CBA (discussed above in *Bunch*) by failing to advise Wilson of the adverse effects of a neck injury sustained during the 2006 season. Wilson sought his 2007 salary after having been terminated prior to the 2007 season. The arbitrator dismissed Wilson's claim as outside the 45-day statute of limitations. (Townley, Arb. Oct. 29, 2008), available as Exhibit 16 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.
- See also *Stevenson v. Houston Texans* (Das, Arb. Feb. 4, 2013) (player's Non-Injury Grievance that Club violated CBA by conducting contact drills in minicamp resulting in player's injury barred by CBA's 45-day statute of limitations), available as Exhibit 18 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.
- 74 CBA, Art. 50, § 1(a).
- 75 CBA, Art. 50, § 1(d).

- 76 In *Stringer v. Nat'l Football League*, the Court also expressed concerns about the effectiveness of the Joint Committee: "While the NFL is required to give "serious and thorough consideration" to recommendations of the Joint Committee, the CBA imposes no independent duty on the NFL to consider health risks arising from adverse playing conditions, or to make recommendations for rules, regulations or guidelines for the clubs to follow." 474 F. Supp. 2d 894, 896 (S.D. Ohio 2007).
- 77 This information was provided by the NFLPA.
- 78 *Id.*
- 79 U.S.C. § 185.
- 80 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 81 *See, e.g., Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).
- 82 *See* Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. 211 (2005) (discussing generally medical malpractice in the sports context and the preclusion of claims by workers' compensation statutes); John Redlingshafer, *Tonight's Matchup – Workers' Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Received When a Team Doctor Allegedly Aids in Ending Their Careers?*, 2 DePaul J. Sports L. & Contemp. Probs. 100 (2004) (same).
- 83 *See* *Lotysz v. Montgomery*, 309 A.D.2d 628 (N.Y. App. Div. 2003) (NFL player's medical malpractice claim against club doctor barred by state workers' compensation statute); *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. Ct. App. 1998) (same); *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991) (same); *Rivers v. New York Jets*, 460 F.Supp. 1233 (E.D. Mo. 1978) (player's claim that club wrongfully concealed the true nature of player's condition barred by workers' compensation statute); *Brinkman v. Buffalo Bills Football Club Division of Highwood Service, Inc.*, 433 F.Supp. 699 (W.D.N.Y. 1977) (player's claim that Club failed to provide adequate medical care barred by workers' compensation law). *See also* *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor); *Martin v. Casagrande*, 559 N.Y.S.2d 68 (N.Y. App. Div. 1990) (NHL player's claim that Club doctor and general manager conspired to withhold information about player's medical condition barred by workers' compensation statute); *Bayless v. Philadelphia National League Club*, 472 F.Supp. 625 (E.D. Pa. 1979) (former MLB player's claim that Club negligently administered pain-killing drugs barred by workers' compensation statute).
- 84 *See, e.g., Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010); *Jeffers v. D'Alessandro*, 681 S.E.2d 405 (N.C. Ct. App. 2009); *Sherwin v. Indianapolis Colts, Inc.*, 752 F.Supp. 1172 (N.D.N.Y. 1990); *see also* *Brocaill v. Detroit Tigers, Inc.*, 268 S.W.3d 90 (Tex. App. 2008) (MLB player's claim that Club failed to provide a proper second opinion preempted). Older cases do not even incorporate a preemption analysis, as the CBA then-controlling was likely less substantive in player health and welfare provisions. *See, e.g., Krueger v. S.F. Forty Niners*, 234 Cal.Rptr. 579 (Cal.App. 1987) (ordering judgment in favor of player who played from 1958–73 and who alleged 49ers fraudulently concealed medical information).
- 85 *Jurevicius Becomes Sixth Browns Player in 4 Years to Contract Staph Infection*, ESPN (Apr. 11, 2008, 6:06 PM), <http://sports.espn.go.com/nfl/news/story?id=3341171>, archived at <http://perma.cc/5Q7K-6ZWK>.
- 86 *See* *Jurevicius v. Cleveland Browns Football Co. LLC*, 09-cv-1803, 2010 WL 8461220 (N.D. Ohio Mar. 31, 2010).
- 87 *Id.*
- 88 *Id.*
- 89 *Id.*
- 90 *Jurevicius Settles Lawsuit with the Browns*, ESPN (June 15, 2010, 6:37 PM), <http://sports.espn.go.com/nfl/news/story?id=5289486>, archived at <http://perma.cc/5FYK-KB94>.
- 91 *See* *Bentley v. Cleveland Browns Football Co.*, 958 N.E.2d 585 (Ohio Ct. App. 2011).
- 92 *Id.*
- 93 *Id.*
- 94 *Browns, LeCharles Bentley Settle*, ESPN (Aug 15, 2012, 8:50 PM), http://espn.go.com/nfl/story/_id/8272933/cleveland-browns-settle-former-lineman-lecharles-bentley-2010-staff-infection-lawsuit, archived at <http://perma.cc/D87L-LZGY>.
- 95 *Tynes v. Buccaneers Limited Partnership*, 15-cv-1594, 2015 WL 5680135 (M.D. Fl. Sep. 24, 2015).
- 96 *Id.* at *5–6.
- 97 F.2d 1265 (3d Cir. 1979).
- 98 *Id.* at 1274.





Part 4: **NFL Club Employees**



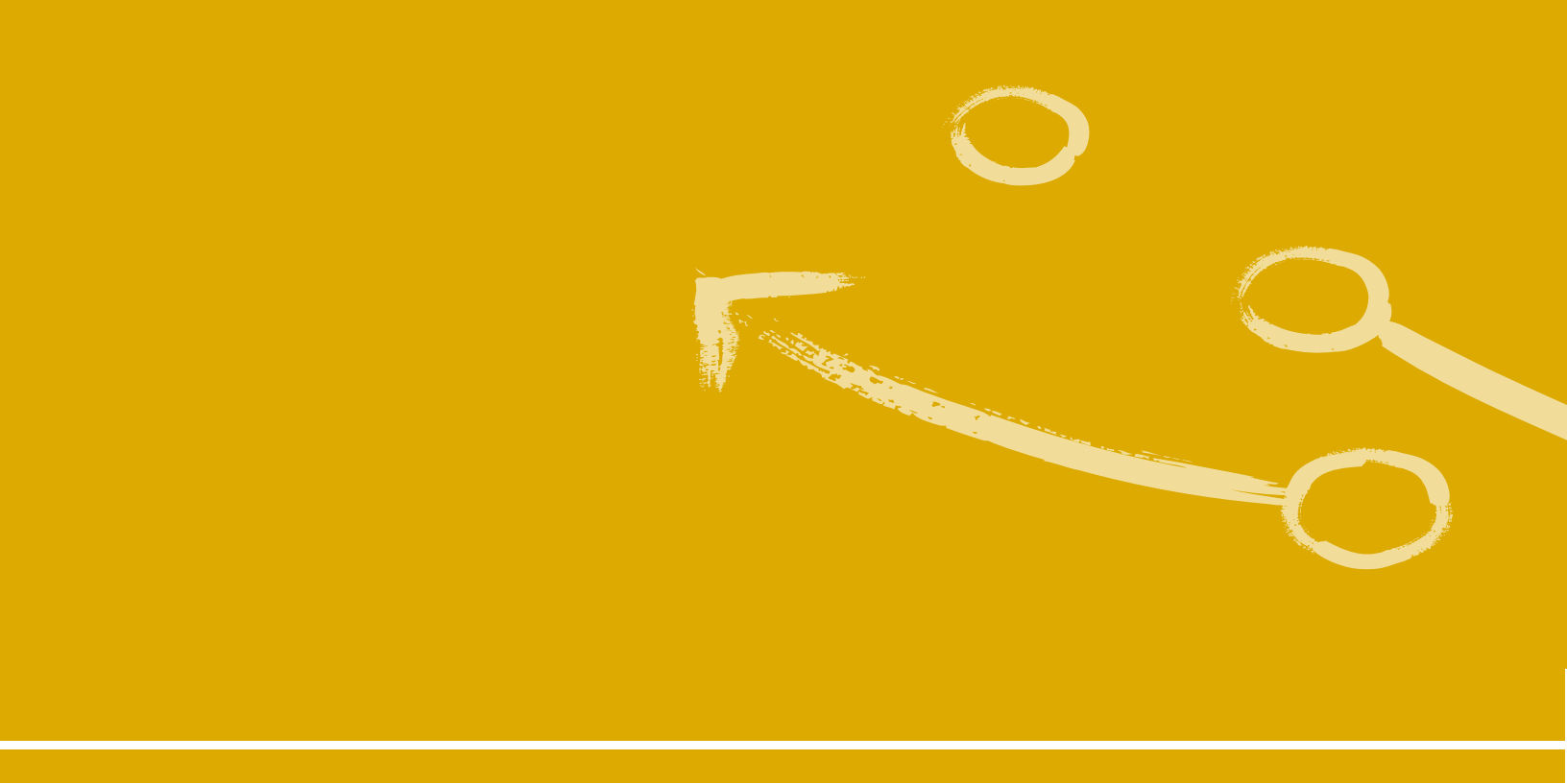
Coaches



Club
Employees



Equipment
Managers



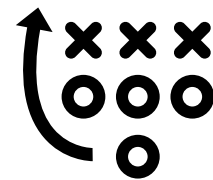
Part 4 discusses those stakeholders who are not a part of the medical staff but otherwise fall under the control of the club, including: coaches; club employees; and, equipment managers. Additionally, we remind the reader that while we have tried to make the chapters accessible for standalone reading, certain background or relevant information may be contained in other parts or chapters, specifically Part 1 discussing Players and Part 3 discussing the NFL and NFLPA. Thus, we encourage the reader to review other parts of this Report as needed for important context.





Chapter 9

Coaches



Of all of the stakeholders considered in this Report, coaches have the most authority over players, and impose the most direct physical and psychological demands on them. Coaches can help players maximize their potential, but in some cases, may also contribute to the degradation of players' health. For these reasons and those discussed below, coaches are important stakeholders in player health.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of coaches is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview coaches as part of this Report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent to the interviews” on the grounds that the “information sought could

directly impact several lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time. Instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors.

In addition, in order to ensure that this chapter was as accurate and valuable as possible, we invited the American Football Coaches Association (AFCA) and the National Football League Coaches Association (NFLCA), both described below, to review a draft version of this chapter prior to publication. The AFCA reviewed the chapter but had no comments or suggested edits.¹ David Cornwell, the Executive Director of the NFLCA, reviewed the chapter and provided comments.

(A) Background

The importance of NFL coaches to a player’s career is obvious but cannot be understated. NFL coaches work incredible hours and face unrelenting criticism and pressure to succeed.² Coaches must be successful in order to retain their jobs and face pressure to provide good outcomes for the team. That pressure no doubt infects their relationship with their players and in some cases is transferred to the players. Head coaches are the individuals ultimately most responsible for the club’s performance on the field and thus take on an immense stature and presence within the organization.³ Coaches largely determine the club’s culture,³ dictate the pace and physicality of practice and workouts, and decide who plays—a decision often borne out by intense physical competition.⁴ Moreover, some head coaches are the final decision-makers on player personnel decisions.⁴

In a 2012 arbitration decision concerning allegations that New Orleans Saints coaches had instituted a “bounty”

scheme to injure opposing players, discussed in detail below, former NFL Commissioner Paul Tagliabue, acting as arbitrator, described the control coaches have over players:⁵

NFL players on average have short careers; their careers can end suddenly through injury or declining skills; players want to be good, cohesive members of the team, or unit, not complainers or dissenters; and players accept that they work for coaches, in “programs” conceived by coaches. These are programs for which coordinators and assistant coaches are often specially selected and hired to execute. Here we have a classic example: Head Coach Payton hired Defensive Coordinator Williams with directions to make the Saints’ defense “nasty.”

In such circumstances, players may not have much choice but to “go along,” to comply with coaching demands or directions that they may question or resent. They may know—or believe—that from the coaches’ perspective, “it’s my way or the highway.” Coaching legends such as George Halas and Vince Lombardi are not glorified or remembered because they offered players “freedom of choice.”

While more recent and current coaches may debate whether and how much coaching approaches to “do it my way” have changed over time, it is clear that directions such as those given by the Saints’ coaches in creating the Program are usually followed by most players. NFL head coaches told me in my seventeen years as Commissioner, “If players don’t do it our way, they can find another team to pay them.”⁵

NFL club coaching staffs are large. A typical NFL coaching staff consists of 15 to 20 people: the head coach; an offensive coordinator responsible for the offensive plays and players; a defensive coordinator responsible for the defensive plays and players; a special teams coordinator responsible for the special teams plays and players; and, position coaches and assistant position coaches at every nearly every position in the game of football.

Considering the size of NFL rosters and the scope of a head coach’s duties, most players communicate principally with their position coaches.⁶ For example, position coaches are the ones instructing and working with the players during practice. Yet given the rigid limits on on-field practice time

a See, e.g., Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 213 (2013) (discussing New England Patriots head coach Bill Belichick ordering recently concussed linebacker Ted Johnson to participate in contact drills during practice and Johnson describing such pressure as common among NFL coaches).

b See, e.g., *id.* at 14 (discussing a particularly violent drill known as the “Nutcracker” and New England Patriots coach Bill Belichick’s affinity for it: “Belichick believed the Nutcracker answered some of football’s most fundamental questions: ‘Who is a man? Who’s tough? Who’s going to hit somebody?’”).

c Christopher R. Deubert, an author of this Report, and the firm at which he formerly practiced, Peter R. Ginsberg Law, LLC, represented former New Orleans Saints player Jonathan Vilma in the “Bounty”-related legal proceedings.

d Former Player 1 described his interactions with the head coach as “minimal interaction,” while Current Player 1 stated “we spend every day with our position coach.”

(three hours per day),⁶ it is the off-field work that is increasingly important. It is perhaps in meetings and video sessions where position coaches provide their best instruction and get to know the players best.

Strength and conditioning coaches also play an important role in a player's career. As their title implies, strength and conditioning coaches are responsible for overseeing a player's general fitness and physical preparedness for NFL games.⁷ Strength and conditioning coaches create weight-lifting and stretching programs for players and otherwise monitor and assist players to ensure that they are in the best possible condition to play each week.⁸ Given the importance of NFL players' health to the success of the team, NFL clubs and players consider strength and conditioning coaches to be among their most important coaches and staff.^{9,e}

The collective bargaining agreement (CBA) contains no references to or requirements for strength and conditioning coaches. Nevertheless, NFL strength and conditioning coaches typically have a college degree in exercise science or a similar discipline and certification from the National Strength and Conditioning Association.¹⁰

NFL coaches might be members of one, both, or neither of two relevant professional associations: the AFCA; and, the NFLCA.

The AFCA is a voluntary organization of more than 11,000 high school, college or professional football coaches.¹¹ The AFCA is largely directed towards college coaches. AFCA members vote for the weekly Coaches Poll, which is one of the long-standing principal methods for ranking and evaluating college football teams.¹² Nevertheless, the AFCA occasionally consults with the NFL¹³ and it is a well-respected organization with a Boards of Trustees past and present that includes many of the most successful college football coaches in history.¹⁴

The NFLCA is more loosely organized than the AFCA. The NFLCA, in its own language, "is a voluntary non-union association that represents the over six hundred coaches and assistant coaches currently employed by the thirty-two individual National Football League Clubs, as well as many retired coaches formerly employed by the NFL teams."^{15,f} In February 2012, the NFLCA hired longtime

Coaches largely determine the club's culture, dictate the pace and physicality of practice and workouts, and decide who plays—a decision often borne out by intense physical competition.

sports attorney David Cornwell as its Executive Director in a part-time capacity.¹⁶

Nevertheless, the NFLCA has a more subdued public status compared to the AFCA. The NFLCA has no website, does not negotiate the terms and conditions of coaches' employment, and rarely makes any positions known (to the extent it has any).

(B) Current Legal Obligations^g

The principal source for regulating the behavior of coaches is the CBA. The 2011 CBA contains multiple provisions governing coaches' health obligations to players. We summarize those provisions here:

- 1. Offseason Workouts:** Offseason workout programs are limited to nine weeks total, separated into three phases of varying intensity and strict prohibitions against live contact.¹⁷ The 9-week limitation is reduced from the 14 weeks permitted under the prior CBA.¹⁸ "The head coach and the Club[] are jointly responsible" for ensuring compliance with the offseason workout rules and are subject to fines beginning at \$100,000 for any violations.¹⁹
- 2. Minicamps:** Each club is limited to one maximum mandatory minicamp for veterans, unless the club hired a new coach, in which case it can hold two mandatory minicamps.²⁰ Minicamps are limited to three days in length,²¹ and there is a strict prohibition against contact during minicamps.²² In addition, all on-field activities from minicamps must be filmed to ensure compliance.²³ The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.²⁴

e Current Player 6: "I think an important part in player health is the strength coach."

f The NFLCA's status as a "non-union association" is important. If the NFLCA were to seek recognition as a union from the National Labor Relations Board, it might not be able to include all coaches in its membership. The National Labor Relations Act, the federal statute governing labor relations, exempts "supervisors" from its protections, which may include some coaches, particularly head coaches. Supervisors are defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action[.]" 29 U.S.C. § 152(11); 29 U.S.C. § 164.

g The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

3. **Preseason Training Camps:** Preseason training camps begin on July 15 at the earliest.²⁵ Two-a-day practices can occur only if certain criteria are met: “(i) players may be on the field for a total of no more than four hours per day; (ii) players may participate in no more than one padded practice per day, which shall be no longer than three hours of on-field activities; (iii) there must be at least a three hour break after the practice; and (iv) the second practice on the same day may only be for a maximum of the remaining available on-field time, and shall be limited to only ‘walk-through’ instruction (i.e., no helmets, full-speed pre-snap, and walking pace after the snap).”²⁶ In addition, all on-field activities from preseason training camp must be filmed to ensure compliance.²⁷ The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.²⁸
4. **Regular Season and Postseason Practices:** Clubs are limited to 14 padded practices during the season and one per week during the postseason.²⁹ During such practices, on-field activities are limited to three hours per day.³⁰ Players must have at least four consecutive off days during bye weeks.³¹ All regular and postseason practices must be filmed to ensure compliance.³² The head coach and club are jointly responsible for ensuring compliance with the preseason training camp rules and are subject to the same discipline scheme outlined in Article 21 governing Offseason Workouts.³³
5. **Days Off:** Clubs are required to provide players with five off days during preseason and four off days per month during the regular season (not including days off during bye weeks).³⁴

(C) Current Ethical Codes

The AFCA maintains a Code of Ethics.³⁵ The Code of Ethics, last updated in 1997, is 20 pages long and covers nine coaching contexts: responsibilities to players; responsibilities to the institution; rules of the game; officials; public relations; scouting; recruiting; game day; and, all-star games.³⁶ The AFCA’s Code of Ethics is principally geared toward college football coaches with its references to recruiting and academic endeavors. Consequently, our analysis focuses on those provisions relevant to players, and, player health in particular.

The Code of Ethics is premised on a 1927 report from Fielding Yost,³⁷ a college football coach from 1897 to 1926, including 25 seasons at the University of Michigan. Yost’s report included ten ethical standards by which he believed all coaches ought to abide, including “to consider the welfare of the players of paramount importance at all times and not to countenance their exploitation for

personal or private gain.”³⁸ Article One of the current Code of Ethics, entitled Responsibilities to Players, expounds on Yost’s proclamation:

1. In his relationships with players under his care, the coach should always be aware of the tremendous influence he wields, for good or bad. Parents entrust their dearest possession to the coach’s charge; and, the coach, through his own example, must always be sure that the young men who have played under him are finer and more decent men for having done so. The coach should never place the value of a win above that of instilling the highest desirable ideals and character traits in his players. The safety and welfare of his players should always be uppermost in his mind, and they must never be sacrificed for any personal prestige or selfish glory.
2. In teaching the game of football, the coach must realize that there are certain rules designed to protect the player and provide common standards for determining a winner and loser. Any attempts to circumvent these rules, to take unfair advantage of an opponent, or to teach deliberate unsportsmanlike conduct, have no place in the game of football, nor has any coach guilty of such teaching any right to call himself a coach. The coach should set the example for winning without boasting and losing without bitterness. A coach who conducts himself according to these principles need have no fear of failure, for in the final analysis, the success of a coach can be measured in terms of the respect he has earned from his own players and from his opponents.
3. Prompt and professional medical attention is a responsibility of the coach. The diagnosis and treatment of injuries is a medical problem; a coach should not involve himself with the diagnosis of any injury. It is important that a solid, independent, and competent medical program of diagnosis and treatment be established and that a coach support such a program in the best interest and well-being of his players.
4. Under no circumstances should a coach authorize or tolerate the use of illegal or performance enhancing drugs. All medicines used by student-athletes should be under the direction of a physician or other appropriate medical personnel.
5. A coach should know and understand rules of eligibility and not violate any rules that would jeopardize his institution or players under his direction.
6. Academics and athletics are a joint effort, each providing benefits to the participants. A coach should encourage the proper time-management skills to his men that will allow them to achieve success both on the playing field and in the classroom. A coach should support the academic endeavors of his players.

The NFLCA does not have a Code of Ethics.

(D) Current Practices

As described in the Background, coaches remain predominant figures in an NFL player's career. Players indicated that their relationships with coaches varied (Current Player 5: "it's very individual"; Current Player 6: "it depends on the coach.")^h Nevertheless, players also discussed that there is often a very different relationship between players and coaches when the coaches were themselves NFL players. Players generally view these coaches as more credible and sympathetic.ⁱ Current Player 6 said "I think coaches that have played kind of understand things a little bit better." Similarly, players also often develop close relationships with their position coaches, with whom they spend most of their time.^j Despite these bonds, players are still reluctant to discuss health-related issues with the coaches for fear that the information will be relayed through the organizational hierarchy.

Interviews and discussions with players and contract advisors revealed continuing concern that coaches place strong implicit (and sometimes explicit) pressure on the players and medical staff concerning a player's treatment and return to play:^k

- **Current Player 4:** *"I think that [player health] is much less of a priority to them than winning and/or producing the best players on the field and getting the best production out of them [T]here is a certain level of distrust with the coaches."*
- **Current Player 5:** *"I've heard a coach tell a player, 'You need to get better, you need to get healthy or else you're going to get cut because you're missing out on [practice].'" "I heard a coach . . . say 'If you pull this muscle again, I'm cutting you or I'm fining you[.]'"*
- **Current Player 7:** *"[I have heard coaches say] so what's the verdict on him? Are they going to be back in time? We need him."*

^h Current Player 8 said: "For guys like me who bounce around, and spend a season or a few weeks in a place, I don't think coaches care that much about my health."

ⁱ See also Rob Huizenga, *You're Okay, It's Just a Bruise* 231–32 (1994) (in discussing former Raiders coach Art Shell, "Shell looked me straight in the eye and said, 'Tell [the player] not to worry, I understand perfectly. I was a player. I'm not going to let him put one foot on the practice field until he's one hundred percent.'").

^j Current Player 9: "I think position coaches have a little more invested in the individual players and so they care a little bit more about your situation." We reiterate that our interviews were intended to be informational but not representative of all players' views and should be read with that limitation in mind.

^k Former Player 3 disagreed: "Coaches would obviously want to know from the medical staff, 'hey, will the guy be able to play?' But I would say they never put any pressure." Also of note, A 2015 study found that 53.7 percent of clinicians (doctors or athletic trainers) in college sports reported having experienced pressure from coaches to prematurely clear athletes to return to participation after a concussion. Emily Kroshus et al., *Pressure on Sports Medicine Clinicians to Prematurely Return Collegiate Athletes to Play After Concussion*, 50 J. Athletic Training 944 (2015).

- **Current Player 8:** *"The head coach meets with the head trainer and says, 'You know, this guy's on the bubble . . . we need him this Sunday.' And he gets bumped off of the bubble."*
- **Current Player 10:** *"[I]t can get a little testy because, in general, the coaches want the players on the field and the trainers do what's best for the players But [the] coaches, their job is to win games, and it's such a bottom line business for them and so they want their best players out there."*
- **Former Player 2:** *"The NFL is a performance business So if you're not winning football games and the head coach is on the hot seat and his star player is nursing their hamstring issue, there's going to be pressure on the trainer to get the guy out there."*

Moreover, one contract advisor interviewed relayed that he has had players tell him that assistant coaches have told players that "the concussion protocol that the NFL has in place is nonsensical and that if they feel good enough to go, they should." Nevertheless, Current Player 2 did also "think that the coaches are genuinely concerned about player health."^m Former Player 2 agreed that coaches are generally "concerned" about player health but noted that the high turnover of players in the NFL often prevents coaches and players from having any relationship that would cause the coach to care.ⁿ Finally, Current Player 10 believes that, while "there's been a [positive] shift in the last five to ten years" concerning coaches' attitudes towards player health, he did not "think player health is the number one concern for coaches. It's wins and losses."

The implicit pressure to play often comes from comments made by coaches.³⁹ A common phrase attributed to NFL coaches is that "sometimes the best ability is availability."^{40, o} Former San Francisco 49ers linebacker

^l For examples of situations in which coaches allegedly pressured players to return to play, Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 129 (2013) (discussing former New York Jets head coach Bill Parcells effectively ordering concussed tight end Kyle Brady to return to the field during 1999 playoff game); *id.* at 213 (discussing New England Patriots head coach Bill Belichick ordering recently concussed linebacker Ted Johnson to participate in contact drills during practice). In addition, strength and conditioning coaches should be differentiated from the football-specific coaches. When players are rehabilitating their injuries, they generally do it under the supervision of the athletic trainer and strength and conditioning coach on a separate practice field away from the coaches and other players.

^m "I've noticed our coaching staff say, 'Hey, get him out of there, he doesn't look right.'"

ⁿ Former Player 3 also believes that coaches care about player health: "It doesn't do the coach any good if the guy is out there and he's not right."

^o Similarly, according to former Seattle Seahawks club doctor Pierce Scranton, one former Seahawks head coach instituted a "no practice, no play" rule, whereby if players were too injured to practice, they could not play in the next game. According to Scranton, the rule was intended to pressure players to practice even while hurt or injured. Pierce E. Scranton, Jr., *Playing Hurt: Treating and Evaluating the Warriors of the NFL* 169 (2001).

Gary Plummer described the pressure from coaches as follows:

The coaches had euphemisms. They'll say: 'You know, that guy has to learn the difference between pain and injury.' Or: 'He has got to learn the difference between college and professional football.' What he's saying is the guy's a pussy and he needs to get tough or he's not going to be on the team. It's a very, very clear message.⁴¹

Interviews and discussions with players and contract advisors revealed continuing concern that coaches place strong implicit (and sometimes explicit) pressure on the players and medical staff concerning a player's treatment and return to play.

Plummer's comments are buttressed by a 2016 comment from Miami Dolphins head coach Adam Gase concerning star wide receiver DeVante Parker's injury problems:

Sometimes it takes some guys more time to learn more than others. Eventually you get tired of being the guy standing on the sideline. I do think he's a little frustrated. He's been the odd man out all the time. Eventually . . . he will know how to push through certain kinds of pain.⁴²

Nevertheless, several players also seemed to excuse the coaches' actions as inherent to the NFL:

- **Current Player 2:** *"It's the culture of football, coaches want their players on the field and they're going to apply that pressure to their trainers."^p*
- **Current Player 6:** *"[M]ost coaches and pretty much anyone in this business has to look out for themselves."*
- **Current Player 8:** *"I don't want to condemn them for [placing pressure on the medical staff], but that's the job. The coach absolutely needs the parts to the machine to be out there for it to function."*

- **Former Player 2:** *"[Putting pressure on the medical staff] is just the nature of the beast."*

Additionally, there is some evidence that in recent years coaches have largely removed themselves from player health decisions, perhaps a change from years past. Moreover, coaches that do not have good reputations among players might find it challenging to recruit players to join the club during free agency.

One incident in which a coach positively involved himself in a player health matter is worth mentioning. In a 2015 game, the Pittsburgh Steelers' medical staff suspected a player of having sustained a concussion and thus attempted to evaluate the player. When the player resisted the evaluation in hopes of staying in the game, Steelers head coach Mike Tomlin intervened and told the player "You will listen to these doctors, and you'll do it now." The player was then evaluated and removed from the game.⁴³

Two additional incidents bear mentioning to shed light on the role of coaches in today's NFL.

First, in March 2012, the NFL issued a press release alleging that New Orleans Saints coaches and players had participated in a "bounty" scheme whereby coaches and players provided financial rewards for good plays as well as for injuring opposing players in violation of NFL rules.⁴⁴ On March 21, 2012, about three weeks after the initial press release, the NFL suspended and fined Saints coaches and officials.⁴⁵ The Saints were also fined \$500,000 and required to forfeit second round draft picks in the 2012 and 2013 NFL Drafts.⁴⁶

The Saints and the coaches accepted the punishments, *i.e.*, did not pursue legal action, while denying the facts upon which the punishments were based.⁴⁷

On May 2, 2012, the NFL suspended four players for their alleged involvement in the "bounty" program.⁴⁸ The players challenged their discipline through various legal options including through CBA arbitration mechanisms and in federal court.⁴⁹ Ultimately, former NFL Commissioner Paul Tagliabue presided over a four-day arbitration designed to ascertain the truth of the NFL's allegations and the fairness of the NFL's punishment.⁵⁰

On December 11, 2012, former Commissioner Tagliabue issued his decision, vacating all discipline against the players but "affirm[ed]" Commissioner Goodell's finding that the players engaged in conduct detrimental to the game of football, except as to one of the four players. Commissioner Tagliabue principally placed the blame for any wrongdoing on the Saints' coaches and organization and faulted

^p Contract Advisor 6 expressed a similar sentiment: "[S]o many coaches believe you play hurt."

Commissioner Goodell's efforts to change a long-standing practice in the NFL too quickly and with insufficient notice to the clubs and players.⁵¹ Tagliabue's decision made clear that the players were under tremendous pressure to follow the coaches' lead.

Commissioner Tagliabue had particularly strong words for the coaches. Tagliabue "condemn[ed]" the Saints' coaches for having created the pay-for-performance program, for pressuring a player to lie, and for their "irresponsible," "persistent and flagrant contempt for clear League rules and policies regarding player safety."⁵² By vacating the player discipline, Commissioner Tagliabue principally laid the blame for any wrongdoing on the Saints' coaches.

Second, on October 28, 2013, Miami Dolphins offensive lineman Jonathan Martin left the Dolphins and checked himself into a nearby hospital, requesting psychological treatment. In the weeks and months that followed, it was reported that Martin had left the club as a result of bullying and harassment from his teammates, in particular fellow offensive lineman Richie Incognito.

On February 14, 2014, attorney Ted Wells and his law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP released a report, commissioned by the NFL, entitled "Report to the National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins." ("Wells Report.")⁵³ To summarize, the Wells Report found the Dolphins locker room to be a place of inappropriate and abusive conduct by the players as well as, at times, some coaches. Of relevance, the Wells Report gave a generally negative view of offensive line coach Jim Turner's involvement in the situation, suggesting that Turner had failed to take action to correct some of the inappropriate behavior and improperly defended Incognito.

The Dolphins fired Turner five days after the Wells Report.

In September 2014, Turner, through the law firm Peter R. Ginsberg Law, LLC, issued a Response to the Wells Report which explained his exemplary career and his involvement in the Martin-Incognito situation.⁵⁴ Turner's response also included interviews with several Dolphins offensive linemen who disagreed with all or parts of the Wells Report.^q

Although neither situation resulted in litigation in which a coach was a party, both situations raised interesting questions concerning a coach's perceived and actual duties to his players.

q Christopher R. Deubert, an author of this Report, previously practiced at Peter R. Ginsberg Law, LLC, and participated in the creation of Turner's response to the Wells Report prior to joining The Football Players Health Study at Harvard University.

(E) Enforcement of Legal and Ethical Obligations^r

In the event a player or the NFLPA believes a coach has violated his obligations to the players, the player could try to commence a Non-Injury Grievance in accordance with the CBA.^s The 2011 CBA directs certain disputes to designated arbitration mechanisms^t and directs the remainder of any disputes involving the CBA, a player contract, NFL rules or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.⁵⁵ Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."⁵⁶

However, there are several impediments to pursuing a Non-Injury Grievance against a coach (or any club employee). First and foremost, coaches are not parties to the CBA and thus likely cannot be sued for violations of the CBA.⁵⁷ Instead, the player could seek to hold the club responsible for the coach's violation of the CBA.⁵⁸ Second, the player's claim might be barred by workers' compensation statutes. Workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers based on the co-workers' negligence.⁵⁹ This was the result in the *Stringer* case (discussed in more detail below), and in multiple cases brought by NFL players against club doctors.⁶⁰ It is unclear how this bar would apply in an arbitration. Third, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based,"⁶¹ a timeframe that is much shorter than your typical statute of limitations. And fourth, players

r Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

s See 2011 CBA, Art. 43 (discussing Non-Injury Grievance procedures). The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, see 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

t For example, Injury Grievances, which occur when, at the time a player's contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15., currently University of Pennsylvania Law School Professor Stephen B. Burbank.

likely fear that pursuing a grievance against a coach could result in the club terminating him.^u

As an alternative to pursuing a Non-Injury Grievance, the NFLPA (at the player's request) might request the NFL to enforce the terms of the CBA and issue the required punishment. For example, after reports of a fight between players during a June 18, 2014 minicamp for the defending Super Bowl champion Seattle Seahawks, the NFLPA filed a complaint and requested the videotape from the practice as was its right.⁶² The videotapes revealed extensive violations of the prohibitions against live contact during minicamps, resulting in a \$100,000 fine for Seahawks head coach Pete Carroll, a \$200,000 fine for the Seahawks, and the loss of two minicamp practices for the Seahawks in 2015.⁶³ Moreover, the Seahawks were repeat offenders, having also violated the no-contact rules in 2012.⁶⁴

A player might also sue in court, but such lawsuits are unlikely to succeed for reasons discussed below. As a preliminary matter, while it is not uncommon for high school and youth sport coaches to be sued for their alleged involvement in a player injury,⁶⁵ research has only revealed two cases in which an NFL player (or someone on his behalf) sued an NFL coach.

In 2001, Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.⁶⁶ Stringer's family later sued the Vikings, Vikings coaches, trainers and affiliated doctors, the NFL, and equipment manufacturer Riddell. Of specific relevance, Stringer's family sued the Vikings' head coach and offensive line coach. In 2003, a Minnesota trial court granted summary judgment^v in favor of the Vikings, the head coach and the offensive line coach.⁶⁷ The court determined that the head coach and the offensive line coach were acting within the scope of their employment concerning Stringer's medical situation, were not grossly negligent, and thus were immune from liability pursuant to Minnesota's workers' compensation laws.⁶⁸

In addition to workers' compensation statutes, the CBA also presents a major obstacle for a player suing a coach. Lawsuits are another possible enforcement method, but face significant barriers. This is because the Labor Management Relations Act ("LMRA")⁶⁹ bars or "preempts" state common law^w claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA.⁷⁰ In order to assess a coach's duty to an NFL player and whether it was satisfied—an essential element of a negligence claim—the court would likely have to refer to and analyze the terms of the CBA, resulting in the claim's preemption.⁷¹ Preemption occurs even though coaches are not parties to the CBA and thus likely cannot be a party in any CBA grievance procedure. So long as the player's claim is "inextricably intertwined" with the CBA, it will be preempted. In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the club), rather than litigation.

In a 1995 lawsuit, two Houston Oilers players alleged that the Houston Oilers general manager and strength and conditioning coach subjected the players to a phony and brutal rehabilitation program designed to coerce the players into quitting the club.⁷² The players alleged state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas held that the players' claims were preempted by the CBA, because the CBA and the players' contracts governed rehabilitation programs.⁷³ The United States Court of Appeals for the Fifth Circuit affirmed.⁷⁴

While these avenues for actions against coaches seem unfruitful, the AFCA Code of Ethics does provide a potential enforcement mechanism. Pursuant to the Code of Ethics, the AFCA Committee on Ethics "is empowered to investigate any and all alleged violations of the Code . . . from any source[.]"⁷⁵ The Code of Ethics includes a robust hearing mechanism, including the presentation of evidence and calling of witnesses.⁷⁶ Nevertheless, the Committee's disciplinary authority is limited to a letter of reprimand or

u Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]" While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

v Summary judgment is "[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law." Black's Law Dictionary (9th ed. 2009).

w Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

the suspension of membership.⁷⁷ Moreover, the AFCA typically does not go that far.^x Each year, the AFCA's Committee on Ethics meets at the AFCA's annual convention and reviews recent charges brought by the National Collegiate Athletic Association (NCAA) for violations of NCAA Bylaws and which involve college football coaches. The AFCA generally does not discipline the coaches involved in any way, and instead issues generic aspirational statements recommending and reminding coaches to be ethical and to follow NCAA Bylaws. Additionally, the AFCA's Committee on Ethics seemingly does not conduct any investigation of its own and only considers cases already adjudicated by the NCAA.

Finally, of the most relevance, the AFCA does not undertake to investigate or discipline NFL coaches for any violations of the AFCA's Code of Ethics, instead deferring to the NFL to handle such matters.⁷⁸ For these reasons the AFCA route for enforcing the legal and ethical obligations of the coach seems anemic.

Currently, the only enforcement of coaches' obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.

x The AFCA provided us copies of its Ethics Committee Reports from 2006 to 2015.

Currently, the only enforcement of coaches' obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.



(F) Recommendations Concerning Coaches

Coaches have tremendous influence over a player’s career and can make decisions or dictate policies or culture that have a substantial impact on a player’s health. Many coaches develop close relationships with players, or are former players themselves, and are thus sensitive to protecting player health. Nevertheless, the inherent pressures of coaching sometimes cause coaches to make decisions or create pressures that are not in the best interests of player health. Unfortunately, when things go wrong, there are currently few, if any, fruitful avenues for players to pursue complaints against coaches related to their health. While we were unable to interview current coaches to gauge their viewpoints,^y we make the below recommendations to help improve the role of coaches in player health.

Goal 1: To hold coaches accountable for their role in player health.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 9:1-A: The NFLCA should adopt and enforce a Code of Ethics that recognizes that coaches share responsibility for player health.

Codes of ethics provide important guidelines and instructions for a wide variety of professionals to ensure that they are conducting themselves in an appropriate and ethical manner. Currently, there is no code of ethics actively governing NFL coaches, which can and does allow for serious lapses concerning player health. To resolve the ethical void for NFL coaches, there are seemingly three options.

First, the AFCA could take a more active role in NFL coaching matters, including enforcing its code of ethics against NFL coaches who are members of the AFCA. However, the AFCA’s focus on college coaches and issues seems appropriate and it would likely be better if there were an organization solely focused on NFL coaches.

Second, if the AFCA is not well-suited to regulate NFL coaches, the NFLCA should be. The NFLCA seemingly has minimal resources and employees and engages in limited work. This seems to be a missed opportunity not only to advance the interests of NFL coaches but, also for our concerns here, to ensure the proper involvement of coaches in the lives and health of their players. Thus our preferred solution and the one we recommend here is that the NFLCA evolve into a more robust and active organization, including the self-regulation of its coaches.

Third, in addition to self-regulation, if the NFLCA is unable or unwilling to take on the role of enforcing the ethical obligations of its coaches, the next best option is likely for such obligations to be included in the CBA. It would be preferable if coaches and the NFLCA voluntarily undertook to recognize and clarify their responsibilities, but if they do not, the NFLPA should seek to have such responsibilities outlined in the CBA—a change the NFL should appreciate and willingly accept.

A code of ethics for NFL coaches should cover at least the following topics: coaches’ obligations to players, including to help support players in preparation for post-football life; coaches’ obligations to other players; communications with medical staff; use of player medical information; and, handling conflicts of interest, including winning and player health. Below, we elaborate on some of these issues.

- **Coaches should establish a locker room culture in which players and their health and safety are respected.** Coaches’ influence in the locker room cannot be understated—they set the tone and culture for the organization and players respond and comport themselves according to the culture preferred by the coaches. To that end, if the coaches create a locker room centered around toughness

^y As described more fully in the Introduction, Section 2(B): Description, citing ongoing litigation and arbitration, the NFL declined to consent to our request to interview persons currently employed by or affiliated with NFL clubs, including coaches, general managers, doctors and athletic trainers. Therefore, we did not pursue interviews with these individuals.

Recommendations Concerning Coaches – continued

and where playing through injuries is required, players are likely to make decisions that negatively affect their health. Moreover, such decisions could negatively affect the club if the player returns to play too soon and worsens his injury, requiring him to miss even more playing time. Ideally, coaches will respect a player's medical condition and his right to be treated in a way that is in the player's best interests.

- **Coaches should orient communications with players about their health so as not to create undue pressure on the player where it may be detrimental to player health.**^z Players are under incredible pressure to play and to play well. They know that coaches control their careers in many respects and thus feel intense pressure to impress the coaches, including their ability to play through injuries. Questions and comments from coaches such as, “How are you feeling?” “Are you good to go today?” or “You know we really need you out there” carry the implications that the player must be ready to play and perform, regardless of the player's actual health status.^{aa} We recognize that such questions from coaches might come from genuine concern and that we want players and coaches to establish a meaningful relationship in this regard. Nevertheless, coaches should also recognize the implicit pressures created by these types of comments. Additionally, coaches cannot be faulted for later using the information conveyed by the player in considering the player's roster status, whether in the short or long term. Consequently, coaches should approach conversations with players concerning their health with sensitivity and the players' potential concerns in mind.
- **Coaches should consider, respect and care about players' post-career lives while the player is playing for that coach.** Although the NFL and NFLPA disagree as to the average length of an NFL player's career, it is undeniably short—somewhere in the three to six year range.⁷⁹ Thus the average NFL player will be out of the NFL well before his 30th birthday. And although NFL player salaries are relatively substantial, few, if any, NFL players could reasonably be expected to live another 50 to 60 years on the income earned in their 20s. Almost all players will need to find a career after football. Coaches and club executives should actively encourage their players to consider their post-career options and provide them the flexibility to further their post-career options where it does not undermine the player's and coach's commitment to winning.^{ab}
- **Coaches should not encourage in any way the injury of opposing players.** While the exact details of the New Orleans Saints' “pay-for-performance”/“bounty” system are unclear and debated, the situation did bring into focus the possibility that NFL coaches, in their attempts to motivate their players, might occasionally use language that promotes or suggests that players should attempt to injure their opponents, or go even further to encourage such behavior. Even if such language is hyperbole or overheated rhetoric, players may take such words literally as part of their enthusiasm for the game and in an effort to please their coaches. Moreover, it is the coaches' obligation to ensure that their players play and conduct themselves within the rules. Language tending to promote the injury of opposing players does not serve this obligation and threatens the safety of players.
- **Coaches should ensure that the medical staff acts independently and does not feel pressured to act in any way other than in the player's best interests.** Coaches are not medical professionals and thus are not qualified to opine on a player's medical condition or treatment course. Historically, at least some coaches have unduly influenced club doctors, clubs, and players to take actions that might jeopardize the player's health for the sake of winning. Such actions violate the player's right to a doctor concerned with his best interests and unfairly take advantage of players' (and perhaps also the club doctor's) eagerness to win the approval of their coaches. In order to prevent these situations, clubs and coaches should provide the medical staff the latitude to provide medical care to the players without influence from non-medical staff. Fortunately, there is reason to believe coaches are largely uninvolved in player health decisions today, but a clear ethical rule prohibiting any such involvement is still necessary to avoid these dangerous situations.

z As is explained in Chapter 2: Club Doctors, we recommend that information about player health be relayed to coaches through a summary form known as the Player Health Report. This approach minimizes some of the concerns explained in this Section.

aa Current Player 9: “A lot of time the coaches can't help themselves but to throw little comments about, ‘When can we have you back,’ ‘how do you feel.’ And sometimes they're honest questions, but a lot of times they are probing questions because they want to know when they're going to get that player back . . . I hate it when I hear a coach ever making light of an injury ‘this is not something serious enough to keep somebody out,’ or whenever they try to challenge someone's manhood so to speak and their toughness. Those just are things that don't need to be said.”

ab For example, during the 2014 season, Chicago Bears head coach Marc Trestman approved of star wide receiver Brandon Marshall flying back to New Jersey each Tuesday to tape the television program “Inside the NFL.” Trestman stated: “I trust Brandon . . . He asked me about it. I trust him to make decisions that are in the best interests of the team first. I know Brandon. I know he'll do that. So I have complete faith that the team always comes first, football has always come first to him, and I believe he'll work it out to where it won't distract him from doing his job.” Bob Wolfley, *Bears' Coach Marc Trestman Approves of Brandon Marshall's 'Inside the NFL' Gig*, SportsDay with Bob Wolfley Blog (Aug. 18, 2014), <http://www.jsonline.com/blogs/sports/271721501.html>, archived at <http://perma.cc/4N68-3ENY>.

Recommendations Concerning Coaches – continued

- **Coaches' interests in winning should not supersede player health.** While coaches have legitimate interests in winning, and face tremendous pressure to do so, those interests cannot cause coaches to act in such a way that jeopardizes player health. We recognize it is difficult to determine at what point a player's health, whether short- or long-term, becomes jeopardized and that coaches are not medical professionals. Consequently, if the above-bulleted recommendations concerning the independence of the medical staff are followed, coaches should be free from concerns about player health and can focus solely on winning. To the extent coaches are still in a position to affect player health, they should immediately involve the proper medical staff to ensure that the situation is handled with the appropriate expertise and care.

In order for the recommended NFLCA Code of Ethics to be effective, all NFL coaches must be members of the NFLCA. While it is unclear whether or not all coaches currently are members, it might be necessary for the CBA to require that all coaches be members or otherwise be bound by the proposed Code of Ethics.

Finally, enforcement is essential. Violations of a professional code of ethics should include meaningful punishments, ranging from warnings and censures to fines and suspensions. Again, in order to be effective, the enforcement and disciplinary schemes might need to be included in the CBA.

Recommendation 9:1-B: The most important ethical principles concerning coaches' practices concerning player health should be incorporated into the CBA.

As discussed above, professional self-regulation is important and useful. However, professional codes often fail to be sufficiently enforced. Additionally, player health and coaches' obligations towards player health are too important to leave in the hands of coaches alone. In particular, it currently seems unlikely that the NFLCA has the resources to adopt and enforce a meaningful code of ethics. Consequently, incorporating at least some of the above-mentioned ethical concepts, particularly those concerning player health primacy, into the CBA is likely necessary, along with appropriate enforcement mechanisms.

Recommendation 9:1-C: Coaches should consider innovative ideas and methods that might improve player health.

Helmet-to-helmet hits are a leading cause of concussions.⁸⁰ As a result, the NFL has increasingly penalized such hits while also emphasizing safer tackling methods, which reduce helmet-to-helmet contact. To reinforce those safer tackling methods, the University of New Hampshire football team occasionally practices tackling without helmets.⁸¹ Players believed that the drills helped them to learn how to tackle by using their chest and legs as opposed to their heads.⁸² Similarly, NFL coaches and players should consider whether new practice drills can be implemented that might improve player health.

For example, in 2015, Dartmouth College's football team also introduced a new practice component designed to improve player health. Engineering students at the college created motorized tackling dummies that players can tackle during practice, as opposed to other players.⁸³ Indeed, in 2016, the Pittsburgh Steelers began using a motorized tackling dummy.⁸⁴ Moreover, based in part on Dartmouth College's new tackling dummy, in 2016, the Ivy League banned full-contact hitting and tackling during regular season practices.⁸⁵ Such innovations should continue to be studied and, if successful, might also prove useful to NFL coaches and players and thus should be considered.

Additionally, it would likely be helpful if coaches had a forum in which to share innovative ideas and methods that might improve player health. Nevertheless, we acknowledge that coaches are likely to have concerns about sharing information they might regard as a competitive advantage with other clubs.

Endnotes

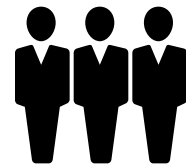
- 1 E-mail from Vince Thompson, AFCA, Director of Media Relations, to author (Apr. 5, 2016, 2:31 PM) (on file with authors).
- 2 See Paul Woody, *NFL Coaching Not a Healthy Occupation*, Richmond Times Dispatch, Dec. 18, 1998, available at 1998 WLNR 1242844.
- 3 See Nate Ulrich, *Pettine's New Boys*, Akron Beacon Journal, Mar. 27, 2014, available at 2014 WLNR 8435196; Rainer Sabin, *Cowboys Blog: Garrett's Message of Toughness Being Heeded by Cowboys*, Dall. Morning News, Sept. 24, 2011, available at 2011 WLNR 19451135; *Lions Hire Marinelli Tampa Bay Assistant Brings Toughness to Wayward Team*, Detroit News, Jan. 19, 2006, available at 2006 WLNR 25099694; Larry Weisman, *Athletes Victims of Culture That Likes Its Heroes Tough*, USA Today, May 16, 1996, available at 1996 WLNR 2832770; Larry Weisman, *In NFL, Pain is Part of the Game*, Seattle Times, May 26, 1996, available at 1996 WLNR 1342239.
- 4 Christopher R. Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 Jeffrey S. Moorad Sports L.J. 427, 477 (2013) (identifying head coaches who also held general manager/personnel decision responsibilities).
- 5 Final Decision on Appeal, *In the Matter of New Orleans Saints Pay-for-Performance/"Bounty,"* at 16–17 (Tagliabue, Arb. Dec. 11, 2012).
- 6 CBA, Art. 24, § 1(d).
- 7 See *How to Become an NFL Strength and Conditioning Coach*, Sports Rehab and Performance Group, Feb. 28, 2014, <http://sportsrehabandperformancegroup.org/?p=494>, archived at <http://perma.cc/U6E4-C7V5> (interview with Cincinnati Bengals strength and conditioning coach Ron McKeefery about the role of a strength and conditioning coach); Mike Vandermause, *Green Bay Packers Assistant Strength and Conditioning Coach Dave Redding Played 'Big Role' in Success*, Green Bay Press-Gazette, Feb. 23, 2011, available at 2011 WLNR 3564295 (discussing role of NFL strength and conditioning coach); Allen Wilson, *By the Power Vested in Him . . . Strength and Conditioning Coach Allaire Helps Bills Meet Fitness Goals for the Long Season*, Buffalo News, Oct. 15, 2006, available at 2006 WLNR 17952756 (same); Mike Preston, *Bigger, Faster, Stronger: Fitness: Looking to Protect Their Investment in Players, NFL Teams Put Their Stock and Faith In Year-Round Strength and Conditioning Programs*, Balt. Sun, Sept. 20, 1996, available at 1996 WLNR 923238 (same); Thomas George, *Strength and Conditioning Coaches: The Force Is With Them*, N.Y. Times, Jun. 27, 1993, <http://www.nytimes.com/1993/06/27/sports/pro-football-strength-and-conditioning-coaches-the-force-is-with-them.html> archived at <http://perma.cc/QH9X-FH25> (same).
- 8 See *id.*
- 9 See *id.*
- 10 See *How to Become an NFL Strength and Conditioning Coach*, *supra* note 7.
- 11 *American Football Coaches Association – Who We Are*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=1135>, archived at <http://perma.cc/EKL5-KNUL>. The AFCA's Executive Director is former Baylor head coach and College Football Hall of Famer Grant Teaff.
- 12 See *Amway Coaches Poll*, USA Today, <http://www.usatoday.com/sports/ncaaf/polls/> (last visited May 18, 2016), archived at <https://perma.cc/GZ9A-JCU6> (explaining the AFCA's involvement in the polls).
- 13 See *Pitt State Football: Gorillas Hire NFL All-Pro Gordon*, Morning Sun (Pittsburg, KS), July 25, 2013, available at 2013 WLNR 18347003 (NFL, NCAA and AFCA collaborated to create coaching intern program); William C. Rhoden, *N.F.L. Crosses A Boundary In the Pryor Case*, N.Y. Times, Aug. 21, 2011, <http://www.nytimes.com/2011/08/22/sports/football/ Pryor-case-highlights-nfls-uncomfortably-cozy-ties-with-ncaa.html>, archived at <http://perma.cc/5X78-DJWC> (NFL, NCAA and AFCA collaborated on efforts to prevent student-athletes from losing their eligibility); *Slive: SEC Will Talk On Agents, Rosters, Rules*, Birmingham News (AL), April 19, 2011, available at 2011 WLNR 7702131 (NFL, NCAA and AFCA collaborated on efforts to curtail unethical agents).
- 14 See *AFCA Board of Trustees*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=5>, archived at <http://perma.cc/S9UA-E8VT>. The Trustees entering the 2015 season were Todd Berry, University of Louisiana-Monroe, First Vice President; Lee Owens, Ashland University, Second Vice President; Rich Rodriguez, University of Arizona, Third Vice President; Bill Cronin, Georgetown College; Frank Solich, Ohio University; Mike Riley, Oregon State University; Gary Patterson, TCU; David Bailiff, Rice University; Mark Richt, University of Georgia; Pete Fredenburg, University of Mary Hardin-Baylor; Turner Gill, Liberty University; Pat Fitzgerald, Northwestern University; Craig Bohl, University of Wyoming; Bronco Mendenhall, Brigham Young University; Todd Knight, Ouachita Baptist University; David Cutcliffe, Duke University; Dale Lennon, Southern Illinois University; Bobby Kennedy, University of Iowa; Dino Babers, Bowling Green State University; and, w Sam Knopik, The Pembroke Hill School (Mo.).
- 15 Amicus Brief of the National Football League Coaches Association in Support of Petitioner, *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (No. 08-661), 2009 WL 3143713, at *1.
- 16 Mike Florio, *Cornwell Named NFLCA Executive Director*, ProFootballTalk (Feb. 21, 2012, 5:03 PM), <http://profootballtalk.nbcsports.com/2012/02/21/cornwell-named-nflca-executive-director/>, archived at <http://perma.cc/3SGB-ZTQT>; see also Barnes & Thornburg, LLP Directory: David Cornwell Sr., <http://www.btlaw.com/david-cornwell/> (last visited Aug. 7, 2015), archived at <http://perma.cc/7GF8-V7MV>, (discussing Cornwell's ongoing legal practice outside of his duties at the NFLCA).
- 17 CBA, Art. 21.
- 18 CBA, Art. XXXV.
- 19 CBA, Art. 21, § 8.
- 20 CBA, Art. 22, § 1.
- 21 CBA, Art. 22, § 2.
- 22 CBA, Art. 22, § 5.
- 23 CBA, Art. 22, § 8.
- 24 CBA, Art. 22, § 9.
- 25 CBA, Art. 23, § 5.
- 26 CBA, Art. 23, § 6.
- 27 CBA, Art. 23, § 10.
- 28 CBA, Art. 23, § 11.
- 29 CBA, Art. 24, § 1(a), (b).
- 30 CBA, Art. 24, § 1(d).
- 31 CBA, Art. 24, § 2.
- 32 CBA, Art. 24, § 4.
- 33 CBA, Art. 24, § 3.
- 34 CBA, Art. 35.
- 35 *AFCA Code of Ethics Summary*, Am. Football Coaches Ass'n (Sept. 22, 2014), <http://www.afca.com/article/article.php?id=8>, archived at <http://perma.cc/KJ49-N68E>. The complete Code of Ethics can be obtained by contacting the AFCA.
- 36 *Id.*
- 37 *Id.*
- 38 *Id.*
- 39 See, e.g., Michael David Smith, *Chip Kelly, Earl Wolff not seeing eye to eye on recovery from injury*, ProFootballTalk (Jun. 10, 2015, 12:06 PM), <http://profootballtalk.nbcsports.com/2015/06/10/chip-kelly-earl-wolff-not-seeing-eye-to-eye-on-recovery-from-injury/>, archived at <http://perma.cc/Z7P6-JCKQ> (Philadelphia Eagles head coach Chip Kelly publicly stating that the only thing holding a player back from participating in practice was pain tolerance); Josh Alper, *Marvin Lewis: Marvin Jones has to "find a way to get out there,"* ProFootballTalk (Aug. 7, 2015, 9:41 AM), <http://profootballtalk.nbcsports.com/2015/08/07/marvin-lewis-marvin-jones-has-to-find-a-way-to-get-out-there/>, archived at <http://perma.cc/8YBW-4GRP>.

- 40 Rick Stroud, *Thomas Catches On Again*, St. Petersburg Times (FL), Sept. 18, 1998, available at 1998 WLNR 2608915.
- 41 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 80 (2013).
- 42 Adam H. Beasley, *Dolphins' Gase challenges Parker to do what it takes to stay on the field*, Miami Her., Aug. 30, 2016, <http://www.miamiherald.com/sports/nfl/miami-dolphins/article98878327.html>, archived at <https://perma.cc/6E6P-9RBT>.
- 43 Mike Florio, *NFL really is doing a better job of spotting concussions*, ProFootballTalk (Dec. 1, 2015, 9:19 AM), <http://profootballtalk.nbcsports.com/2015/12/01/nfl-really-is-doing-a-better-job-of-spotting-concussions/>, archived at <http://perma.cc/BPN9-E64P>.
- 44 See Christopher R. Deubert, *A Summary of the NFL's Investigation Into the New Orleans Saints Alleged Bounty Program and Related Proceedings*, 9 DePaul J. Sports L. & Contemp. Probs. 123 (2013).
- 45 *Id.*
- 46 *Id.*
- 47 Sean Payton Proud of Saints, ESPN (Sept. 5, 2012), http://espn.go.com/nfl/story/_id/8339699/sean-payton-expects-new-orleans-saints-do-well-him, archived at <http://perma.cc/3QEB-A4R4>.
- 48 See Deubert, *supra* note 44.
- 49 *Id.*
- 50 *Id.*
- 51 *Id.* See Final Decision on Appeal, *In the Matter of New Orleans Saints Pay-for-Performance/"Bounty"* (Tagliabue, Arb. Dec. 11, 2012).
- 52 *Id.*
- 53 The Wells Report is available from a variety of online sources, most reliably the Sports Lawyers Association, www.sportslaw.org (membership required).
- 54 Turner's response can be found at http://espn.go.com/pdf/2014/0911/turner-response_r.pdf, archived at <https://perma.cc/74B3-78AT?type=pdf>.
- 55 See 2011 CBA, Art. 43, § 1.
- 56 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").
- 57 See *Jackson v. Kimel*, 992 F.2d 1318, 1325 n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 58 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and Clubs but no other party).
- 59 See Alexander Cornwell, *Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 60 See *Lotysz v. Montgomery*, 309 A.D.2d 628 (N.Y. App. Div. 2003) (NFL player's medical malpractice claim against club doctor barred by state workers' compensation statute); *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. Ct. App. 1998); *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991). See also *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor). For more information on the possibility of players suing coaches, see Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. Rev. 571 (2008).
- 61 CBA, Art. 43, § 2.
- 62 Mike Florio, *Report of Richard Sherman Minicamp Fight Sparked NFLPA Investigation*, ProFootballTalk (Aug. 27, 2014), <http://profootballtalk.nbcsports.com/2014/08/27/report-of-richard-sherman-minicamp-fight-sparked-nflpa-investigation/>, archived at <http://perma.cc/Y4RT-D8XW>. See also 2011 CBA, Art. 22, § 8 (discussing NFLPA's rights to films from minicamps).
- 63 Chris Mortensen, *NFL Fines Pete Carroll, Seahawks*, ESPN (Aug. 26, 2014 8:00 PM), http://espn.go.com/nfl/story/_id/11414018/seattle-seahawks-pete-carroll-...1, archived at <http://perma.cc/46ZR-HWX7>.
- 64 *Id.*
- 65 See Glenn M. Wong, *Essentials of Sports Law*, § 4.2 (4th ed. 2010) (discussing liability of coaches and gathering cases).
- 66 *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 748 (Minn. 2005).
- 67 See Memorandum and Order, *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415 (Minn. Dist. Ct. Apr. 25, 2003); *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 2003 WL 25766738 (Minn. Dist. Ct. Dec. 8, 2003) (discussing Court's prior order). Following *Stringer's* death, the NFL now issues an annual memorandum to NFL Clubs warning them about the risks of players overheating during training camp. See, e.g., Memorandum from NFL Injury and Safety Panel (Elliott Hershman, M.D., Chairman), to General Managers, Head Coaches, Team Physicians, and Team Athletic Trainers re: 2014 Training Camps – Adverse Weather Conditions (July 11, 2014) (on file with author).
- 68 See Memorandum and Order, *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 71–76 (Minn. Dist. Ct. Apr. 25, 2003).
- 69 U.S.C. § 185.
- 70 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 71 See, e.g., *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).
- 72 *Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).
- 73 *Id.*
- 74 *Id.*
- 75 AFCA Code of Ethics at p. 9.
- 76 *Id.* at 9–10.
- 77 *Id.* at 10.
- 78 E-mail from Vince Thompson, Director of Media Relations, AFCA, to Christopher R. Deubert (Feb. 26, 2015).
- 79 See *Average NFL Career Length*, Sharp Football Analysis, Apr. 30, 2014, <http://www.sharpfootballanalysis.com/blog/?p=2133>, archived at <http://perma.cc/X8QV-77A3> (discussing disagreement between NFLPA and NFL about average career length and determining that the average drafted player plays about 5 years).
- 80 At Super Bowl XLIX, the NFL presented data showing that between 2012 and 2014 that helmet-to-helmet hits were responsible for 49.7% of concussions. The next most likely cause was the playing surface, which accounted for only 12.9% of concussions. See *Super Bowl XLIX Health & Safety Press Conference*, NFL (May 1, 2015), <http://static.nfl.com/static/content/public/photo/2015/01/29/0ap3000000465343.pdf>, archived at <https://perma.cc/8GV6-JJ7W?type=pdf>.
- 81 Jenny Ventras, *Helmetless Football? It's the New Practice at New Hampshire*, Sports Illustrated, Dec. 4, 2014, <http://mmqb.si.com/2014/12/04/helmetless-football-practice-university-of-new-hampshire/>, archived at <http://perma.cc/6CBB-8Y5J>.
- 82 *Id.*
- 83 Holly Ramer, *In bid to reduce concussions, Dartmouth debuts remote-controlled tackling dummy*, U.S. News & World Report (Aug. 26, 2015 1:16 PM), <http://www.usnews.com/news/sports/articles/2015/08/26/tackling-goes-high-tech-at-dartmouth>, archived at <http://perma.cc/2UXD-LB4K>.
- 84 Josh Alper, *Steelers experimenting with robots in practice*, ProFootballTalk (May 20, 2016, 7:28 AM), <http://profootballtalk.nbcsports.com/2016/05/20/steelers-experimenting-with-robots-in-practice/>, archived at <https://perma.cc/TBD2-NLEX>.
- 85 Ken Belson, *Ivy League Moves to Eliminate Tackling at Football Practices*, N.Y. Times, Mar. 1, 2016, <http://www.nytimes.com/2016/03/02/sports/ncaafootball/ivy-league-moves-to-eliminate-tackling-at-practices.html>, archived at <https://perma.cc/24W6-VKQ2>.



Chapter 10

Club Employees



This chapter discusses the roles of NFL club general managers (often referred to as “GMs”), developmental staff, and scouts. Each of these employees has involvement with players at key moments in players’ careers. For example, as will be explained further below, general managers draft, sign, and release players; developmental staff help players after they have been drafted; and scouts gather as much information as possible on players. Consequently, these club employees have the potential to influence player health in important ways.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of club employees is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview club employees as part of this report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek

interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent to the interviews” on the grounds that the “information sought could directly impact several lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time; instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors. Nevertheless, the NFL did not facilitate review of this chapter by any of the types of club employees discussed: general managers; developmental staff; and, scouts.

(A) Background

1) GENERAL MANAGERS

NFL general managers by and large are the persons responsible for every aspect of the club. General managers report directly to the club’s owner and are responsible for putting together a cohesive and well-functioning organization that wins on the field and is maximally profitable off of it. To that end, general managers handle some of the most important football-related tasks, such as hiring the coach and making player personnel decisions, but also a variety of non-football specific tasks, including overseeing and directing the financials, human resources, marketing, stadium development, and media and community relations.¹ Additionally, general managers come from a variety of career paths, including many who played in either college and/or the NFL. Generally, about two-thirds of general managers played college football and about a fifth played in the NFL.²

General managers are an integral part of the entire NFL club and thus are an integral part of the process for identifying and addressing player health and welfare matters. General managers are responsible for, or at least intimately involved in, hiring coaches, doctors, athletic trainers and other club staff involved in player health matters.

Perhaps most importantly to the players, general managers make roster decisions affecting the player’s employment

and contract decisions affecting the player’s compensation.^a During the season, clubs are limited to a 53-man roster and general managers are constantly looking to replace injured players with healthy players and underperforming players with better players. It is thus vital that players be seen positively in the eyes of the general manager.

2) DEVELOPMENTAL STAFF

Each NFL club employs someone with the title of Director of Player Development or Director of Player Engagement. These employees are often ex-players who are responsible for assisting the club’s players with a blend of professional and personal issues, including transitioning from college to the NFL, getting the player and his family settled in a new environment, dealing with the media, continuing their education, planning for retirement, and providing general life coaching and guidance.³ As respected elder statesmen of the game, these individuals have the opportunity to play an important role in assisting players and making sure the actions taken are in their best interests.

Nevertheless, the ability of these staff members to have a meaningful impact on the club and players depends on the resources provided and the club’s commitment to player development. For example, in February 2012, the Washington football club hired 15-year veteran defensive end Phillip Daniels as their Director of Player Development.⁴ Daniels left the organization after one season because he felt the club did not take his position or player development seriously.⁵ Daniels never met with head coach Mike Shanahan or General Manager Bruce Allen and said he was not given any financial resources to implement the types of programs he thought would be beneficial to the club’s players and their families.⁶

3) SCOUTS

Quality scouts can also be the core of a successful football team. Each NFL club employs approximately 10 to 15 people in their player personnel/scouting departments. Scouts are separated into two categories: professional and college. Professional scouts are responsible for scouting players on other NFL clubs, while the college scouts fan out across the country and provide scouting reports on thousands of college football players.⁷

Scouts seek out every personal and professional detail on players and thus provide valuable insight to a club when it comes time for personnel decisions. For example, in

^a In any given season, there are, however, a handful of head coaches who possess final control over the club’s roster as opposed to the general manager.

addition to how well they play football, scouting reports often include details of family and romantic relationships, academic performance, troubles with the law or coaches, personality profiles, injury history, and perceived toughness and intelligence.^b Scouts often interview the players, their high school and college coaches, college medical staff, and others who know the players to obtain these details.⁸ Scouts then have the power to decide whether to label a prospect as “injury prone” or someone with “bad character.”

Moreover, it is important to note that many NFL clubs share scouting reports through one of two scouting services: National and BLESTO.⁹ Both services employ scouts who provide comprehensive reports to multiple clubs.¹⁰ Consequently, one scout can have a very big impact on a player’s future. It is thus essential that the scout’s information be accurate.

Scouting information can also play an important role once a player joins a club. If a club knows from a scouting report that a player has any particular social issues, such as family, friends or drugs, the club is potentially in a position to effectuate positive change.^c Additionally, if a scouting report reveals that a player suffers or has suffered from a physical ailment of some kind, the club can ensure that the player is treated appropriately. Indeed, out of their own self-interest, clubs are likely to try and provide a player with the support (physical, social, and otherwise) he needs to be a successful football player.

(B) Current Legal Obligations^d

The 2011 CBA contains no provisions specifically addressing the obligations of general managers, developmental staff, or scouts.

- b One scout described his efforts to obtain information about a college player as follows: “When you arrive at a school, you get there early in the morning and you meet with the football operations director. He gives you background information on the kid: the hometown, their family and those types of things. After that, you’ll go to a film room and watch tape for the biggest part of the day. You meet with the strength coach. You meet with an academic advisor that gives you some background on the player’s performance in those areas. You meet with the trainer to see if they have ever been injured, how their rehab habits are. Then you go to practice. You get a feel for their effort in practice, how hard they work and that type of thing.” See John Zernheld, *Scout’s Tales: Aaron Donald*, St. Louis Rams (Mar. 27, 2015), <http://www.stlouisrams.com/news-and-events/article-1/Scouts-Tales-Aaron-Donald/910aff46-e2cd-49d5-8a7a-45814fa773de>, archived at <http://perma.cc/NSJ6-4Q7L>.
- c For example, when the Dallas Cowboys drafted wide receiver Dez Bryant in the first round of the 2010 NFL Draft, after Bryant’s college career had ended in suspension, the Cowboys and Bryant negotiated a set of regulations concerning Bryant’s off-field activities and provided Bryant with a three-man security team. Josh Alper, *Cowboys Enact Set of Behavioral Rules for Dez Bryant*, ProFootballTalk (Aug. 26, 2012, 12:07 PM), <http://profootballtalk.nbcsports.com/2012/08/26/cowboys-enact-set-of-behavioral-rules-for-dez-bryant/>, archived at <http://perma.cc/6LFT-XYFL>.
- d The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

The CBA does contain many provisions concerning the responsibilities of clubs. General managers, as the persons at the top of the club’s football hierarchy, are generally responsible for ensuring the clubs’ compliance with its various CBA-identified obligations. Indeed, it is not uncommon for general managers to be fined when a club fails to comply with NFL policies.¹¹

Although scouts and development staff could potentially be complicit in the violation of the CBA or NFL policy, they are under no general obligation to ensure compliance with the CBA or NFL policies.

(C) Current Ethical Codes

There are no ethical codes specific to general managers, developmental staff, or scouts.^e

(D) Current Practices

It is generally believed that general managers have little involvement with player health decisions or treatment, other than in an administrative capacity such as relaying information from the club doctor to the contract advisor or letting the contract advisor know if the player is being placed on Injured Reserve. Moreover, the players we interviewed generally said they have had no relationship with their general managers.^f Some contract advisors believe general managers’ involvement in player health decisions has decreased in the last five years or so, as clubs have looked to avoid conflict and/or liability concerning these issues.^g

General managers are involved with the player’s health to the extent that it affects the club’s roster.^h Athletic trainers and, to a lesser extent, club doctors keep coaches and general managers apprised of players’ injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the

- e If any of these club employees were licensed in some other way, they might have additional obligations.
- f Current Player 7: “For the most part, the General Managers are up in the office. We don’t really see them, or the owners.” Current Player 8: “[T]he top 10 to 20 percent on each team, I think, have a passing relationship with [the General Manager], or some may have more but, again, this is going into my eighth year and I’ve never had a relationship with any General Manager.”
- g Contract Advisor 1: “I think in the last five to seven years, the coaches and general managers have taken a step back from the medical component. There’s too much risk and owners have probably told them . . . why would you do this, not to mention for the most part, general managers are not interested in having players get hurt on their watch more severely than they needed to be.” Contract Advisor 6: “[V]ery few general managers have a clue. They rely strictly on their medical staff. So they don’t really spend a lot of time [dealing with player health issues].” Former Player 3: “I think general managers are probably better than coaches at looking at the long view [on player health] because they have a little bit longer shelf life.”

event a player is unable to play.ⁱ Club medical staff keep coaches and general managers apprised of players' injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the event a player is unable to play. Players indicated that these meetings place pressures on players to practice to avoid having the athletic trainer tell the general manager that he should consider signing a potential replacement.

Current players often recognize the tenuous nature of their career and that it lays in the hands of the general manager and coaches, as Current Player 1 stated:

[Y]ou like to think that they care about you but I think you kind of realize that it's a business. They're just trying to get the most out of you for as many years as they can [while] they feel that you're still serviceable and productive.

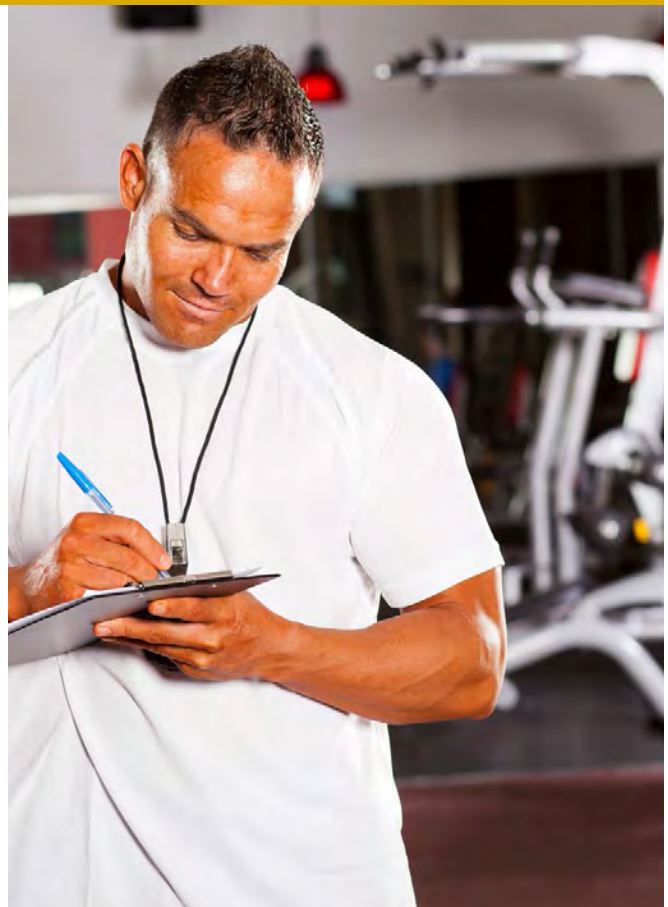
i Current Player 1: "[O]ur head trainer has a meeting with our GM and head coach at least once a week about whatever injuries are going on in the team." Current Player 9: "[General Managers] are in meetings with the head coaches and with the head trainers."

Players indicated that developmental staff is a "great resource" for a player, particularly when he is new to the club or city. The staff is able to get them situated with housing, transportation, and other living necessities. In addition, some players explained that the developmental staff would meet with rookies before the season to try to help them adjust to the NFL and also to understand the realities of the NFL.^j For example, the developmental staff might try to make the player aware of the possible brevity of his career and encourage him to spend his money wisely and to begin to consider life after football. Nevertheless, players also indicated that the development staff is generally far removed from matters concerning player health or the player's status on the club.

Despite the incredible amount of information and data that scouts collect about players, scouts generally do not play any role in player health once the player joins the club.

j Current Player 1: "[W]hen you're a rookie you spend a ton of time with the director of player of development. We have numerous meetings talking about how to spend your money, how to deal with family relationships now that you're in the NFL, [and] how to deal with outside influences. He really helps you to develop[.]" Current Player 8: "I think that the player development guy on each team assists the young guys in kind of the mental and social changes that they have to go through."

Club medical staff keep coaches and general managers apprised of players' injury status during weekly meetings so the general manager can make a decision about whether or not to sign another player in the event a player is unable to play.



(E) Enforcement of Legal and Ethical Obligations^k

In the event a player or the NFLPA believes a club employee has violated his obligations to the players, the player could try to commence a Non-Injury Grievance in accordance with the CBA.¹ The 2011 CBA directs certain disputes to designated arbitration mechanisms^m and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.¹² Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a “money award.”¹³

However, there are several impediments to pursuing a Non-Injury Grievance against a club employee. First and foremost, club employees are not parties to the CBA and thus likely cannot be sued for violations of the CBA.¹⁴ Instead, the player could seek to hold the club responsible for the club employee’s violation of the CBA.¹⁵ Second, the player’s claim might be barred by workers’ compensation statutes. Workers’ compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers based on the co-workers’ negligence.¹⁶ This was the result in the *Stringer* case (discussed in detail in Chapter 9: Coaches), and in multiple cases brought by NFL players against club doctors.¹⁷ It is unclear if or how this bar would apply in an arbitration. Third, Non-Injury Grievances must be filed within 50 days “from the date of the occurrence or non-occurrence upon which the grievance is based,”¹⁸ a timeframe that is much shorter than your typical statute of limitations. And fourth,

players likely fear that pursuing a grievance against a club employee could result in the club terminating him.ⁿ

In addition to workers’ compensation statutes, the CBA also presents a major obstacle for a player suing a club employee. This is because the Labor Management Relations Act (LMRA)¹⁹ bars or “preempts” state common law^o claims, such as negligence, where the claim is “substantially dependent upon analysis of the terms” of a CBA, *i.e.*, where the claim is “inextricably intertwined with consideration of the terms of the” CBA.²⁰ In order to determine whether a club employee was appropriately attentive to a player’s health or welfare needs, the court might have to refer to and analyze the terms of the CBA governing player health, resulting in the claim’s preemption.²¹ Preemption occurs even though club employees are not parties to the CBA and thus likely cannot be a party in any CBA grievance procedure. So long as the player’s claim is “inextricably intertwined” with the CBA, it will be preempted. In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the club), rather than through litigation.

In a 1995 lawsuit, two Houston Oilers players alleged that a Houston Oilers general manager and strength and conditioning coach subjected the players to a phony and brutal rehabilitation program designed to coerce the players into quitting the club.²² The players alleged state law claims of coercion, duress, extortion, assault and battery, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas held that the players’ claims were preempted by the CBA, because the CBA and the players’ contracts governed rehabilitation programs.²³ The United States Court of Appeals for the Fifth Circuit affirmed.²⁴

Currently, the only enforcement of club employees’ obligations concerning player health tends to be discipline by the NFL. It is thus suspect whether current practices and the current enforcement scheme are sufficiently protective of player health.

^k Appendix K is a summary of players’ options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players’ behalves.

^l See 2011 CBA, Art. 43 (discussing Non-Injury Grievance procedures). The term “Non-Injury Grievance” is something of a misnomer. The CBA differentiates between an “Injury Grievance” and a “Non-Injury Grievance.” An Injury Grievance is exclusively “a claim or complaint that, at the time a player’s NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.” 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, see 2011 CBA, Art. 15) concerning the CBA or a player’s terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player’s injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

^m For example, Injury Grievances, which occur when, at the time a player’s contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

ⁿ Current Player 8: “You don’t have the gall to stand against your franchise and say ‘They mistreated me.’ . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]” While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

^o Common law refers to “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions.” Black’s Law Dictionary (9th ed. 2009). The concept of “preemption” is “[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation.” *Id.*

(F) Recommendations Concerning Club Employees

NFL club general managers and scouts make important decisions concerning a player's career, often based on a player's current or expected health status. In addition, general managers, scouts, and developmental staff all have unique relationships with players that provide them a unique opportunity to promote player health. Indeed, like coaches, many NFL club employees develop close relationships with players, or are former players themselves, and are thus sensitive to protecting player health. Nevertheless, the inherent pressures of winning and running a successful business can sometimes cause these employees to make decisions or create pressures that negatively affect player health. While we were unable to interview these employees to gauge their viewpoints,^p we make the below recommendations to help improve the role of club employees in player health.

In Chapter 9: Coaches, we recommended that the NFLCA adopt and enforce a Code of Ethics that demands that coaches be responsible for player health. We then highlighted several important ethical concepts or practices for coaches, including that:

- Coaches should establish a locker room culture in which players and their health and safety are respected.
- Coaches should keep communications with players about their health to a minimum.
- Coaches should consider, respect, and care about players' post-career lives.
- Coaches should not encourage in any way the injury of opposing players.
- Coaches should ensure that the medical staff acts independently and does not feel pressured to act in any way other than in the player's best interests.
- Coaches' interests in winning cannot supersede player health.

Each of the above-listed ethical concepts or practices can also be applied to the club employees discussed in this chapter.

Additionally, while we recommended that the NFLCA enact and enforce such a Code of Ethics, we recognized that it might not have the resources or will to do so. Consequently, we recommended that the most important principles concerning coaches' conduct be incorporated into the CBA. Similarly, since there are generally no professional societies governing general managers, developmental staff, or scouts, these principles as applied to those club employees should be incorporated into the CBA.

Below are recommendations more specific to the club employees discussed in this chapter.

Goal 1: To encourage clubs and their employees to advance a culture of health.

Principles Advanced: Respect; Health Primacy; Managing Conflicts of Interest; and, Collaboration and Engagement.

Recommendation 10:1-A: Clubs and club employees, in particular general managers and developmental staff, should take steps to resolve any concerns discovered about a player's health.²⁵

^p As described more fully in the Introduction, Section D(2): Description of Legal and Ethical Obligations, citing ongoing litigation and arbitration, the NFL declined to consent to our request to interview persons currently employed by or affiliated with NFL clubs, including coaches, general managers, doctors, and athletic trainers. Therefore, we did not pursue interviews with these individuals.

Recommendations Concerning Club Employees – continued

Clubs expend considerable effort to learn a great deal of information about players, including their medical, family, intellectual, personality, financial and social issues. These issues can threaten a promising career. Clubs learn about these issues during the pre-Draft process, when considering signing the player as a free agent, and when the player is a member of their club. While clubs are interested in helping players address these issues to protect their investment in the player, clubs should look beyond what might only be short-term solutions that help the player while he is with the club to include longer-term solutions, such as a variety of programs offered by the NFL and NFLPA, that will improve player health over a more extended period of time.

Recommendation 10:1-B: Clubs should adequately support the developmental staff.

Players we interviewed generally spoke well of the effort by developmental staff to assist players, particularly young players. Nevertheless, through these interviews and news articles, it also seems likely that the developmental staff can sometimes be under-resourced and limited in its role. The developmental staff has the potential to be a powerful resource for players, particularly in pointing them to the various programs and benefits offered by the NFL and NFLPA, and helping them through the process of taking advantage of those programs and benefits. By better supporting these staffs and professionalizing their role, clubs can make gains in player health.



Endnotes

- 1 For a discussion of the role of NFL General Managers, see Christopher R. Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 Jeffrey S. Moorad Sports L.J. 427 (2013).
- 2 See *id.* at 475 (chart showing playing experience of NFL General Managers in 1992, 2002 and 2012).
- 3 See Mike Chappel, *Ex-Colt Pollard Feeling Blessed*, Indianapolis Star, Jun. 9, 2014, available at 2014 WLNR 15630530 (discussing fourteen-year veteran Marcus Pollard's hiring as the Jacksonville Jaguars Director of Player Development); Conor Orr, *Tyree's Hiring Comes With Controversy, Former WR Blasted For His Personal Views*, Star-Ledger (Newark, NJ), Jul. 23, 2014, available at 2014 WLNR 20130392 (discussing former wide receiver David Tyree's hiring as the New York Giants Director of Player Development).
- 4 Dan Steinberg, *Phillip Daniels Said He Was 'On an Island' When He Worked for the Redskins*, Wash. Post DC Sports Blog (Jun. 30, 2014), <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2014/06/30/phillip-daniels-said-he-was-on-an-island-when-he-worked-for-the-redskins/>, archived at <http://perma.cc/NZ5K-DW5K>.
- 5 *Id.*
- 6 *Id.*
- 7 See Deubert, *supra* note 1, at 466–72 (discussing composition, purpose and duties of scouting departments).
- 8 Ben Volin, *NFL Teams Go Extra Yard to Vet Prospects Before Draft*, Bos. Globe, Apr. 26, 2015, <http://www.bostonglobe.com/sports/2015/04/25/nfl-teams-homework-including-spying-draft-prospects/I5EIHkWSQBvI6fwvQNVkYl/story.html>, archived at <http://perma.cc/8NNY-GPR3>.
- 9 *Id.* BLESTO stands for Bears, Lions, Eagles and Steelers Talent Organization, although now approximately twelve Clubs use BLESTO.
- 10 Volin, *supra* note 8.
- 11 See *Fall From Grace, Saints Suffer Unprecedented Penalties from NFL for Running Bounty Program*, New Orleans Times Picayune, Mar. 22, 2012, available at 2012 WLNR 6061758 (\$500,000 fine for New Orleans Saints General Manager Mickey Loomis for alleged involvement in bounty program); J.P. Pelzman, *NFL Hits Jets with \$100K Fine*, N.J. Record, Sept. 17, 2009, available at 2009 WLNR 20070367 (\$25,000 fine for New York Jets General Manager Mike Tannenbaum for Club's failure to include injured quarterback Brett Favre on injury report); Mike Freeman, *Pro Football Notebook: Mara Not Blaming Tagliabue*, N.Y. Times, Dec. 17, 2000, <http://www.nytimes.com/2000/12/17/sports/pro-football-notebook-mara-not-blaming-tagliabue.html>, archived at <http://perma.cc/ZP64-WVUP> (\$400,000 fine for San Francisco 49ers General Manager Carmen Policy for Salary Cap violations).
- 12 See 2011 CBA, Art. 43, § 1.
- 13 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").
- 14 See *Jackson v. Kimel*, 992 F.2d 1318, 1325n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 15 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and Clubs but no other party).
- 16 See Alexander Cornwell, *Trapped: Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 17 See *Lotysz v. Montgomery*, 766 N.Y.S.2d 28 (N.Y. 2003) (NFL player's medical malpractice claim against Club doctor barred by state workers' compensation statute); *Daniels v. Seattle Seahawks*, 968 P.2d. 883 (Wash. Ct. App. 1998) (same); *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991) (same). See also *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor). For more information on the possibility of players suing coaches, see Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. Rev. 571 (2008).
- 18 CBA, Art. 43, § 2.
- 19 U.S.C. § 185.
- 20 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 21 See, e.g., *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).
- 22 *Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).
- 23 *Id.*
- 24 *Id.*
- 25 Mark Cuban, owner of the NBA's Dallas Mavericks, has advocated such an approach: "You don't go from the minors or college to the pros and all of a sudden become a spouse abuser, or any of a number of other serious personal issues. Those traits don't suddenly appear when you make a pro roster. They were there in college. They were probably there prior to college. Yet we as leagues ignore those issues when we sign and draft players. That has to change. We need to participate in programs that publicly identify those athletes that have issues, and not allow them to play unless they go through rigorous counseling. We need to demand that colleges and minor leagues and high schools and summer travel programs identify and report issues. By not reporting abuse or other issues with their players, they could be costing them a shot at the pros. It's our fault for not being more proactive. It's college's fault for not red-flagging these kids and getting them help." Tim MacMahon, *Cuban: Be Proactive About Red Flags*, ESPN (Nov. 8, 2014, 1:46 PM), http://espn.go.com/dallas/nba/story/_/id/11836940/mark-cuban-need-more-proactive-athlete-red-flags, archived at <http://perma.cc/5U2J-7KNS>.



Chapter 11

Equipment Managers



Each NFL club employs three to four equipment managers. While equipment managers assist players in a variety of ways, their principal job is to help outfit players in equipment that will maximize their safety on the field, a crucial component of player health.

Before we begin our analysis, it is important to point out that throughout this chapter we emphasize that the practice of equipment managers is likely heterogeneous from club to club at least to some extent. Nevertheless, we were unable to interview equipment managers as part of this Report to gain a better understanding of their work. In November 2014, we notified the NFL that we intended to seek interviews with club personnel, including general managers, coaches, doctors, and athletic trainers. The NFL subsequently advised us that it was “unable to consent” to the interviews on the grounds that the “information sought could directly impact several

lawsuits currently pending against the league.” Without the consent of the NFL, we did not believe that the interviews would be successful and thus did not pursue the interviews at that time; instead, we have provided these stakeholders the opportunity to review draft chapters of the Report. We again requested to interview club personnel in July 2016 but the NFL did not respond to that request. The NFL was otherwise cooperative—it reviewed our Report and facilitated its review by club doctors and athletic trainers. The NFL also provided information relevant to this Report, including but not limited to copies of the NFL’s Medical Sponsorship Policy (discussed in Chapter 2: Club Doctors) and other information about the relationships between clubs and doctors.

Nevertheless, the NFL did not facilitate review of this chapter by any equipment managers. On the other hand, the American Equipment Managers Association (AEMA) did review the Report and provide comments.

(A) Background

Equipment managers are responsible for million dollar or more budgets and for ordering and constantly stocking hundreds of items players want and need in every conceivable variety, from their helmets and cleats to gum, washcloths, and toothpaste.¹ Equipment managers take pride in being responsive to the players’ every need to make sure they are maximally comfortable and prepared to play.² Perhaps most importantly, equipment managers help players select equipment and make sure the equipment fits according to the manufacturer’s guidelines.³

Equipment managers are also a critical link between equipment manufacturers (discussed in Chapter 16) and players. Equipment managers deal directly with equipment manufacturers and attend two NFL-organized seminars a year to keep up to date on the latest equipment so that they can provide the players the best available options.⁴

In summary, players rely on the equipment managers to help prepare and protect them. Not surprisingly, players and equipment managers sometimes develop close, personal relationships during their tenures with a club.⁵

The AEMA, a voluntary organization, provides certification to equipment managers working in sports across the country.⁶ The certification process requires: (1) a four-year college degree; (2) at least two years of experience working in athletics; and, (3) passing a written examination.⁷ The written examination covers management, administration, professional development, procurement, accountability, maintenance, and fitting and safety.⁸

The AEMA has a limited role in the NFL, in part because the AEMA’s limited resources prevent the AEMA from engaging with the NFL and other leagues as robustly as it would like.⁹ Approximately 60 to 70 percent of NFL equipment managers are AEMA-certified but neither the CBA nor the NFL independently requires any certification for equipment managers.¹⁰ Nevertheless, in recent years, the NFL has increasingly shown an interest in the AEMA’s work and the importance of qualified, well-trained equipment managers.¹¹

(B) Current Legal Obligations^a

The CBA contains no provisions specifically relevant to equipment managers or equipment. The NFL does have detailed policies on what equipment is mandatory for players, but these rules are directed at players, not equipment managers.

Employers have a common law non-delegable obligation to provide safe equipment to their employees.¹² A non-delegable duty is one whereby the employer cannot escape liability by having passed along the task to an employee; the employer will generally be held vicariously liable for the employee’s conduct concerning the provision of equipment regardless.¹³ In the context of NFL equipment managers, the law thus imposes the obligation to provide safe equipment to the players on the club, rather than the equipment managers.

Lastly, it is plausible that NFL players and equipment managers have a fiduciary relationship. Nevertheless, there are no known cases in which a player has alleged an equipment manager owed or breached a fiduciary duty and enforcing an alleged fiduciary relationship poses legal problems discussed below.^b

(C) Current Ethical Codes

The AEMA has a Code of Ethics for equipment managers.¹⁴ Of relevance, the fifth objective of the AEMA Code of Ethics is: “[t]o work as a group to bring about equipment improvements for greater safety of participants in all

a The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

b Generally speaking, a fiduciary is “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.” “Duty,” Black’s Law Dictionary (9th ed. 2009). Whether a fiduciary relationship exists is a fact-based inquiry into the nature of the relationship. *Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 455 (S.D.N.Y. 2012) (applying New York law); *Carcano v. JBSS, LLC*, 684 S.E.2d 41, 53 (N.C. Ct. App. 2009); *L.C. v. R.P.*, 563 N.W.2d 799, 802 (N.D. 1997); *Allen Realty Corp. v. Holbert*, 318 S.E.2d 592, 595 (Va. 1984); *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 511 (Minn. 1976). An argument could exist that the relationship of trust and confidence between a player and the equipment managers rises to that of a fiduciary relationship.

sports.” The AEMA Code of Ethics describes equipment manager’s obligations to players as follows:

Each and every member of an athletic squad should be treated conscientiously without discrimination or partiality. An athletic equipment manager can wield a great amount of influence on members of athletic squads by proper conduct and the use of good judgment in dealing with various personalities and temperaments.

In the care of equipment, the athletic equipment manager must be thorough in carrying out the accepted procedures and instructions. Any carelessness or laxity on the part of the athletic equipment manager in following through his responsibilities to players is a breach of ethical conduct (sic).¹⁵

(D) Current Practices

Equipment managers’ responsibilities have not changed much over time. As discussed above, they are focused on providing players not only their equipment, but also all the little things that make it easier for players to succeed. They are important but not particularly powerful employees in the NFL club hierarchy. Current players we interviewed had only good things to say about equipment managers:

- **Current Player 1:** *“I would say [they] are really good. Any time I need something, they’ve always taken care of it for me. And even for certain injury specific equipment, maybe it’s like an extra pad, shoulder pads or shin guards, something like that, or something you need done to your helmet, they’ve always been good about that – done whatever I’ve asked of them.”*
- **Current Player 2:** *“They do play a big role. Especially when it comes to helmets . . . , making sure that our helmets fit properly, that we’re in technology that’s up to date . . . I know that our guy here does a great job of that. He goes above and beyond to make sure everything that we wear . . . are up-to-date and fitting us properly.”*
- **Current Player 4:** *“I think they do a great job of getting players the equipment they want/or need.”*

Today, equipment managers seem to take serious their responsibility to help players understand the different helmet options and to choose one that fits best for that player. The New York Giants maintain two racks of possible helmet options for players to try on and consider.¹⁶ There, Joe Skiba, the Giants’ equipment director and a member of the NFL’s Subcommittee on Safety Equipment and Playing Rules, can explain to the players “the intricacies of helmet technology.”¹⁷

The equipment manager’s assistance in helping a player finding the right helmet is crucial. According to the American Academy of Neurology, “[t]here is moderate evidence indicating that use of a helmet (when well fitted, with approved design) effectively reduces, but does not eliminate, risk of concussion and more-serious head trauma in hockey and rugby; [and] similar effectiveness is inferred for football.”¹⁸

According to the American Academy of Neurology, “[t]here is moderate evidence indicating that use of a helmet (when well fitted, with approved design) effectively reduces, but does not eliminate, risk of concussion and more-serious head trauma in hockey and rugby; [and] similar effectiveness is inferred for football.”

To assist equipment managers help players with their helmet decisions, in 2015, the Engineering Subcommittee of the NFL’s Head, Neck and Spine Committee completed a study evaluating the ability of 17 different helmets to absorb impacts, including accounting for rotational velocity and rotational acceleration.¹⁹ Based on the test results, the NFL created a poster listing the helmets in order of performance for equipment managers to display for the players’ review.²⁰ The study was repeated in 2016, and again presented to the players in both a memorandum and as a poster.²¹ Similarly, according to the NFL, the NFL and NFLPA have also commissioned studies concerning cleats and shoes, and have created posters warning players about certain shoes and cleats that are not recommended for use.²² More information on player equipment can be found in Chapter 16: Equipment Manufacturers.

The difficulty equipment managers sometimes face is player cooperation. Linebacker Keith Rivers admitted that appearance generally mattered more than safety: “a lot of guys go looks first.”²³ Additionally, many players are reluctant to change helmets from the ones they have been playing with for their entire NFL career, if not since college.²⁴ This

practice may stand in the way of adopting safer helmets or other equipment by players. Nevertheless, while some players might choose their helmet based on looks, what is important is that they are choosing among helmets that have met threshold requirements for safety. What is essential is that equipment managers help players find the best helmet for them.

(E) Enforcement of Legal and Ethical Obligations^c

Any claim brought by a player against an equipment manager would likely be barred by workers' compensation laws. Workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits against co-workers (such as NFL players and equipment managers) based on the co-workers' negligence.²⁵

The CBA also presents a potential obstacle for claims against an equipment manager. This is because the Labor Management Relations Act (LMRA)²⁶ bars or "preempts" state common law^d claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA.²⁷ In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the Club), rather than litigation. In the case of equipment managers, the CBA is generally silent as to the provision of equipment and thus it is not certain that claims concerning equipment against either the club or equipment manager would be preempted by the LMRA. Nevertheless, as discussed in several chapters of this Report, the NFL has successfully asserted the preemption defense in many lawsuits concerning the health of NFL players.

Instead of attempting a lawsuit, players who believe they have been harmed by the actions of their equipment managers could likely commence a Non-Injury Grievance.^e The 2011 CBA directs certain disputes to designated arbitration mechanisms^f and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.²⁸

However, there are several impediments to pursuing a Non-Injury Grievance against an equipment manager. First and foremost, club employees are not parties to the CBA and thus likely cannot be sued for violations of the CBA.²⁹ Instead, the player could seek to hold the club responsible for the equipment manager's violation of the CBA.³⁰ Second, as discussed above, the player's claim might be barred by workers' compensation statutes. Third, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based,"³¹ a timeframe that is much shorter than your typical statute of limitations. And fourth, players likely fear that pursuing a grievance against an equipment manager could result in the club terminating him.^g

The AEMA is empowered to investigate possible breaches of its Code of Ethics but its remedial authority is limited to a "letter or censorship, letter of censorship with a period of probation, or cancellation of membership."

c Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

d Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

e The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

f For example, Injury Grievances—which occur when at the time a player's contract was terminated the player claims he was physically unable to perform the services required of him because of a football-related injury—are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

g Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]" While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.



(F) Recommendations Concerning Equipment Managers

As a preliminary matter, we recommend equipment managers continue to act as they have. Reports indicate that equipment managers work diligently and take seriously their role in providing players with equipment that will minimize the health and safety risks of playing football. Equipment managers do not appear to have any incentive to make decisions which might jeopardize player health, *e.g.*, such as pressuring a player to play with an injury, like other club employees, such as coaches or medical staff. Additionally, the twice-annual meetings for equipment managers and manufacturers seem like an appropriate way for the equipment managers to remain current and educated on the latest equipment. Minimal other recommendations are needed concerning equipment managers.

Goal 1: To ensure that players are served by the best possible equipment managers.

Principles Advanced: Respect; Health Primacy; and, Collaboration and Engagement.

Recommendation 11:1-A: The CBA should require that all equipment managers be certified by the AEMA.

As discussed above, the AEMA's certification program sets reasonable minimum education and experience requirements and requires equipment managers to pass a test certifying their competence in a variety of issues pertinent to the equipment industry, including fitting and safety. In addition, the AEMA requires its members to attend continuing education courses. Requiring NFL equipment managers to be AEMA-certified is a meaningful way of ensuring that the equipment managers working with NFL players are among the most qualified and educated in the industry. The requirement is meaningful enough that it should be codified in the CBA. Ensuring highly-qualified equipment managers will help ensure that players are using the best, well-fitting, and safest equipment possible.

Endnotes

- 1 See Bill Pennington, *A Full-Gear Operation*, N.Y. Times, Aug. 17, 2013, <http://www.nytimes.com/2013/08/17/sports/football/for-the-giants-a-full-gear-operation.html> archived at <http://perma.cc/2SQB-LUSR>; Kevin Baxter, *NFL: Gearing Up for the Game, a Whole Laundry List*, L.A. Times, Nov. 6, 2012, available at 2012 WLNR 23540542; Craig K. Paskoski, *Lit-tlestown Resident Helps the Ravens Look Good, Play Well*, Evening Sun (Hanover, PA), Oct. 16, 2011, available at 2011 WLNR 21180003; Danny Woodward, *All the Right Equipment: Cowboys Staff Makes Sure Team Has Everything It Needs*, Dall. Morning News, Nov. 21, 2001, available at 2001 WLNR 11689243; Rob Huizenga, M.D., You're Okay, It's Just a Bruise 13 (1994) (discussing Los Angeles Raiders players "stealing various toiletries").
- 2 See *id.*
- 3 Interview with Kelly Jones, Certification Steering Committee Chair, AEMA, and Equipment Manager, Gettysburg College, and Mike Royster, Executive Director, AEMA, and Equipment Manager, University of Tennessee Chattanooga (Oct. 27, 2014).
- 4 See Sam Borden, *Despite Risks, N.F.L. Leaves Helmet Choices in Players' Hands*, N.Y. Times, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/sports/football/despite-risks-nfl-leaves-helmet-choices-in-players-hands.html>, archived at <https://perma.cc/K4YB-PBT7?type=pdf>. Research did not reveal the details about the nature of these seminars, *e.g.*, whether they are more like trade shows than informational seminars.
- 5 See, *e.g.*, Paskoski *supra* note 1 (discussing Baltimore Ravens Pro Bowl defensive end Terrell Suggs referring to Ravens' equipment manager Ed Carroll as "dad").
- 6 For more information on the AEMA, see its website at <http://equipmentmanagers.org>.
- 7 Interview with Jones and Royster, *supra* note 3.
- 8 *Certification*, Athletic Equipment Managers Ass'n, <http://equipmentmanagers.org/certification> (last visited Aug. 7, 2015), archived at <http://perma.cc/2SSQ-9JGS>.
- 9 Interview with Jones and Royster, *supra* note 3.
- 10 *Id.* By comparison, approximately 90 percent of NCAA Division I equipment managers are AEMA members.
- 11 *Id.*
- 12 *Suburban Hospital, Inc. v. Kirson*, 763 A.2d 185, 205 (Md. 2000); *Gerrish v. Savard*, 739 A.2d 1195, 1199 (Vt. 1999); *Johansen v. Anderson*, 555 N.W.2d 588, 593 (N.D. 1996); *Smith v. Massey-Ferguson, Inc.*, 883 P.2d 1120, 1131 (Kan. 1994); *Kennemer v. McFann*, 470 So.2d 1113, 1116 (Ala. 1985); *Gerger v. Campbell*, 297 N.W.2d 183, 186 (Wis. 1980).
- 13 See *id.*
- 14 The AMEA Code of Ethics is on file with the authors.
- 15 *Id.*
- 16 Borden, *supra* note 4.
- 17 *Id.*
- 18 *Update: Evaluation and Management of Concussion in Sports—2013*, Am. Acad. Neurology, https://www.aan.com/uploadedFiles/Website_Library_Assets/Documents/3Practice_Management/5Patient_Resources/1For_Your_Patient/6_Sports_Concussion_Toolkit/evaluation.pdf (last visited Aug. 7, 2015), archived at <https://perma.cc/7943-3EXG?type=pdf>.
- 19 Nat'l Football League, 2015 Player Health & Safety Report 12 (2015), <http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf>, archived at <https://perma.cc/Y4BN-TUP7?type=pdf>.
- 20 *Id.*
- 21 NFL Comments and Corrections (June 24, 2016).
- 22 *Id.*
- 23 Borden, *supra* note 4.
- 24 *Id.* (Giants center David Baas, who is in his eighth NFL season, said veterans can be hesitant to change anything related to their equipment. "Some guys don't want to switch because they're comfortable in the same one they've had since college or whatever," he said.)
- 25 See Alexander Cornwell, *Trapped; Missouri Legislature Seeks to Close Workers' Compensation Loophole with Some Co-Employees Still Inside*, 77 Mo. L. Rev. 235, 235 (2012); David J. Krco, *Case Note: Torts – Narrowing the Window: Refining the Personal Duty Requirement for Coemployee Liability Under Minnesota's Workers' Compensation System – Stringer v. Minnesota Vikings Football Club, LLC*, 33 Wm. Mitchell L. Rev. 739, 739 (2007); John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491, 497 (2001).
- 26 U.S.C. § 185.
- 27 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 28 See 2011 CBA, Art. 43, § 1.
- 29 See *Jackson v. Kimel*, 992 F.2d 1318, 1325 n.4 (4th Cir. 1993) (collecting cases holding that employees that are not signatories to the CBA cannot be sued for violations of the CBA).
- 30 See 2011 CBA, Art. 2, § 2 (generally discussing CBA's binding effect on NFL, NFLPA, players and clubs but no other party).
- 31 CBA, Art. 43, § 2.



Part 5: **Player Advisors**



**Contract
Advisors
(Agents)**



**Financial
Advisors**



Family





Part 5 discusses those individuals closest to the players and who should always be looking out for the players' best interests: contract advisors, financial advisors, and family members.



In reading this part, it is important to remember our broad definition of health, which includes and extends beyond clinical measurements to the social determinants of health, including financial wellbeing, education, and social support. The stakeholders discussed in this part are particularly important in these broader aspects of health. As a result, these stakeholders are also critical stakeholders in protecting and promoting players' long-term health.

Additionally, we remind the reader that while we have tried to make the chapters accessible for standalone reading, certain background or relevant information may be contained in other parts or chapters, specifically Part 1 discussing Players and Part 3 discussing the NFL and NFLPA. Thus, we encourage the reader to review other parts as needed for important context.



Chapter 12

Contract Advisors (aka “Agents”)



Contract advisors, more commonly known as “agents,” are often players’ most trusted and important resources and allies when it comes to protecting them during their NFL career, including their health. In fact, as will be explained below, contract advisors are “agents” of both players and the NFLPA. They often communicate with players on a nearly daily basis during the season and are obligated to represent the players’ interests, particularly when those interests conflict with those of the club. Consequently, contract advisors are typically the first and most important line in ensuring that player’s health-related rights (and other rights) are followed and enforced. As we emphasized in the Introduction to the Report, we employ a broad definition of “health,” which includes and extends beyond clinical measurements to the social determinants of health, including financial wellbeing, education, and social support. Contract advisors play a key role concerning these issues, as well as those related to the player’s medical health. Below, we describe the

legal and regulatory background of contract advisors, how they come to represent NFL players, and the types of services they generally provide to players, current and former. Additionally, it is useful to keep in mind that approximately 62 percent of contract advisors are attorneys, creating unique obligations and relationships, as will be discussed in more detail below.

To better inform our understanding of contract advisors' obligations and practices, we conducted approximately hour-long interviews with six currently active contract advisors. On average, those interviewed had been NFLPA-certified contract advisors for 17 years, had each represented an estimated 275 players in their careers, and currently represent 23 players. The interviews were not intended to be representative of the entire contract advisor population or to draw scientifically valid inferences, but were instead meant to be informative of general practices among these advisors. We provide anonymous quotes from these interviews throughout this Report, and urge the reader to keep that caveat in mind throughout. We then invited all six contract advisors to review a draft of this chapter prior to publication. Although five agreed to review a draft, only three provided comments. In addition, we interviewed an NFLPA representative to understand the NFLPA's perspective of the contract advisor industry.^a

Finally, this chapter contains significant discussion about the contract advisor industry and practices. On their face, these items may not seem directly related to player health. However, as mentioned above and as will be explained below, contract advisors are a crucial advocate and defender of players concerning all matters, and their health in particular. For example, it would be a very rare occurrence for a player to commence a Non-Injury Grievance, Injury Grievance, or lawsuit without the support and advice of his contract advisor. Nevertheless, as will also be explained below, there are serious problems in the contract advisor industry. Until and unless these problems are addressed, there will continue to be problems promoting and protecting player health. Hence, resolving issues in the contract advisor industry is an important step in promoting and protecting player health.

^a During the course of reviewing this Report for confidential information, the NFLPA requested information obtained from the NFLPA be attributed to the NFLPA generally, rather than specific NFLPA employees. For our purposes, the specific individual that provided the information was irrelevant, so long as the NFLPA provided the information. Thus, we agreed not to identify specific NFLPA employees.

(A) Background

Pursuant to the National Labor Relations Act (NLRA), the NFLPA is currently “the exclusive representative[] of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”¹ The NFLPA thus has “exclusive authority to negotiate with NFL Clubs on behalf of NFL players.”² The NFLPA, as is its prerogative, nevertheless delegates a portion of its exclusive representational authority to contract advisors,³ more commonly known as “agents.” If the NFLPA so chose, it has the right under the NLRA to itself negotiate every NFL player's contract. Thus, contract advisors only exist as a profession because the NFLPA allows them to exist. Since the 1993 collective bargaining agreement (CBA), the NFL has explicitly recognized the NFLPA's authority to govern contract advisors and has agreed to fine clubs that negotiate with contract advisors not certified by the NFLPA.⁴

Contract advisors were not historically well received by clubs. Vince Lombardi, the Hall of Fame coach of the Green Bay Packers from 1959 to 1967 who also negotiated the Club's contracts, famously refused to deal with agents, including trading a player who had shown up to a contract negotiation with a lawyer.⁵

Nevertheless, as the business of football grew, so did the concept of players using advisors to assist with contract negotiations, marketing, and other business items. Today, all but a handful of NFL players retain contract advisors. The NFLPA has been certifying contract advisors in at least some fashion since 1983.⁶ However, the NFLPA's certification and enforcement procedures in the 1980s were largely considered ineffective.⁷

When the NFLPA de-certified itself as the official and exclusive bargaining representative of NFL players in 1989,⁸ it also lost the legal authority to regulate contract advisors pursuant to the NLRA.⁹ Thus, no progress was made on tightening contract advisor regulation until the NFLPA re-certified itself in 1993.¹⁰

In 1994 and the years shortly thereafter, the NFLPA released new and more comprehensive Regulations Governing Contract Advisors (“Contract Advisor Regulations”), including new certification requirements, a standard code of conduct for contract advisors, an arbitration mechanism for disputes between or among players and/or contract advisors, and a cap on contract advisor's fees equal to 3 percent of a player's negotiated compensation. Of note, the new Contract Advisor Regulations explicitly obligated contract advisors to “[a]ct at all times in a fiduciary capacity on behalf of players,”¹¹ an obligation that continues to this day.

The Contract Advisor Regulations have been amended from time to time since 1994, most recently in 2012,¹² but still largely follow the structure and rules set forth in the 1990s. The 2012 Contract Advisor Regulations, discussed in more detail below, require individuals seeking certification as contract advisors to have a college degree and post-graduate degree or, as an alternative, at least seven years of sufficient negotiating experience at the NFLPA's discretion.¹³ In addition, they must pass a written examination covering the provisions of the Contract Advisor Regulations and CBA.¹⁴

Contract advisors who represent fewer than 10 active players pay an annual fee to the NFLPA of \$1,500.¹⁵ Contract advisors who represent 10 or more active players pay an annual fee of \$2,000.¹⁶

1) FORMATION OF THE PLAYER-CONTRACT ADVISOR RELATIONSHIP

Contract advisors typically begin recruiting players as soon as the player demonstrates that he might become an NFL player. For some players, this might mean they will begin receiving phone calls, text messages and recruitment materials from contract advisors their freshman year of college—even though they cannot enter the NFL Draft until after their junior year.¹⁷ For most players, the recruiting efforts become most intense in the summer preceding their senior season. Beginning with that summer and continuing through the season, players will hear from contract advisors according to their perceived Draft status: top prospects will hear from dozens of contract advisors, while players who are questionable to be drafted might only hear from a few.

Ultimately, the college players, with the help of their family, friends, and college, will sort through the multitude of contract advisors, meet with a few, and choose one. The player and contract advisor formalize the relationship by executing the NFLPA's Standard Representation Agreement (SRA), which dictates the parties' obligations to one another with minimal permitted variation.^b The SRA is typically executed within days of the player's collegiate season being completed.

Within weeks (if not days) of the SRA's execution, the contract advisor will typically arrange (*i.e.*, pay) for the player to be flown to a training facility. Over the next few months, the player, under the tutelage of professional athletic trainers and football coaches (often former NFL players or

coaches), will prepare for the NFL Combine in February as well as additional workouts that may be held at the player's college or at an NFL club's facility around the same time to help advance the player's stock before the NFL Draft in April or May. The costs of training are typically between \$15,000 and \$35,000 per player.

If the NFLPA so chose, it has the right under the NLRA to itself negotiate every NFL player's contract. Thus, contract advisors only exist as a profession because the NFLPA allows them to exist.

The contract advisors almost always pay the full cost of the player's training and housing during this crucial time period. However, most contract advisors require players to execute an agreement obligating the player to repay the costs of training in the event the player terminates the contract advisor prior to the contract advisor negotiating a contract on behalf of the player (at which point the player will be obligated to pay the contract advisor commissions on that contract).

Contract advisors will also look to make sure their client is in optimal physical health for the NFL Combine and NFL Draft. The contract advisor will often receive the player's college medical records and have any condition that might cause concern to an NFL club (such as a prior injury) be examined and treated by a doctor trusted by the contract advisor. The contract advisor will also often enlist the services of nutritionists, massage therapists, tutors, and others to ensure the players are maximally prepared for the Combine and other workouts.

In addition to paying for training, many (but not all) contract advisors routinely provide new clients with tens or hundreds of thousands of dollars in loans or advances which generally do not have to be repaid if the player continues to retain the contract advisor. The legality of these advances will be discussed in further detail below.

In sum, the contract advisor and his staff will be involved in the player's life on a near constant basis from the moment the player signs the SRA until he is drafted. What happens after the player is officially a member of an NFL club is discussed below.

^b The SRA requires the parties to set forth the contract advisor's compensation, up to the maximum of 3 percent. Additionally, the SRA permits the parties to execute other agreements concerning the representation, including loans or advances paid to the player by the contract advisor.

2) SERVICES PROVIDED TO CURRENT PLAYERS

A contract advisor's duties run the gamut of almost every service a professional could offer a client. Services range from the more intellectual tasks of negotiating contracts, securing endorsements, handling relations with the club, providing career and post-career counseling (including taking advantage of programs and benefits offered by the NFL and NFLPA), and providing legal services and financial advice, to the most mundane and personal tasks, such as making travel and dinner reservations, resolving housing and parking issues, purchasing the latest cellular phones and technological gadgets, arranging for free clothing, and helping handle domestic issues.¹⁸ More established contract advisors generally enlist client service representatives, recently certified contract advisors, and interns to handle these pettier matters. Nevertheless, in general, contract advisors provide advice for every aspect of an NFL player's life. Contract Advisor 4:

I end up, in the role of agent as being the quarterback for everything that happens in their life or in their career. And so it ends up being a wide range of things from 'I want to go on vacation,' 'I want to rent a car,' to 'I just blew out my knee, what do I do.'

For their efforts, contract advisors can be compensated a maximum of 3 percent of the compensation¹⁹ a player receives in each playing season covered by the contract negotiated by the contract advisor.²⁰ Contracts executed pursuant to the Franchise or Transition tag provisions of the CBA,²¹ are further limited to between 1 percent and 2 percent depending on how many times the player has previously been so designated.²² Nevertheless, competition among contract advisors routinely drives them to offer their services for less than 3 percent. Importantly, a "Contract Advisor is prohibited from receiving any fee for his/her services until and unless the player receives the compensation upon which the fee is based."^{23,c}

Players can and do switch contract advisors very easily. Players can terminate the Standard Representation Agreement at any time, effective five days after written notice of termination to the contract advisor.²⁴

3) RELATIONSHIP WITH FORMER PLAYER-CLIENTS

Once a player's NFL career has ended, his relationship with the contract advisor is generally no longer governed by the Contract Advisor Regulations^d and the contract advisor and player have no more contractual obligations to one another. Thus, contract advisors generally do not receive any compensation from a player after his playing career ends (unless they represent them in marketing, coaching or broadcasting deals). Nevertheless, the contract advisors interviewed generally expressed that they believe their role is unchanged—to provide the player with whatever guidance and support he needs. The contract advisors we interviewed admitted that the degree of assistance provided to a player after his career is over depends on the strength of the relationship between the contract advisor and player; some former players will communicate with their contract advisor almost every day, just as they did when they were playing; while those who communicated less with their contract advisor during their career could easily break off all communication with their former contract advisor.^e

Contract advisors have multiple reasons for continuing to help players after their career. First, many develop very close, almost sibling-like relationships with their clients. Second, they can often continue to benefit from their association with their former clients. In particular, if a former NFL player happens to stay involved with his former college football team, the contract advisor might use his former client to facilitate meetings with players from that team. Generally speaking, success in the contract advisor industry is very reputation-driven; thus, contract advisors will generally try to avoid doing things that could make them look bad in the eye of players—current, former, and future.

Not surprisingly, multiple contract advisors discussed the difficulty players have in transitioning from a highly competitive and structured life in the NFL to being unsure of what to do next. Contract advisors explained that those who prepare themselves for the transition understandably handle it much better. Thus, all of the interviewed contract advisors expressed the importance of preparing for a

d The contract advisor will still be subject to the contract advisor's broad prohibition against "[e]ngaging in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other activity which reflects adversely on his/her fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players." 2012 NFLPA Contract Advisor Regulations, § 3(B)(14).

e Contract Advisor 3: "[I]t all depends on the player. Some I'm still pretty involved with, others just kind of disappear and fade away. It really depends on what your relationship was with the guy during their career and kind of what their motivations are post career. So you know there's a few that I still send Christmas cards to. There's others that I don't even know if they have my e-mail."

c Current Player 9: "One thing that guys aren't as happy about, I think across the board, is agent fees and paying agents 3 percent."

player's exit from the NFL as soon as possible. To prepare players for their life after football, the contract advisors often encourage players to finish their degree if necessary in the offseason, consult with a financial advisor (assuming it is one the contract advisor trusts), get media training, take advantage of workshops offered by the NFL and NFLPA, and participate in internships in the offseason.

(B) Current Legal Obligations^f

Contract advisors are regulated by several bodies of law: 1) common law; 2) Contract Advisor Regulations; 3) state statutes; and, 4) federal statutes.

1) COMMON LAW

First and foremost, pursuant to the NLRA, contract advisors exist to represent and protect the player's best interests in dealings with the club. More broadly, contract advisors are "agents," which, by law, are authorized to act on the behalf of another individual (the "principal") and must act in the best interests of the principal at all times.²⁵ The agent has many duties to the principal, including loyalty, care, good faith, competence and diligence.²⁶ These duties are more generally known as fiduciary duties. Generally speaking, a fiduciary is "a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor."²⁷ While the existence of a fiduciary relationship generally requires a fact-based inquiry,²⁸ there is little doubt that contract advisors and their player-clients are in a fiduciary relationship.

2) CONTRACT ADVISOR REGULATIONS

The Contract Advisor Regulations are a set of obligations established by the NFLPA by which contract advisors have agreed to abide.

The Contract Advisor Regulations include a comprehensive list of 19 actions a contract advisor is "required" to take.²⁹ Of the most relevance, they must:

- (7) Advise the affected player and report to the NFLPA any known violations by an NFL Club of a player's individual contract or of his rights under any applicable Collective Bargaining Agreement;

* * *

- (14) Fully comply with applicable state and federal laws;
- (15) Become and remain sufficiently educated with regard to NFL structure and economics, applicable Collective Bargaining Agreements and other governing documents, basic negotiating techniques, and developments in sports law and related subjects[.];
- (16) Disclose in an addendum (in the form attached as Appendix G) attached to the Standard Representation Agreement between the Contract Advisor and player, the names and current positions of any NFL management personnel or coaches whom Contract Advisor represents or has represented in matters pertaining to their employment by or association with any NFL club;
- (17) Act at all times in a fiduciary capacity on behalf of players;

* * *

- (20) Educate player-clients as to their benefits, rights and obligations pursuant to the Collective Bargaining Agreement; and to advise and assist those player-clients in taking maximum advantage of those benefits and rights, including, without limitation, Termination Pay, Severance Pay, Bert Bell/Pete Rozelle disability benefits, workers compensation benefits, second medical opinions, and right to chose (sic) their own surgeon.⁹

Just as importantly, the Contract Advisor Regulations list 31 specific actions in which contract advisors are **prohibited** from engaging. Of particular relevance, they are prohibited from:

- (2) Providing or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services;
- (3) Providing or offering money or any other thing of value to a member of the player's or prospective player's family or any other person for the purpose of inducing or encouraging that person to recommend the services of the Contract Advisor;
- (4) Providing materially false or misleading information to any player or prospective player in the context of recruiting the player as a client or in the course of representing that player as his Contract Advisor;

* * *

^f The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

^g The contract advisor's obligation to help players obtain second medical opinions and to receive treatment from the surgeon of their choice demonstrates the unique and significant role contract advisors play in player health.

- (8) Engaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL players;

* * *

- (12) Concealing material facts from any player whom the Contract Advisor is representing which relate to the subject of the player's individual contract negotiation;
- (13) Failing to advise the player and to report to the NFLPA any known violations by an NFL Club of a player's individual contract;
- (14) Engaging in unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or other activity which reflects adversely on his/her fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players;

* * *

- (19) Violating the confidentiality provisions of the National Football League Policy and Program for Substances of Abuse. The NFLPA Executive Director in consultation with the Disciplinary Committee may fine a Contract Advisor in accordance with the terms of the National Football League Policy and Program for Substances of Abuse. Such fine, if imposed, shall be in addition to, and not a substitute for, discipline which may be imposed pursuant to Section 6 of these Regulations;

* * *

- (21) (a) Initiating any communication, directly or indirectly, with a player who has entered into a Standard Representation Agreement with another Contract Advisor and such Standard Representation Agreement is on file with the NFLPA if the communication concerns a matter relating to the: (i) Player's current Contract Advisor; (ii) Player's current Standard Representation Agreement; (iii) Player's contract status with any NFL Club(s); or (iv) Services to be provided by prospective Contract Advisor either through a Standard Representation Agreement or otherwise.
- (b) If a player, already a party to a Standard Representation Agreement, initiates communication with a Contract Advisor relating to any of the subject matters listed in Section 3(B)(21)(a) the Contract Advisor may continue communications with the Player regarding any of those matters.
- (c) Section 3(B)(21) shall not apply to any player who has less than sixty (60) days remaining before his NFL Player Contract expires, and he has not yet signed a new Standard Representation Agreement with a Contract Advisor within the sixty (60) day period.

- (d) Section 3(B)(21) shall not prohibit a Contract Advisor from sending a player written materials which may be reasonably interpreted as advertising directed at players in general and not targeted at a specific player.

* * *

- (24) Affiliating with or advising players to use the services of a person who is not an NFLPA Registered Player Financial Advisor for purposes of providing financial advice to the player; or acting as a "Financial Advisor" and/or providing "Financial Advice" to an NFL player as those terms are defined in the NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors, without first becoming a Registered Player Financial Advisor pursuant to the NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors;

* * *

- (28) Referring a player to a workers compensation attorney who is not a member of the NFLPA Panel of Workers Compensation Attorneys;

* * *

- (32) Using, associating with, employing or entering into any business relationship with any individual in the recruitment of prospective player-clients who is not Certified and in good standing as a Contract Advisor pursuant to these Regulations[.]

3) STATE STATUTES

Forty-three states have enacted some version of the Uniform Athlete Agents Act (UAAA).^h The UAAA is principally concerned with the transition from college student-athlete to professional athlete but also governs contract advisors' conduct more generally as well. The UAAA requires persons representing athletes,³⁰ *i.e.*, "agents," to register with the relevant state's Secretary of State and to notify the college when an agent signs an agreement with a college player in the process of turning professional.³¹ The UAAA also prohibits many of the actions discussed in the Contract Advisor Regulations, including "giv[ing] any materially false or misleading information or mak[ing] a materially false promise or representation," and, "furnish[ing] anything of value to a student-athlete before the student-athlete enters into the agency contract."³² Finally, the UAAA gives colleges the right to sue agents for failing to comply with

h In 2015, the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws approved a revised version of the UAAA, first approved in 2000. Nevertheless, the revised law does not substantially implicate player health in any new ways and, as of October 2016, had only been adopted by three states.

the law,³³ since colleges could be forced to declare players ineligible under National Collegiate Athletic Association (NCAA) Bylaws for having accepted gifts or money from an agent.

While the UAAA was designed to protect colleges and players from unscrupulous agents, unfortunately, it has done little but increase agents' costs of doing business through increased registration fees since few states take any measures to enforce the law.³⁴ In addition, California, Michigan, and Ohio have passed their own agent laws that also require registration and forbid certain acts.³⁵

Research has not revealed any litigation involving any state's version of the UAAA. However, in 2006, former NFL player Chad Morton sued former contract advisor Leigh Steinberg alleging Steinberg had violated California's Miller-Ayala Athlete Agents Act.³⁶ Morton alleged Steinberg and his firm failed to repay \$500,000 in loans.³⁷ The case was settled when Steinberg agreed to repay the loan.³⁸

The UAAA does not contain any language directly concerning player health, safety, or welfare.

4) FEDERAL STATUTES

Contract advisors must comply with the federal Sports Agent Responsibility and Trust Act (SPARTA),³⁹ passed in 2004. SPARTA, like the UAAA, is principally concerned with student-athlete recruitment but also governs contract advisors more generally. SPARTA prohibits sports agents from soliciting clients with misleading information, making false promises, providing anything of value as an inducement, or neglecting to provide a required disclosure statement warning the student-athlete that he or she may lose his or her eligibility.⁴⁰ The Federal Trade Commission is responsible for enforcing SPARTA but has never brought any legal action against an agent.⁴¹

SPARTA does not contain any language directly concerning player health, safety, or welfare.

5) OTHER CONSIDERATIONS – NCAA BYLAWS

The NCAA bears mentioning in this context, as many might believe (incorrectly) that it has some authority over agents. The NCAA is a private organization through which the nation's colleges and universities govern their athletic programs. The NCAA consists of more than 1,200 member institutions, all of which participate in the creation of

NCAA rules and voluntarily submit to its authority.⁴² As a voluntary organization, the NCAA can only exercise plenary power over its member institutions, their employees, and their student-athletes.⁴³ Consequently, while the NCAA prohibits student-athletes from entering into agreements with agents,⁴⁴ the NCAA has no authority to discipline contract advisors.

Although the NCAA has no direct jurisdiction over agents, as described earlier, the UAAA does empower educational institutions with certain regulatory powers and the ability to file civil suits against agents.⁴⁵ Many NCAA member institutions require each agent wishing to recruit a player at that school to also register with the school's athletic department or compliance office.⁴⁶ Contract advisors wishing to remain in the good graces of the school will comply with the school's regulations.

(C) Current Ethical Codes

Attorney's Rules of Professional Conduct, like the Contract Advisor Regulations, are quasi-legal/quasi-ethical in nature, in that they are ethical rules that can be legally enforced.

Contract advisors who are also attorneys must comply with their respective state bar's attorney ethics rules. In 2015, 545 of the 875 certified contract advisors (62 percent) had a law degree.⁴⁷ While we do not know the number of contract advisors who subsequently were admitted to practice law by a state bar, it seems likely that many did. The Model Rules of Professional Conduct (which serve as guidance for every state's Attorney's Rules of Professional Conduct) include several rules that could be implicated by some of the alleged wrongful behavior of contract advisors. For example, Rule 1.1 requires "competent" representation, Rule 1.7 governs conflicts of interest, Rule 1.15 strictly directs how a lawyer is to handle client money, and Rule 5.3 holds attorneys liable for the conduct of non-lawyer employees, such as the "runners" often employed by contract advisors.⁴⁸ In addition, Rule 7.1 prohibits false or misleading communications about a lawyer's services, Rule 7.2 prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services, and Rule 7.3 limits a lawyer's ability to solicit clients.⁴⁹

(D) Current Practices

Players generally have mixed feelings about the contract advisor industry.ⁱ While many like their advisors, they have also heard horror stories about others. In particular, players believe many contract advisors look to take advantage of players in whatever way they can.^j Below, we discuss some most important areas where contract advisors have an opportunity to influence player health, including Recruiting, Negotiating Contracts, Assisting with Medical Care, Engaging with the NFLPA, and Potential Conflicts of Interest.

1) RECRUITING

The extreme competitiveness of the industry prevents contract advisors from promoting and protecting player health as one might hope they could. Entering the 2015 NFL season, there were 869 NFLPA-certified contract advisors but only 420 actually had clients (48.3 percent).⁵⁰ Importantly, “[t]he Certification of any Contract Advisor who has failed to negotiate and sign a player to an NFL Player Contract (excluding Practice Squad Contracts) for at least one NFL player during any three-year period shall automatically expire at the end of such three-year period.”⁵¹ Thus, in the rare case that a contract advisor has one or multiple clients and none of their contracts expire during a three-year period, those advisors will need to go through the contract advisor certification process again, including retaking the contract advisor examination.⁵² The NFLPA representative we interviewed explained that the purpose of the rule is to ensure that contract advisors remain “active in the business.”

Entering the 2015 NFL season, there were 869 NFLPA-certified contract advisors but only 420 actually had clients (48.3 percent).

Contract advisors interviewed, on average, spent 30 percent of their time recruiting players, a proportion that has only increased over time. Recruiting thus diminishes the amount of time and resources available for contract advisors to devote to their current clients.

Some scholars have commented that the competition and allure of the industry have resulted in a ruthless professional environment and nearly continuous allegations of wrongdoing.⁵³ Contract advisors engage in protracted recruiting battles for the right to represent college football players entering the NFL.⁵⁴ Even though the Contract Advisor Regulations have long forbid “[p]roviding or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services,”⁵⁵ as discussed above, many (but not all) contract advisors routinely provide new clients with tens or hundreds of thousands of dollars in loans or advances which generally do not have to be repaid if the player continues to retain the contract advisor.⁵⁶ Perhaps counterintuitively, such arrangements have repeatedly been approved by NFLPA arbitrator Roger Kaplan^k in disputes between players and contract advisors.⁵⁷ Recently, in *Rosenhaus v. Jackson*, NFLPA Case No. 13-31 (Kaplan, Arb. Apr. 10, 2014), Kaplan held that since the loan agreements between contract advisor Drew Rosenhaus and player DeSean Jackson explicitly stated that the loans were not conditioned on the signing of an SRA, “[t]he mere existence of the loan and/or the possibility that some or all of it might be interest free or forgiven entirely does not render it an improper inducement.”⁵⁸

Also as discussed above, contract advisors typically pay \$15,000 to \$35,000 to prepare their clients for the NFL Combine and Draft. Players are typically only obligated to repay the training costs in the event they terminate the contract advisor prior to signing an NFL contract. Arbitrator Kaplan has held that such expenses are reasonable and necessary to the negotiation of the player’s first contract and thus the player is obligated to repay them if he has agreed to do so as part of the SRA.⁵⁹

Former Player 1 explained that the loans and advances are “one of the biggest selling points for most kids out of college”:

[T]hose kids for the most part come from modest means and haven’t seen the type of money thrown around and thrown at them and all of a sudden

i Current Player 5: “Some guys love their agents, have a great relationship and some guys don’t. I think it would be split pretty close down the middle.” Current Player 6: “Most agents don’t really do anything apart from negotiating the contract.” Current Player 10: “Agents do a good job of looking after players.” Former Player 3: “For the most part, agents do a pretty good job.”

j Current Player 4: “I think there are a lot of those guys that are preying on players.”

k Arbitrator Roger Kaplan has presided over almost every NFLPA arbitration since 1994. See *Weinberg v. Nat’l Football League Players Ass’n*, 06-cv-2332, 2008 WL 4808920, at *2 (N.D. Tex. Nov. 5, 2008) (citing affidavit from Kaplan in which he explained he has been the NFLPA arbitrator since 1994).

you have this guy that's willing to put up the cash for cars and jewelry and clothes and everything else and you know it's quite alluring for a lot of kids that have never seen that.¹

Several current players also expressed concern with the loans and advances from contract advisors to players:

- **Current Player 4:** *"It definitely creates a problem where guys are in the hole that amount of money before they've ever made a dollar."*
- **Current Player 5:** *"I think it's one of the worst things that you can possibly do. I'm 100 percent against it. I think that it's basically agents buying players . . . I can understand why a player may need money . . . before the draft to help him train and all that. But I think it's gotten way out of control."*
- **Current Player 8:** *"I think that it's highway robbery because I've seen some of the interest rates that they've charged these guys. I think that's a person of power taking advantage of an uneducated kid . . . I think it's become kind of a competitive market that definitely has its downfalls."*
- **Current Player 9:** *"I view it as a major problem because it's just the player already in debt before he even has money."*

The NFLPA representative we interviewed also explained the players' and NFLPA's concern with these arrangements:

From the agent's perspective, the financial output they have to put into a player prior to the draft has certainly grown exponentially over the last five, ten years.

* * *

[W]ith the increased competition in the agent business—for clients coming out of college especially—it has led to agents having to put out more dollars financially in pre-Combine training and stipends and whatever you want to call it, pre-draft loans, whatever you want to call it.

And it may be that some players make their choice of agent solely based on the amount of money that the agent's willing to pay out, rather than necessarily signing with the one that's the best fit for them. Has that harmed players? That's hard to quantify—whether or not that's harmed anybody. But I think certainly that does put a player in a position where maybe he's making the choice of

an agent not using the right criteria, or at least not prioritizing it the right way.

The NFLPA representative also explained that the possibility of amending the Contract Advisor Regulations to restrict pre-Draft loans and advances in some way has "been discussed," but that "the player rep[resentative]s haven't taken any action to change our rules as of yet."

2) NEGOTIATING CONTRACTS

The principle responsibility of contract advisors, in accord with the delegation of that responsibility to them by the NFLPA as discussed above, is to represent players in contract negotiations with clubs. However, contract advisors generally only negotiate contracts in two windows: (1) around the beginning of a new League Year in March when veteran players become free agents; and, (2) in the summer after rookies have been drafted. However, the 2011 CBA significantly reduced and restricted rookie compensation and thus also the rookie contract negotiations. While veteran players might sign contract extensions or renegotiations at a variety of times during the year, the truth is that negotiating contracts does not consume a majority of a contract advisor's time.

This is not to say, however, that contract advisor's negotiating services are not important. They are extremely important. A skilled contract advisor will perform comprehensive statistical and economic analysis of a player's worth in preparation for a contract negotiation. Moreover, quality contract advisors will be able to negotiate with multiple clubs, judge the market, and sell the player's skill to obtain a contract acceptable to the player. Contract advisors and their negotiations are a critical component to maximizing career earnings, an important consideration when discussing player health.

3) ASSISTING WITH MEDICAL CARE

As the player's principal advocate and advisor, contract advisors play an important role in player health matters. Indeed, they have an important obligation to ensure players understand and take advantage of the myriad of programs and benefits offered by the NFL and NFLPA. Many of the contract advisors interviewed explained that very early on in the contract advisor-player relationship, they have a meeting or telephone call with the player to explain the realities of the business, *i.e.*, that they are likely to get injured and have short careers and thus must be responsible and plan accordingly. Whether players are receptive to and understand this advice is another question.

¹ We reiterate that our interviews were intended to be informational but not representative of all players' views and should be read with that limitation in mind.

Contract advisors also guide players after they have been injured. In a typical scenario where a player suffers an in-season or in-game injury, the contract advisor will often be in touch with the player and someone from the club's front office as soon as possible to learn the extent of the injury. Within 24 hours, the player will undergo a variety of possible examinations by club doctors, including but not limited to X-rays, MRIs,⁶⁰ or CT scans.⁶¹ The contract advisor will then obtain the films from the examinations, by requesting them from the player, the club's medical staff, or the club's front office. The contract advisor will then have the films sent to another doctor chosen by them for a second opinion.

Of the six contract advisors interviewed, five stated that they obtain a second opinion every time or nearly every time a player is injured while another stated he obtains a second opinion about 50 percent of the time.⁶² The motivation behind obtaining the second opinions stems from both general and specific distrust of club doctors by the contract advisors. Some contract advisors indicated that by almost always obtaining a second opinion, it removes any concern that the club doctor might have been making a recommendation that was in the club's interest and not the player's.^m One contract advisor even stated that when assessing a player's injury, "the club doctor has nothing to do with it . . . the club doctor's input means nothing to us."ⁿ Some contract advisors also indicated that their experience with, and the reputation of, a particular club or club medical staff will color the decision of whether to obtain a second opinion or to proceed with the club

doctor's recommended course of treatment.^o It is important to emphasize that we are merely reporting the perception of the contract advisors. We lack the relevant data to evaluate whether second opinion doctors are superior to club doctors in any way.

The second opinion doctor typically only reviews the film but occasionally will request to see the player in person if the doctor believes it is necessary. Contract advisors' estimates of how often a second opinion doctor's diagnosis differed from the club doctor's were generally low ("10 to 20 percent," "as much as 20 percent," "about a third of the time," "not incredibly often"). "According to the Patient Advocate Foundation, 30 percent of patients who sought second opinions for elective surgery found the two opinions differed."⁶³ However, it is difficult to compare the figures because, as discussed above, players obtain second opinions almost as a matter of course while the average patient might only seek a second opinion about serious diagnoses.

If the second opinion doctor's diagnosis does differ, a decision then must be made as to which course of treatment to pursue and which doctor will perform the surgery (if necessary). In some cases, the contract advisor might arrange for the second opinion doctor to talk with the club doctor to see if a consensus can be reached.^p Sometimes a third doctor will provide an opinion. Nevertheless, the prevailing sentiment among the advisors interviewed is that the second opinion doctor's recommended course of treatment almost always is the one taken in today's NFL.

There are two main reasons why the second opinion doctor's recommended course is followed. First, as discussed above, some contract advisors regard the club doctor's opinion as meaningless and will not follow it (unless, of course, it concurs with that of the second opinion doctor). Second, some contract advisors believe that in recent years clubs and club medical staff have resigned themselves to doing what the player wants to do (as recommended by the contract advisor and second opinion doctor).

In the course of this process, contract advisors are also likely to review the player's contract to refresh their understanding as to any provisions which might be relevant to the player's health and gauge how the injury might

Of the six contract advisors interviewed, five stated that they obtain a second opinion every time or nearly every time a player is injured while another stated he obtains a second opinion about 50 percent of the time.

m Contract Advisor 1: "I've effectively removed any of that [concern]. I've said okay, where I feel like I need to get a second opinion almost every time, I get a second opinion. So it's become a nonissue." Contract Advisor 5: "I'm always concerned that the doctor is involved because he's, you know, an employee of the club."

n Contract Advisor 4: "[T]he team doctor is there to advise the team on how they should approach a player. The team doctor has nothing to do as far as I'm concerned with how the player should approach his own health . . . The team doctor is a medical advisor to the team."

o Contract Advisor 2: "[I]t depends sometimes on the organization that we're dealing with." Nevertheless, Clubs seem to have become less adversarial about a player choosing to obtain a second opinion. Contract Advisor 1: "I will say there was a lot more pushback early in my career about second opinions and going somewhere else."

p Yet, Contract Advisor 1 explained that the club doctor "will have to make a very good argument" to the second opinion doctor to convince the second opinion doctor and contract advisor to follow the club doctor's recommendation.

affect the player's contract status. In addition, the contract advisor will likely review relevant CBA provisions and advise the player of his rights, such as the right to a second opinion, the surgeon of his choice, workers' compensation benefits, and the Injury Protection benefit. Contract advisors generally stressed the importance of taking advantage of these safeguards to protect a player's health.

There was also a general consensus among the contract advisors that they themselves have become, and are, increasingly sensitive to player health issues, and to concussions in particular.⁶⁴ Of course, such self-evaluations have to be viewed with that perspective in mind. One contract advisor explained an effort he made to prevent a player from suffering a future injury. Understanding that his client had played defensive end on only one side of the line his entire career, the contract advisor was concerned that the player's hips and legs would become unbalanced, increasing the risk of injury. The contract advisor worked with the player and the player's athletic trainer to make sure the player's hips were equally strong and flexible.

Another contract advisor had a creative idea for helping his players. Throughout his career, he has recommended his clients to maintain an "injury diary," contemporaneously listing each condition the player has and the treatment recommended and received. The contract advisor believes the diary could serve multiple purposes: (1) ensure the player's medical condition is accurately described and understood to assist with treatment; (2) help the player improve treatment in the future in the event the condition recurs; and, (3) for possible use during an Injury Grievance against the club.

4) ENGAGING WITH THE NFLPA

Contract advisors and the NFLPA are two stakeholders intimately involved in protecting players' health. However, some of the contract advisors we interviewed suggested that a poor relationship between the two groups reduces the effectiveness of both groups in assisting players.

The sentiment among the contract advisors interviewed was near universal that the relationship between contract advisors and the NFLPA is mediocre at best, "horrible" at worst. Contract Advisor 1 explained that, in his opinion:

[I]f you can't win the war with 32 owners, you show the players that you're saving money, say cutting agent fees or having the ability to do certain things with the agents and showing that power[.]

The contract advisors we spoke to indicated their view that the principle issue preventing the NFLPA and contract advisors from working well together centers around a lack of communication and trust. In general, contract advisors seem to believe that the NFLPA is missing out on a valuable opportunity to help players by not engaging contract advisors more fully. As explained by Contract Advisor 1:

[N]obody knows the players as well as we do and nobody has more day-to-day interaction with them. So the issues they face—while we're told we have a platform and an avenue to articulate [the issues to the NFLPA]—never really comes to bear.

Similarly, Contract Advisor 4, explained "they [the NFLPA] don't quite understand the influence that we could have and that we may have in a player's life." Contract Advisor 6 expressed his opinion that the NFLPA thinks contract advisors are "idiots . . . , a nuisance." Of course, this may just be their own biases as to their importance and relevance, and the opinions need to be evaluated in that light.

Multiple contract advisors did, however, recognize the difficulty the NFLPA faces with such a large and constantly changing membership. Additionally, several contract advisors believed the NFLPA's work on player health matters has improved in recent years and that the NFLPA is taking those issues seriously.^q

In reviewing a draft of this Report, peer reviewer and former contract advisor and club executive Andrew Brandt had this to say about the relationship between contract advisors and the NFLPA:

The Chapter does a good job of explaining the tense relationship—or lack of relationship between agents and the NFLPA. Even though they are both on the same side of looking out for the best interests of players, there is an apprehension from each side in dealing with the other. The reasons are several, often due to personalities, but emanate from the collective versus individual nature of their representation. The union is looking out for the overall constituency and providing collective benefit; agents are concerned about maximizing income and benefits for their clients rather than the general population of players. I know that, as the Chapter says, there are annual meetings at the Combine for all agents and for a select group of agents with union representatives, but I often hear negative viewpoints about

q Contract Advisor 1: "[O]ne of the good things that the NFL has done and the PA has done is ensuring that these guys can have an easy way to get their degree[.]"

*these meetings, especially from agents that are excluded.*⁶⁵

For the NFLPA's part, the NFLPA representative we interviewed was more optimistic and generally praised contract advisors:

To the best of my knowledge, they're doing fine . . . 99 times out of 100 they are aware of filing deadlines for grievance purposes and stuff like that. I think most agents genuinely care about the welfare of their players. It's in their best interest. The longer the player plays, the more money the agent's going to make.^r

The NFLPA representative also believed that the NFLPA's relationship with agents was "generally . . . good." Nevertheless, the NFLPA representative acknowledged that "a lot of [contract advisors] would probably say we need to do more in the discipline area."

At the conclusion of each season, the NFLPA provides the contract advisors an "End of Season Player Checklist." The Checklist is a multi-page document summarizing many of the players' important rights, benefits, and opportunities, such as obtaining medical records, obtaining second medical opinions, filing for workers' compensation, Injury Protection or disability benefits, understanding their insurance options, understanding off-season compliance with the Policies on Performance-Enhancing Substances and Substances of Abuse, and preparing for life after football by engaging the benefits and programs offered by the NFL and NFLPA. Contract advisors are required to provide the Checklist to all of their clients and certify in writing to the NFLPA that they have discussed the Checklist with their clients. In short, the Checklist is an excellent document and the NFLPA should be commended for its creation and use.

Nevertheless, contract advisors we interviewed expressed that there is an insufficient opportunity for contract advisors and the NFLPA to discuss issues affecting players. Several contract advisors indicated that the NFLPA only ever solicits advice from, or listens to, the most successful and powerful contract advisors. The NFLPA representative we interviewed explained that every year at the NFL Combine, the NFLPA holds an invitation-only meeting with approximately 20 contract advisors to discuss issues

affecting contract advisors and players. The invited contract advisors are selected by the NFLPA.

5) POTENTIAL CONFLICTS OF INTEREST

While contract advisors' and players' interests are generally well-aligned, an NFL player should be aware of a variety of situations in which his contract advisor's interests might conflict with his own. It is quite clear that there are many situations which on their face present the perception of a conflict.^s What is not clear is the extent to which these conflicts are real or hurt players. It is, however, paramount that players be aware of the potential conflicts. As discussed above, contract advisors are typically the player's most trusted and involved advocate. They play a critical role in protecting and advancing player health. A situation in which a contract advisor is not wholly committed to the player's interests undermines the contract advisor's representation and zealous advocacy on behalf of the player, potentially damaging to the player's short-term and/or long-term health.

Before turning to the explanation of each potential conflict, it is important to recognize that conflicts and potential conflicts—including those of the type faced by contract advisors—are common in many professional industries. Thus, that contract advisors face potential conflicts is not necessarily problematic. Instead, what is important is that players (like all professional clients) be aware of the potential conflict and that the contract advisor (like all professionals) attempt to minimize those conflicts, and where not possible to do so, be transparent about the conflict and attempt to manage it appropriately.

The potential conflicts include:

- **The contract advisor's relationship with club officials.** Generally speaking, contract advisors rely on their professional network and contacts as much as any other industry. Club officials—particularly general managers and other front office executives such as the Directors of Football Administration—are important and powerful contacts for contract advisors. Contract advisors can obtain important information from club officials about any number of football-related items (perhaps most importantly, information, *e.g.*, telephone numbers, of college players the contract advisor might want to recruit). Contract advisors might even be able to secure favorable contract terms for a player when he has a good relationship with a particular club. As a result, contract advisors occasionally walk a fine line between zealous advocacy on behalf of their client and refraining from angering club

^r The NFLPA representative also explained that contract advisors might pressure players to continue their careers: "I'm not saying there's agents that are encouraging players to continue their careers when maybe the player shouldn't. But I wouldn't be surprised if that's happened a few times."

^s Current Player 2: "There's always going to be agents out there that are just doing what they do to benefit themselves personally."

officials. To this end, the possibility exists that a contract advisor might avoid a confrontation with a club for one player to benefit another player that is a member, or potential member, of the same club. Contract Advisor 4 confirmed this rare but troublesome practice:

I've heard of some larger scale agents kind of wheeling and dealing in order to make one thing better for someone [saying] "I let you have a point last time on the last player, so you owe me on this player."^t

Moreover, the contract advisor business is highly competitive and fraught with challenges, as described above. Some contract advisors might decide they are more interested in working for an NFL club than representing NFL players.^u Thus, the possibility exists that some contract advisors might have an interest in maintaining a good relationship with a club at the expense of his client (even if unconsciously).

- **The contract advisor's compensation structure.** As discussed above, contract advisors are paid a percentage of the player's contract. Thus, until a contract is finally signed, a contract advisor is entitled to nothing. The contract advisor business model revolves around players reaching a "second contract." In other words, contract advisors generally do not generate a profit from representing players during the term of their rookie contracts, particularly after the 2011 CBA, which significantly reduced rookie compensation.^v A player's

- financial value is generally at its maximum when his rookie contract expires (or is near expiration) and he reaches (or nears) free agency for the first time (usually after four seasons in the NFL). It is at this point that players are able to offer their services to any and all clubs for whatever price the free agency market will bear. This "second contract" is a significant financial moment for the player, the club, and the contract advisor.

As a result of the significance of the second contract, contract advisors are under pressure to successfully negotiate the second contract. Not surprisingly, these more important and costly contract negotiations tend to be more difficult and subject to media attention. Players therefore may begin questioning whether another contract advisor might be more successful at "closing the deal" on the second contract (often at the prompting of a competing contract advisor). In this environment, a contract advisor likely feels pressure to have a contract executed before he or she can be terminated by the player or else the contract advisor risks losing out on a significant income stream. Contract advisors with a questionably committed client might therefore refrain from continued difficult negotiations with a club and instead recommend a player sign a contract of perhaps less than maximum value to ensure that the contract advisor will be paid. Contract Advisor 4 also confirmed this practice:

[I]f players are incentivized to leave their agent by other agents, at some point in time, an agent is going to recognize that "Hey, it's in my best interest personally to get a deal done." I am sure that has occurred multiple times, many times.

* * *

^t Interviewer: Do you think sometimes agents are reluctant to push hard on teams because they don't want to ruin the relationship with the club?

Contract Advisor 4: Yes, I do.

^u For example, Andrew Brandt was a contract advisor before becoming Vice President of the Green Bay Packers in 1999. *WSBI Bios*, Wharton Sports Bus. Inst., <http://wsb.wharton.upenn.edu/wsbibios-brandt.html> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/RWN7-2E7T>. Brandt's switch came soon after he was representing top draft pick Ricky Williams; he was approached by the Packers within a week after Williams informed Brandt he wanted him to work with the rapper Master P, who was starting a sports management firm. Andrew Brandt, Peer Review Response (Oct. 30, 2015). Similarly, Cliff Stein, current Vice President of Football Administration and General Counsel for the Chicago Bears, was a contract advisor for nine years before joining the Bears in 2002. *Front Office – Cliff Stein*, Chi. Bears, <http://www.chicago-bears.com/team/staff/Cliff-Stein/8dbdd7b5-9ffa-4612-8ddd-902086ec91a3>, *archived at* <http://perma.cc/ZKL9-JX7H> (last visited Aug. 7, 2015). Both Stein and Brandt are very well-regarded in the sports industry and thus we do not mean to suggest that either engaged in a conflicted manner while contract advisors.

^v For example, the Houston Texans selected C.J. Fiedorowicz with the first pick of the third round in the 2014 NFL Draft. *C.J. Fiedorowicz*, Spotrac, <http://www.spotrac.com/nfl/houston-texans/c.j.-fiedorowicz> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/DBU2-MBRV>. Fiedorowicz signed a four-year contract with a maximum value of \$3,195,114. *Id.* If a contract advisor were to recoup 3% of Fiedorowicz' contract, and Fiedorowicz is able to play all four years of the contract (far from a guarantee) the contract advisor would make \$95,853. A contract advisor could easily spend \$35,000 recruiting a player and preparing him for the NFL Draft, not to mention the contract advisor's other professional and administrative costs. If the contract advisor were only receiving a 2% commission, which is often the case, he or she would only earn \$63,902. Thus, the contract advisor stands to make very little, if any, profit from a player's rookie contract.

Contract advisors with a questionably committed client might therefore refrain from continued difficult negotiations with a club and instead recommend a player sign a contract of perhaps less than maximum value to ensure that the contract advisor will be paid.

You have to choose. You have to decide what side of the line do you want to come down on. Do you want to come down on the side of the line where you want to do the best job? Or do you want to come down on the side of the line where you got a deal done and locked in a commission when it could be a fine deal, but not the best deal. That's the choice agents have to make, and . . . I'd be pretty sure on a regular basis, agents come down on the side of the line where it's, "Okay, let me get this done."

* * *

I think some agents are just looking to get deals done . . . I've seen the agents that just want to sign off and move on to the next one.^w

The contract advisor-player Standard Representation Agreement (SRA) attempts to alleviate these concerns by providing terminated contract advisors “the reasonable value of the services performed in the attempted negotiation of such contract(s) provided such services and time spent thereon are adequately documented by Contract Advisor.”⁶⁶ Indeed, this *quantum meruit* provision of the SRA is a frequent subject of arbitrations between players and their former contract advisors.⁶⁷ However, NFLPA Arbitrator Kaplan strictly applies the documentation requirements and limits the hourly rate a contract advisor can obtain to \$250/hour,⁶⁸ and the amounts awarded are generally far less than the commission would have been had the contract advisor completed negotiations.^x

Relatedly, there is a potential conflict concerning short- and long-term interests. The contract advisor only gets paid while the player is playing, and thus may have an interest in having the player continue playing, even when it might not be in the best interests of the player's long-term health.

w Contract Advisor 4 also believes that the NFLPA's failure to enforce the Contract Advisor Regulations prohibitions against soliciting and offering inducements to players that are other contract advisors' clients contributes to this conflicted scenario: “[T]he NFLPA doesn't really care about [these situations; they have] turned a blind eye.” Relatedly, Contract Advisor 4 explained: “I think we agents probably feel the most pressure, and that's where the conflicts come from, is the idea of losing players for no good reason when you're trying to do your best job. There are a lot of agents who do try to do their best job but have to worry about the idea of a player being scooped up because someone else stole them.”

x In rare instances, Arbitrator Kaplan has awarded the terminated contract advisor a percentage of the contract ultimately negotiated by the player or another contract advisor if the terms were significantly similar to those negotiated by the terminated contract advisor. See *Harrison v. Peek*, NFLPA Case No. 07-38 (Kaplan, Arb. 2007) (awarding terminated contract advisor the agreed-upon 2 percent commission where player terminated contract advisor but signed contract negotiated by contract advisor); *Lock/Metz v. Galloway*, NFLPA Case No. 00-26 (Kaplan, Arb. 2001) (awarding terminated Contract Advisors 1.25% of \$12 million signing bonus where contract's elements “had been primarily and substantially negotiated” by prior Contract Advisors); *Professional Stars, Inc. v. Townsend*, NFLPA Case No. 95-11 (Kaplan, Arb. 1996) (awarding terminated Contract Advisor the agreed-upon 2% commission where player terminated Contract Advisor but signed contract negotiated by Contract Advisor).

- **The contract advisor's representation of multiple players on the same club.** Each NFL club is only permitted to pay players in aggregate up to the limit of the Salary Cap. Thus, there is a finite amount of money to be divided among the club's players. If a contract advisor represents two players on the same club, every dollar a contract advisor is able to secure for one player is one less dollar that is available to the other player.
- **The contract advisor's representation of multiple players at the same position.** If the players are comparably skilled, contract advisors might market one player's services at the expense of the other. Creative Artists Agency (CAA) Contract Advisor Tom Condon and former CAA Contract Advisor Ben Dogra,⁶⁹ among the most powerful in the business, have faced some scrutiny for being in such a situation. For example, in the 2012 NFL Draft, CAA was recruiting top quarterback prospect Andrew Luck who was expected to be and ultimately was chosen with the first overall pick by the Indianapolis Colts.⁷⁰ However, at the same time, CAA represented then Colts quarterback Peyton Manning, recovering from an injury.⁷¹ Some commentators thus questioned whether CAA could encourage the Colts to draft Luck while also looking out for the best interests of Manning.⁷² In addition, CAA represented several of the other top quarterbacks in the NFL at the time, including Drew Brees, Eli Manning, Matt Ryan, Matthew Stafford, and Sam Bradford.⁷³ In the end, Luck decided not to sign with CAA.⁷⁴

Moreover, in that same offseason, San Francisco 49ers quarterback Alex Smith, also represented by CAA, reportedly contemplated terminating CAA as his representatives because there was speculation that the 49ers wanted Manning as their quarterback.⁷⁵ Smith was ultimately traded to the Kansas City Chiefs, did not terminate CAA,⁷⁶ and Manning signed with the Denver Broncos. In CAA's defense, CAA's experience in negotiating quarterback contracts, generally the richest in the NFL, certainly serves Smith and the other quarterbacks represented by CAA well.

- **The contract advisor's representation of multiple players contemplated to be the top pick in the NFL Draft.** For example, speculation has been raised in multiple NFL Drafts that contract advisors, by representing several of the top prospects, could not properly advocate for each player to be considered the top pick and thus receive a larger contract.⁷⁷ Although the issue has been raised,⁷⁸ no known action has been taken against any contract advisor (which is not to necessarily suggest that any conflicts of interest rules have been violated).

In each of the above-described situations where a contract advisor's loyalties to two clients might seem at odds, the contract advisor's defense is likely to be that his or her role or ability to influence NFL clubs is being overstated, that clubs carefully make personnel and contract decisions and are not likely to be influenced in any way by a contract advisor's sales pitches. As Contract Advisor 4 explained: "The team is deciding who they want. I would describe the agent's role more in terms of helping the player get as much money as possible."

- **The contract advisor's representation of club executives and coaches.** Contract advisors are permitted to represent club executives and coaches provided they disclose those representations to the player-clients.⁷⁹ These relationships (which are not uncommon)^y are not surprising considering many players go on to become coaches or executives and wish to retain the services of the contract advisor from their playing days. The potential conflicts in these situations are obvious—a contract advisor's advocacy and negotiation efforts on behalf of a player could be in direct conflict with the interests (financial or otherwise) of the club executive or coach the contract advisor also represents.

Figure 12-A: Potential Conflicts of Interest for Contract Advisors

1	The contract advisor's relationship with club officials.
2	The contract advisor's compensation structure.
3	The contract advisor's representation of multiple players on the same club.
4	The contract advisor's representation of multiple players at the same position.
5	The contract advisor's representation of multiple players contemplated to be the top pick in the NFL Draft.
6	The contract advisor's representation of club executives and coaches.

^y There are and have been several successful contract advisors who represent both NFL players and club personnel. See Pete Thamel, *How Jimmy Sexton became college football's most powerful agent*, Sports Illustrated, Jan. 3, 2014, <http://www.si.com/college-football/2014/01/03/jimmy-sexton-college-football>, archived at <http://perma.cc/N5UT-HXMF>; Anthony L. Salvador, *The Regulation of Dual Representation in the NFL*, 13 Tex. Rev. Ent. & Sports L. 63, 65–66 (2011).

(E) Enforcement of Legal and Ethical Obligations^z

The Contract Advisor Regulations provide an arbitration mechanism that is generally the exclusive mechanism by which NFL players can bring a claim against a contract advisor for a violation of the contract advisor's obligations. Specifically, the Contract Advisor Regulations arbitration procedures govern, in relevant part, "[a]ny dispute between an NFL player and a Contract Advisor with respect to the conduct of individual negotiations by a Contract Advisor," "[t]he meaning, interpretation or enforcement of a fee agreement," and "[a]ny other activities of a Contract Advisor within the scope of the[] [NFLPA] Regulations."⁸⁰

The arbitrations are commenced with the filing of a grievance, generally followed by a hearing where each side has the opportunity to present evidence and witnesses.⁸¹ Arbitrator Roger Kaplan has presided over almost every NFLPA arbitration since 1994.⁸² Kaplan is empowered to and regularly awards monetary damages to both contract advisors and players.

The NFLPA's arbitration provisions preempt civil lawsuits and thus have effectively eliminated player-contract advisor litigation. Consequently, a player's best recourse against a contract advisor is to pursue damages through the NFLPA arbitration process.⁸³ Each year there are dozens of grievances filed between contract advisors and players. However, a review of the NFLPA's arbitration cases reveals only one case concerning player health, safety or welfare: *Mayes v. Zucker*.

In *Mayes v. Zucker*,⁸⁴ the arbitrator awarded former Miami Dolphin Alonzo Mayes \$100,000 in damages against his former contract advisor. The Dolphins had cut Mayes after he suffered a knee injury and his contract advisor failed to file an Injury Grievance on Mayes' behalf, which would have entitled Mayes to his salary for the amount of games for which the injury would have prevented him from playing. The contract advisor's NFLPA-certification was also revoked in a separate decision arising out of the same facts.

Importantly, while the arbitration process settles disputes between contract advisors and players (or other contract advisors), it is not the process by which contract advisors are disciplined for violations of the Contract Advisor Regulations. The NFLPA has a three- to five-player Committee on Agent Regulation and Discipline (CARD), which is responsible for investigating and taking disciplinary action against contract advisors.⁸⁵ CARD issues a complaint to the contract advisor and, after the contract advisor files an answer, CARD issues its discipline.⁸⁶ CARD's disciplinary authority includes letters of reprimand, suspensions, fines, prohibitions on recruiting, and revocation of the contract advisor's NFLPA-certification.⁸⁷ The contract advisor can appeal any discipline to Kaplan, who will hold a hearing as he would pursuant to a dispute between or among contract advisors and players.⁸⁸

At the 2015 Harvard Symposium on Sports & Entertainment Law, NFLPA Assistant General Counsel Heather McPhee explained that the quality of contract advisors "run[s] the gamut" and that enforcement of the Contract Advisor Regulations is difficult because the NFLPA only has five attorneys who work on those types of issues in addition to their other legal work.^{aa} McPhee further explained that "evidentiary" issues create enforcement issues, *e.g.*, allegations are hard to prove, particularly if players are unwilling to testify. Consequently, McPhee expressed that the NFLPA is often only able to enforce "really egregious" violations of the Contract Advisor Regulations.

The NFLPA representative we interviewed echoed McPhee's comments in many respects, explaining that when it comes to proving a violation of the Contract Advisor Regulations, "filing a sworn statement or turning over proof, all of a sudden [the Contract Advisors] start clamming up." The NFLPA representative believes that the NFLPA has done "a pretty good job" of enforcing the Contract Advisor Regulations, but that "[i]t could always be improved." Finally, the NFLPA representative affirmed that "where a player's being harmed financially, that's something that we go after hard and heavy."

^z Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

^{aa} As discussed in Chapter 7: The NFL and NFLPA, Section J: Current Practices of the NFLPA, many contract advisors also believe the NFLPA is understaffed. One contract advisor that we spoke with expressed the belief that "the NFLPA is severely understaffed," while another explained that in his opinion the NFLPA does a "terrible job" of policing club medical staff and enforcing player health and safety provisions of the CBA because, in part, it is "absolutely not" adequately staffed. Similarly, another contract advisor said it would help "100 percent" if the NFLPA hired more attorneys focused on health issues.

(F) Recommendations Concerning Contract Advisors

Contract advisors are a critical stakeholder in protecting and advancing player health.^{ab} Indeed, peer reviewer and former contract advisor and NFL club executive Andrew Brandt noted in his comments that contract advisors “are the gateway to the player” and thus are “key stakeholders in player health issues.”⁸⁹ A contract advisor is typically involved in all aspects of a player’s life, including but not limited to his personal, career, medical, legal, and financial matters. They have the ability to ensure that the player receives proper medical care during his career, that the player’s health-related rights are respected and that the player considers the risks of an NFL career while at the same time helping to prepare the player for a life after football.

While some may think that the role of contract advisors is further afield from health than other stakeholders in this Report, it is important to bear in mind our broad definition of health, as explained in the Introduction. We define health for purposes of this Report as “a state of overall wellbeing in fundamental aspects of a person’s life, including physical, mental, emotional, social, familial, and financial components.” To truly improve player health we cannot focus solely on avoiding brain injury, protecting joints, and promoting cardiovascular health, for example, but we must also address well-being more generally, which depends on other factors, such as the existence of family and social support, the ability to meet economic needs, and life satisfaction. Contract advisors play a critical role in all of these aspects of player health.

Nevertheless, as explained above, there are structural and regulatory issues with the contract advisor industry that prevent players from receiving the best possible representation and the best possible protection of their health-related rights. Improvements to the contract advisor industry should increase the level of professionalism in the industry, reduce unethical behavior, increase stability in contract advisor operations, and most importantly, help players receive the guidance and representation they deserve, particularly on health-related matters. Simply put, improvements in player health require sufficient representation and enforcement concerning player rights. Sufficient representation and enforcement will not come unless the contract advisor industry is improved.

Before getting to contract advisor-specific recommendations, there are additional recommendations concerning contract advisors that are made in other chapters:

- Chapter 1: Players— Recommendation 1:1-A: With assistance from contract advisors, the NFL, the NFLPA, and others, players should familiarize themselves with their rights and obligations related to health and other benefits, and should avail themselves of applicable benefits.
- Chapter 13: Financial Advisors— Recommendation 13:1-A: Players should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors.

In addition to these recommendations, and in light of the above background and the important role that contract advisors are capable of playing in protecting and promoting player health, we recommend the following:

Goal 1: To recognize contract advisors as an important resource alongside the NFLPA in their shared endeavor to advance player interests, and to seek opportunities to strengthen their connections whenever possible.

Principles Advanced: Respect; Health Primacy; and, Collaboration and Engagement.

^{ab} Current Player 8 explained that “there are many, many guys that . . . need an agent to help them transition, and help them in their everyday lives of the NFL.”

Recommendations Concerning Contract Advisors – continued

Recommendation 12:1-A: The NFLPA should create a Contract Advisor Committee that meets with NFLPA representatives at least twice a year to discuss issues affecting NFL player health, as defined broadly in this Report to include health, finances, education, and the like.

It seems clear that the relationship between the NFLPA and contract advisors could be considerably stronger. By law, contract advisors are agents of the NFLPA—acting in largely the same capacity as the NFLPA, *i.e.*, protecting players’ best interests. Contract advisors are typically players’ most trusted guides and the ones who take on almost all dealings with NFL clubs. For these reasons, the NFLPA should view contract advisors as partners in protecting players’ rights, particularly when it comes to their health, and should develop formal mechanisms for contract advisors to pass along their knowledge, experience, concerns, and suggestions. A committee comprised of contract advisors would provide such a mechanism. Without getting into the specifics of the precise structure and terms of this proposed committee, we simply emphasize that the committee members should reflect a wide range of clientele, and systems should be put in place to allow all contract advisors to be heard.

Recommendation 12:1-B: The NFLPA should provide contract advisors with a copy of all materials and advice that it provides to players concerning player health.

Contract advisors typically serve as the main conduits and filters for information and documents to players. Given their trust in their contract advisors and competing demands for their time, many players might only pay serious attention to information or a document if their contract advisor tells them to read it. The NFLPA provides players with documents during training camp and at other times during the season and offseason concerning various topics, including their rights, current issues, and their health. While the NFLPA does make summaries of the benefit plans available to contract advisors via a password-protected website, contract advisors that we interviewed expressed that the NFLPA does not otherwise provide contract advisors with copies of the documents it is providing to players.^{ac} During its review of this Report, the NFLPA stated that it believes it does provide contract advisors with all such documents. Without resolving this dispute, in order to ensure that the players take the notices seriously, the NFLPA should provide a copy of these documents related to health, as defined broadly by this Report, to contract advisors so that they can confirm that the player received and properly considered the information. Again, the NFLPA should consider contract advisors as its partners in representing and protecting players.

Goal 2: To improve professionalism and ethical conduct within the contract advisor industry.

Principles Advanced: Respect; Health Primacy; Empowered Autonomy; Transparency; Managing Conflicts of Interest; and, Justice.

Recommendation 12:2-A: The NFLPA should amend the Contract Advisor Regulations to prohibit loans or advances from contract advisors to players or prospective players in excess of the costs reasonable and necessary to prepare for the NFL Draft.

^{ac} Contract Advisor 4: “I don’t know what they [the NFLPA] share with the players.”

Recommendations Concerning Contract Advisors – continued

The NFLPA Contract Advisor Regulations forbid “[p]roviding or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services.”⁹⁰ However, many (but not all) contract advisors routinely provide new clients with tens or hundreds of thousands of dollars in loans or advances that generally do not have to be repaid if the player continues to retain the contract advisor. The NFLPA arbitrator has routinely found such arrangements not to be in violation of the NFLPA Contract Advisor Regulations based on a questionable legal analysis.

Although such arrangements would seem to benefit players by providing them with significant amounts of money up front, permitting these loans and advances may actually work to the detriment of players to the extent they cause players to choose their contract advisors for the wrong reasons—cash over competence, integrity, and experience. As a result, what appears to be a windfall in the short-term can result in long-term deficits to the player.

For example, an inadequate contract advisor might fail to tell the player he has the right to a second medical opinion or might arrange for a second medical opinion by an unqualified doctor. The contract advisor might not know how to appropriately work with the NFLPA in protecting a player’s rights, such as filing a grievance. The contract advisor might also avoid filing a grievance to avoid spoiling his or her relationship with the club. Moreover, the contract advisor might not adequately assist the player in taking advantage of the benefits and programs available to him to prepare for life after football.

Accordingly, we recommend limiting loans and advances from contract advisors to the costs reasonable and necessary to prepare players for the NFL Draft. The NFLPA should consider developing a maximum amount (to grow annually at some nominal rate) that contract advisors may loan or advance to players for training purposes and treat any amount above that as presumptively violative. This will help players focus on competence over short-term benefits when selecting contract advisors and allow them more freedom to end relationships with contract advisors who are not working out, as they will avoid having large debts that come due only if and when they select a new contract advisor.

In terms of enforcement, NFLPA Contract Advisor Regulations already require contract advisors to provide the NFLPA with a copy of any agreement between the contract advisor and player.⁹¹ Thus, the NFLPA should review those agreements to determine whether the amounts being advanced or loaned appear to be acceptable and investigate as appropriate. To further assist in enforcement, the NFLPA should also require that all agreements between a contract advisor and a player be in writing.

Recommendation 12:2-B: The NFLPA should consider investing greater resources in investigating and enforcing the Contract Advisor Regulations.

As discussed above, there are serious problems with the contract advisor industry that sometimes result in substandard representation for and advice to the players, including poor handling of player health matters. Additionally, the NFLPA admittedly has difficulty enforcing the Contract Advisor Regulations. Without meaningful enforcement, the Regulations lose their effectiveness to the detriment of players. One possibility is hiring more attorneys to focus on these matters.

Recommendation 12:2-C: Players should be given information to ensure that they choose contract advisors based on their professional qualifications and experience and not the financial benefits the contract advisor has or is willing to provide to the player.

Recommendations Concerning Contract Advisors – continued

As discussed above, prospective NFL players often choose their contract advisors not based on their professional qualifications but instead on how much the contract advisor is willing to “loan” or “advance” to the player. Players understandably are excited about the opportunity to receive large sums from the contract advisors simply for letting the contract advisor represent them. However, players do so at their own peril. As Contract Advisor 4 stated:

“[I]f a player wants to make a business decision based on how much money they’re being given or advanced, well, then that’s their right . . . The sad thing, of course, is when they’re young, they’re from more difficult socioeconomic backgrounds, so they don’t understand that when you take money or you take some sort of favor for the right to represent them, that . . . you’re only going to get what you paid for . . . [J]ust as you wouldn’t go to the heart doctor for your heart surgery that’s going to give you the most money . . . [y]ou want to go to the best doctor. And we see every day players wondering why am I getting improper guidance, why am I getting poor advice, why am I being left to hang out to dry. And sometimes I’ll tell them to look in the mirror and ask why did I choose the people around me that I did. And often times it’s because of the financial advances, financial favors that they were given.”

If the Contract Advisor Regulations are not amended to prohibit such arrangements as recommended above, it is important that the players at least understand the downsides of choosing their contract advisor based on loans or advances.^{ad}

However, presently, there are minimal resources for players about how to choose a contract advisor. While colleges might be able to help players, they are not experts in the contract advisor industry and often have their own interests which might conflict with the player’s—such as when the player is considering leaving college even though he has college eligibility remaining.⁹²

The NFLPA has the potential to be the best resource for helping players choose contract advisors appropriately and does make some effort on this topic. The NFLPA conducts “Pipeline to the Pros” with current college football players to try to inform them about the process of becoming an NFL player, including hiring a contract advisor.⁹³ In addition, the NFLPA’s website includes a page advising “Active Players” on “How to Pick Your Agent,”⁹⁴ but the page is sparse on information. The NFLPA only lists five recommendations for consideration in picking a contract advisor:

- (1) The primary reason you hire an agent is to negotiate your NFL Player Contract. Your agent should be skilled at negotiating the following: Signing Bonus; Paragraph 5 Salary; Roster, Report and Workout Bonuses; and, Incentives.
- (2) Interview several there are more than 850 certified agents (sic).
- (3) Verify clients represented.^{ae}
- (4) Contact the NFLPA and/or utilize the agent search feature on this website to ensure the agent is active and in good standing.
- (5) Familiarize yourself with the NFLPA Regulations Governing Contract Advisors and understand required and prohibited conduct for the agents.

ad Contract Advisor 5: “[P]layers have a tendency to focus in on the fee, focus in on the flavor of the month, so to speak, and just worry about what kind of contract they think they’re gonna get or what the agent promises them. And I think what happens is that the player doesn’t understand that really this is from A, which is the start of their career, to B, the end of their career, to C, which is after their career.”

ae During the recruiting process, the contract advisor will generally make the player aware of other players the contract advisor purportedly represents, to try and demonstrate the contract advisor’s skill. A list of contract advisor’s clients is available to players after they are in the NFL—but not before. Thus, before the player enters the NFL, the best resource for confirming a contract advisor’s clients is the NFLPA. Players should also seek to discuss the quality of a contract advisor’s services with current and/or former clients.

Recommendations Concerning Contract Advisors – continued

Notably, each of these steps is fairly burdensome for the players. Additionally, the NFLPA's site does not include any information on the contract advisor hiring process, the types of services contract advisors must or can provide, potential conflicts of interest, or the types of fee and contractual arrangements between contract advisors and players (such as loans and advances) and the benefits and drawbacks of such arrangements.

The NFLPA is in a powerful position to help prospective NFL players pick contract advisors. While such players are not yet in the NFLPA's bargaining unit (and thus the NFLPA has no legal obligations towards them, see Chapter 7: The NFL and NFLPA), hundreds of college players will soon be NFLPA members and their decisions concerning a contract advisor while still in college can have a significant impact on their NFL career. Although the NFLPA provides some guidance to players about the process, problems clearly remain. The NFLPA could expand and intensify the information made available to prospective NFL players and could work with both the NCAA and the NFL (both of which more closely track potential NFL players) to ensure that the right players are receiving the necessary information. The NFLPA should also consider creating a system whereby players are able to rate their contract advisors' performance and that data could be made available, including but not limited to a regular survey, a Yelp-like service, or some other form of information-sharing.

Recommendation 12:2-D: The Contract Advisor Regulations should be amended to require contract advisors to consider a player's long-term health interests in providing representation and advice.

It is clear that a player's career can be short and that the physical and mental tolls of a career can be permanent. Players will often take physical risks to maximize their earnings, even if those earnings come at the cost of future health. Balancing these risks and rewards is difficult. Nevertheless, the long-term effects of a player's decision—including whether to play through an injury and how to structure a contract—must be taken into consideration. Contract advisors must be aware, and make sure the players are aware, of these short-term versus long-term trade-offs.

Contract advisors should continue to be a resource for players after their careers are over. Even though contract advisors are no longer compensated once a player's career ends, players are still likely to view them as their most trusted and best resource for many matters in life, including, specifically, items related to the CBA, such as various benefits and programs. While contract advisors are likely to help former players because it is in their own business interests, they should also recognize that a player will view ongoing assistance as a logical and natural extension of their relationship during the player's playing days.

Recommendation 12:2-E: The NFLPA should amend the Contract Advisor Regulations to prohibit contract advisors from revealing a player's medical information or condition to anyone without the player's consent.

Players are obligated by the CBA to advise the club of any injury or medical condition. Contract advisors might often be a conduit for this information, particularly where the player has been seen by a second opinion doctor. Thus, it is unclear that there is a problem with contract advisors disclosing player medical information to clubs without the player's consent. Nevertheless, considering the importance of the information, we believe it is a practice that should be more closely examined.

Recommendations Concerning Contract Advisors – continued

There are numerous laws and ethical rules that make clear that an individual's medical history, conditions, and records are entitled to the utmost confidentiality. These laws and rules emanate from respect for people's privacy and recognition that people generally should not be discriminated against based on medical conditions. As explained in Chapter 2: Club Doctors, these confidentiality protections can only be bypassed with the individual's consent or in certain rare situations. Contract advisors should similarly be required to hold in confidence a player's medical condition where the condition is not otherwise public knowledge. While there may be many legitimate reasons for a contract advisor to disclose a player's medical history or condition to a third party, such as a club interested in drafting or signing the player, considering the sensitivity of the information, the contract advisor should involve the player in important processes related to their health and obtain consent to disclose such information.

Recommendation 12:2-F: The NFLPA should consider including at least one non-player member on the Committee on Agent Regulation and Discipline (CARD).

CARD is responsible for investigating and disciplining contract advisors for violations of the NFLPA Contract Advisor Regulations. However, the most egregious and regular violations of the NFLPA Contract Advisor Regulations are those that, on their face, seem to benefit players—large payouts and other improper inducements. As discussed above, these practices undermine the industry's professionalism at the expense of the players and their health. Yet players serving on CARD might not consider these practices to be as detrimental as they are, perhaps because they themselves took benefits or inducements at one time, or know teammates or friends who have, or know and like contract advisors who have provided such inducements.

Adding a law professor or attorney familiar with the sports industry to CARD would provide a different and independent perspective on the relevant issues and practices. Although the NFLPA assists CARD members in their investigations, adding a neutral member to the Committee would strengthen the process.

Recommendation 12:2-G: The NFLPA should consider whether there are structural or regulatory changes that can be made to the contract advisor industry to remove or reduce possible conflicts of interests, including situations where the contract advisor represents players on the same club, players at the same position, and/or players in the same NFL Draft.

As discussed above, there are a variety of situations and practices that could pose conflicts for contract advisors or, at a minimum, present the appearance of a conflict. It is not clear whether these potential conflicts are in fact harming players or how these conflicts can be removed or reduced without also harming players. For example, if a player were to be represented by a contract advisor devoid of any possible conflicts, *i.e.*, one who does not represent any other players at the same position, on the same team, in free agency, or have relationships with club personnel, the player might easily end up being represented by an inexperienced and marginally skilled advisor.

Recommendations Concerning Contract Advisors – continued

One possibility is for contract advisors to disclose these potential conflicts to their clients. Indeed, those contract advisors who are also attorneys are required to obtain their client's informed consent before proceeding with a conflicted representation.⁹⁵ However, research has shown that sometimes disclosing conflicts can actually increase the level of trust between the biased advisor and the person to whom the conflict is disclosed.⁹⁶ Moreover, disclosure does not remove the potential conflict.

There are no clear answers, but the NFLPA should more closely examine the issue via analyzing past and future situations that might present conflicts, and by discussing the issue with players and contract advisors.



Endnotes

- 1 U.S.C. § 159(a).
- 2 *White v. Nat'l Football League*, 92 F. Supp. 2d 918, 924 (D. Minn. 2000).
- 3 See *Black v. Nat'l Football League Players Ass'n*, 87 F. Supp. 2d 1, 2 (D.D.C. 2000) ("NFLPA nevertheless permits individual agents, or 'contract advisors,' to represent individual players in negotiations with NFL Clubs."); *White v. Nat'l Football League*, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) ("Player agents are permitted to negotiate player contracts in the NFL only because the NFLPA has delegated a portion of its exclusive representational authority to them."). See also *Magic Pan, Inc. v. NLRB*, 627 F.2d 105, 109–10 (7th Cir. 1980), citing *General Electric Co. v. NLRB*, 412 F.2d 512, 520 n.6 (2d Cir. 1969) (explaining relationship between unions and agents); Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 Conn. L. Rev. 355, 359 (2007) (describing union's authority to delegate responsibility for player contract negotiations to agents).
- 4 See 1993 CBA, Art. VI; see also 2011 CBA, Art. 48 (discussing NFLPA's authority to govern agents and discipline for Clubs which negotiate with non-certified agents).
- 5 See Dan Cook, *Sports agents busy chasing sweetest deals*, San Antonio Express-News, July 4, 1999, available at 1999 WLNR 7890207.
- 6 Anndee Hochman, *Manley Case to Players Union*, Wash. Post, Jan. 26, 1985, available at 1985 WLNR 1507095.
- 7 See Brian Schmitz, *Agents Agree that Unscrupulous Practitioners Give Field Bad Name*, Orlando Sentinel, Jun. 12, 1988, available at 1988 WLNR 2014977 (discussing problems in the sports agency business with focus on football and basketball industries); Doug Bedell, *The Crackdown on Agents*, Dallas Morning News, July 19, 1987, available at 1987 WLNR 1923190 (same); Mitch Lawrence, *A Bad Deal: Player Agents and College Athletes*, Dallas Morning News, Nov. 10, 1985, available at 1985 WLNR 1326922 (same).
- 8 See *NFLPA is no longer labor group*, Dallas Morning News, Dec. 6, 1989, available at 1989 WLNR 3102115.
- 9 See Larry Weisman, *Redskins Get a Good Four-Year Deal in Harvey*, USA Today, Mar. 9, 1994, available at 1994 WLNR 2322485 (referencing NFLPA's inability to regulate Contract Advisors during legal dispute with NFL).
- 10 See Bob Oates, *With Free Agency Won, NFLPA Ready to Recertify as a Union*, L.A. Times, Mar. 14, 1993, available at 1993 WLNR 3986006.
- 11 Contract Advisor Regulations, § 3(A)(17).
- 12 The 2012 Contract Advisor Regulations are available from the NFLPA's website at http://nflparesources.blob.core.windows.net/mediareources/files/PDFs/SCAA/2012_NFLPA_Regulations_Contract_Advisors.pdf.
- 13 Contract Advisor Regulations, § 2(A).
- 14 *Id.* The NFLPA's enforcement of its rules was tested when the rap and entertainment mogul Jay-Z announced the creation of Roc Nation Sports, a prospective athlete representation firm, in 2013. Jay-Z did not graduate high school and was presumably not interested in taking the NFLPA's exam. Jay-Z evaded the Contract Advisor Regulations by hiring Kim Miale, a certified contract advisor, to work for Roc Nation Sports. Nevertheless, because he was not certified, Jay-Z was thought not to be permitted to engage in recruiting on behalf of Roc Nation Sports. The NFLPA provided Jay-Z a reprieve when it issued a memorandum stating non-Contract Advisor employees could sit in on recruiting meetings held at the contract advisor's office. See Darren A. Heitner and Bryan Saul, *Jay Z Has 99 Problems, And Being a Sports Agent May Be One*, 24 Marq. Sports L. Rev. 59 (2013); Jason Cole, *NFLPA Adopts Jay-Z Rule*, Nat'l Football Post (Dec. 6, 2013, 5:53 PM), <http://www.nationalfootballpost.com/NFLPA-adopts-JayZ-Rule.html>, archived at <http://perma.cc/7YD9-JYLP> (discussing NFLPA's memorandum on the issue).
- 15 Agent Certification FAQs, NFLPA, <https://nflpa.com/agents/faq> (last visited Aug. 7, 2015).
- 16 *Id.*
- 17 A player is not eligible for the NFL Draft "until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier." 2011 CBA, Art. 6, § 2. From 2007 to 2012, contract advisors were prohibited from recruiting players until they were eligible for the NFL Draft. The "Junior Rule," as it was known, only empowered those contract advisors who disregarded the Junior Rule as well as "runners," who are not regulated by the NFLPA. As a result, in 2012, the Contract Advisor Regulations were amended to remove the Junior Rule. Mike Florio, *NFLPA dumps "junior rule"* ProFootballTalk (Mar. 27, 2012, 6:00 PM), <http://profootballtalk.nbcsports.com/2012/03/27/nflpa-dumps-junior-rule/>, archived at <http://perma.cc/W53W-KT7H>.
- 18 See Mike Florio, *Good agents do a lot more than negotiate contracts*, ProFootballTalk (July 23, 2015, 11:01 AM), <http://profootballtalk.nbcsports.com/2015/07/23/good-agents-do-a-lot-more-than-negotiate-contracts/>, archived at <http://perma.cc/UWB8-DXC3>.
- 19 "The term "compensation" shall be deemed to include only salaries, signing bonuses, reporting bonuses, roster bonuses, Practice Squad salary in excess of the minimum Practice Squad salary specified in Article 33 of the Collective Bargaining Agreement, and any performance incentives earned by the player during the term of the contract (including any option year) negotiated by the Contract Advisor. For example, and without limitation, the term compensation shall not include any "honor" incentive bonuses (e.g. ALL PRO, PRO BOWL, Rookie of the Year), or any collectively bargained benefits or other payments provided for in the player's individual contract." 2012 NFLPA Contract Advisor Regulations, § 4(B)(3).
- 20 NFLPA Contract Advisor Regulations, § 4(B)(1).
- 21 Each year, clubs can designate one unrestricted free agent as a "Franchise Player" and one unrestricted free agent as a "Transition Player." These designations provide the clubs the opportunity to match any offers made to the players and to receive draft picks as compensation in the event the players sign with another club. In exchange, the players are guaranteed a one-year contract that makes them among the highest paid at their position. See 2011 CBA, Art. 10.
- 22 NFLPA Contract Advisor Regulations, § 4(B)(1)(a).
- 23 NFLPA Contract Advisor Regulations, § 4(B)(4).
- 24 ¶ 12 of the NFLPA Standard Representation Agreement, which can be found as Appendix D-4 to the 2012 NFLPA Contract Advisor Regulations.
- 25 See Restatement (Third) of Agency § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.")
- 26 See *id.* § 8.03, cmt. d (describing agent's duty of undivided loyalty); *id.* § 8.08 (2006) (explaining agent's duty to act with care, competence and diligence of agents in similar circumstances); *id.* § 8.10 (stating that agent has duty "to refrain from conduct that is likely to damage the principal's enterprise").
- 27 "Duty," Black's Law Dictionary (9th ed. 2009).
- 28 *Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 455 (S.D.N.Y. 2012) (applying New York law); *Carcano v. JBSS, LLC*, 200 N.C.App. 162, 177 (N.C.App. 2009); *L.C. v. R.P.*, 563 N.W.2d 799, 802 (N.D. 1997); *Allen Realty Corp. v. Holbert*, 227 Va. 441, 447 (Va. 1984); *Murphy v. Country House, Inc.*, 307 Minn. 344, 350 (Minn. 1976).
- 29 NFLPA Contract Advisor Regulations, § 3(A).
- 30 The UAAA defines an "athlete agent" as: an individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual

- is an athlete agent. The term does not include a spouse, parent, sibling, [or] grandparent[, or guardian] of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization. UAAA, § 2(2).
- 31 *Uniform Athletes Agents Act*, National Conference of Commissioners on Uniform State Laws, Aug. 4, 2000, http://www.uniformlaws.org/shared/docs/athlete_agents/uaaa_finalact_2000.pdf, archived at <https://perma.cc/798J-QENC?type=pdf>.
 - 32 *Id.*
 - 33 Marc Edelman, *Will The New Uniform Athlete Agents Act Continue To Pander To The NCAA?*, *Forbes* (June 4, 2013 9:00 AM), <http://www.forbes.com/sites/marcedelman/2013/06/04/will-the-new-uniform-athlete-agents-act-continue-to-pander-to-the-ncaa/>, archived at <https://perma.cc/ALC6-79CS?type=pdf>; see also *Athlete Agents Acts*, Uniform Laws Comm'n, <http://www.uniformlaws.org/Act.aspx?title=Athlete%20Agents%20Act> (last visited Aug. 7, 2015), archived at <http://perma.cc/V223-PE7Q> (showing the status of the UAAA across the country).
 - 34 See Chris Deubert, *What's A Clean Agent to Do? The Case for a Cause of Action Against a Players Association*, 18 *Vill. Sports & Ent. L.J.* 1, 6–10 (2011) (discussing problems with the UAAA).
 - 35 See *id.* at 10–11 (discussing other states' agent laws).
 - 36 See *Morton v. Steinberg*, No. G037793, 2007 WL 3076934 (Cal.Ct.App. Oct. 22, 2007).
 - 37 *Id.*
 - 38 See Bernie Wilson, *Steinberg is Dealing with the Fallout from Drinking*, *The Augusta Chronicle* Jan. 15, 2012, available at 2012 WLNR 1050482 (discussing Steinberg's outstanding debt to Morton of \$450,000 as of January 2012).
 - 39 Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807.
 - 40 See Deubert, *supra* note 34 at 11–12 (discussing problems with SPARTA).
 - 41 *Id.*
 - 42 See *Who We Are*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/about/who-we-are> (last visited Aug. 7, 2015), archived at <http://perma.cc/2S7M-GL89>; *Membership*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/about/who-we-are/membership> (last visited Aug. 7, 2015), archived at <http://perma.cc/5J5P-RQ2V> (describing membership as more than 1,200 schools).
 - 43 See *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (discussing scope of NCAA's power).
 - 44 –14 NCAA Division I Manual, § 12.1.2.
 - 45 See UAAA §§ 15, 17 (2000) (explaining that violations of parts of act prohibiting certain conduct may result in criminal and administrative punishments).
 - 46 Deubert, *supra* note 34 at 14.
 - 47 This information was provided by the NFLPA.
 - 48 “The term ‘runner’ generally describes someone employed by an agent, typically a young person, whose job is to become friendly with the student-athlete, providing the student-athlete with cash, meals, clothes or other gifts and ultimately steering the student-athlete towards the employing agent.” Deubert, *supra* note 34 at 6.
 - 49 *Model Rules of Prof'l Conduct*, Am. Bar Ass'n (2013), available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.
 - 50 Information about the number of Contract Advisors and their clientele is on file with the NFLPA.
 - 51 Contract Advisor Regulations, § 2(G). See also Kivisto v. Nat'l Football League Players Ass'n, 10-cv-24226, 2011 WL 335420 (S.D.Fla. 2011) (dismissing Contract Advisor's challenge to his decertification for having not negotiated an NFL contract in a three-year period), *aff'd* 435 Fed. Appx. 811 (11th Cir. 2011).
 - 52 This information was provided by the NFLPA.
 - 53 See Scott Kestenbaum, *Uniform Alternative Dispute Resolution: The Answer to Preventing Unscrupulous Agent Activity*, 14 *Pepp. Disp. Resol.* L.J. 55, 56–58 (2014) (discussing recent scandals involving sports agents); James Masteralexis, Lisa Masteralexis and Kevin Snyder, *Enough is Enough: The Case for Federal Regulation of Sport Agents*, 20 *Jeffrey S. Moorad Sports L.J.* 69, 71 (2013) (same); Deubert, *supra* note 34 (discussing problems with the current agent regulatory scheme).
 - 54 See Andrew Brandt, *An agent's life isn't all glamour*, ESPN, Nov. 27, 2012, http://espn.go.com/nfl/story/_/id/8681968/nfl-agent-life-all-glamour, archived at <http://perma.cc/7VVL-CYBG> (discussing realities of Contract Advisor industry).
 - 55 See 2012 Contract Advisor Regulations, § 3(B)(2).
 - 56 See *Champion Pro Consulting Group, LLC v. Impact SportsFootball, LLC*, 12-cv-27, 2015 WL 4392994, *2 (M.D.N.C. July 15, 2015) (discussing \$100,000 advanced to NFL player Robert Quinn); Mike Florio, *As rookie money dries up, agents continue to cut great deals for players*, *ProFootballTalk* (Jan. 11, 2012, 1:17 PM), <http://profootballtalk.nbcsports.com/2012/01/11/as-rookie-money-dries-up-agents-continue-to-cut-great-deals-for-players/>, archived at <http://perma.cc/KUM5-WFPB> (discussing large advances and loans being provided to prospective clients).
 - 57 See, e.g., *Rosenhaus v. Jackson*, NFLPA Case No. 13-31 (Kaplan, Arb. Apr. 10, 2014) (player required to repay Contract Advisor \$361,415 in loans made at the time the player became a client or shortly thereafter); *Fleming v. Brown*, NFLPA Case No. 13-29 (Kaplan, Arb. Mar. 18, 2014) (player required to repay Contract Advisor \$60,875.45 in pre-draft loans and advances); *Kiernan v. Rachal*, NFLPA Case No. 13-2 (Kaplan, Arb. Jul. 18, 2013) (player required to repay Contract Advisor \$43,573.76 in loans and advances); *Martin v. Galette*, NFLPA Case No. 10-40 (Kaplan, Arb. Mar. 1, 2011) (player required to repay Contract Advisor \$21,978.10 in pre-draft loans); *Canter v. Lee*, NFLPA Case No. 08-40 (Kaplan, Arb. Apr. 9, 2009) (player required to repay Contract Advisor \$9,228.42 in pre-draft loans).
 - 58 *Rosenhaus v. Jackson*, NFLPA Case No. 13-31 (Kaplan, Arb. Apr. 10, 2014), at 34–35.
 - 59 See, e.g., *Mackler & Archambeau v. Nicks*, NFLPA Case No. 08-38 (Kaplan, Arb. May 7, 2009) (player required to repay Contract Advisors \$25,493.96 in training expenses).
 - 60 “Magnetic resonance imaging (MRI) is a test that uses a magnetic field and pulses of radio wave energy to make pictures of organs and structures inside the body. In many cases, MRI gives different information about structures in the body than can be seen with an X-ray, ultrasound, or computed tomography (CT) scan.” *Magnetic Resonance Imaging (MRI)*, WebMD, May 24, 2013, <http://www.webmd.com/a-to-z-guides/magnetic-resonance-imaging-mri>, archived at <http://perma.cc/QC93-HA5B>.
 - 61 “A computed tomography (CT) scan uses X-rays to make detailed pictures of structures inside of the body.” CT or CAT Scan, WebMD, Jun. 5, 2013, <http://www.webmd.com/hw-popup/ct-or-cat-scan>, archived at <http://perma.cc/FB76-AP2P>.
 - 62 See also David Canter, *From Doctor to Watchdog to Friend*, ESPN (2000), <http://espn.go.com/page2/s/confessions/001115agent.html>, archived at <http://perma.cc/8KTJ-S2CB> (NFL Contract Advisor David Canter: “For some clients, I play doctor. I have to know detailed physical information about the injuries the players have suffered in the past. I have to know whether or not those injuries could be career-threatening or career-ending, and whether or not my client should see a doctor for a second opinion or if he should see a certain specialist.”); Sally Jenkins & Rick Maese, *NFL Medical Standards, Practices Are Different Than Almost Anywhere Else*, *Wash. Post*, Mar. 16, 2013, http://www.washingtonpost.com/sports/redskins/nfl-medical-standards-practices-are-different-than-almost-anywhere-else/2013/03/16/b8c170bc-8be8-11e2-9f54-f3fd70acad2_story.html, archived at <http://perma.cc/AJ9Y-EAGY> (“[NFL Contract Advisor] Smith demands his clients receive an MRI and second opinion for every injury. He estimates they diverge from the club physician's opinion ‘four to five times out of every 25.’”);
 - 63 Jerry Cianciolo, *Get a second opinion*, *Bos. Globe*, Jan. 25, 2015, available at 2015 WLNR 2386857; see also Robert Klitzmann, *Second*

- Opinions, Through a Patient's Eyes*, N.Y. Times, Feb. 12, 2008, http://www.nytimes.com/2008/02/12/health/views/12essa.html?_r=0, archived at <https://perma.cc/Z4AA-S386?type=pdf> (“For 30 percent of patients who voluntarily seek second opinions for elective surgery and 18 percent of those whose insurance companies require it, the second doctors disagree with the first.”)
- 64 See also Mark Fainaru-Wada and Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 76–82 (2013) (discussing the efforts of Leigh Steinberg, at one time one of the most powerful sports agents in the world, to educate his clients on the risks of concussions in the mid-1990s).
- 65 Andrew Brandt, Peer Review Response (Oct. 30, 2015).
- 66 NFLPA Contract Advisor Regulations, App. D, ¶ 12.
- 67 See, e.g., *Elnitski/Redden v. Wake*, NFLPA Case No. 09-28 (Kaplan, Arb. 2010) (awarding terminated Contract Advisors \$6,000 in *quantum meruit* for their efforts in negotiating contract before termination); *Sarnoff v. Boldin*, NFLPA Case No. 06-6 (Kaplan, Arb. 2006) (awarding terminated Contract Advisor \$18,000 in *quantum meruit* for his efforts in negotiating contract before termination); *Segal/Levy v. Lincoln*, NFLPA Case No. 96-3 (Kaplan, Arb. 1997) (awarding terminated Contract Advisors \$11,250 in *quantum meruit* for their efforts in negotiating contract before termination).
- 68 See, e.g., *Carey v. Quinn*, NFLPA Case No. 12-13 (Kaplan, Arb. 2013) (awarding Contract Advisor Carl Carey only 70 hours of the 650 hours he requested for *quantum meruit* based on Carey's failure to provide sufficient documentary evidence of his alleged work).
- 69 CAA terminated Dogra in November 2014. Michael David Smith, *High-profile agent Ben Dogra out at CAA*, ProFootballTalk (Nov. 13, 2014, 5:41 PM), <http://profootballtalk.nbcsports.com/2014/11/13/high-profile-agent-ben-dogra-out-at-caa/>, archived at <http://perma.cc/NC6P-LFHB>.
- 70 Mike Florio, *Report: Luck could be signing with CAA*, ProFootballTalk (Dec. 20, 2011, 6:21 PM), <http://profootballtalk.nbcsports.com/2011/12/20/report-luck-could-be-signing-with-caa/>, archived at <http://perma.cc/7FNU-JX9K>.
- 71 *Id.*
- 72 *Id.*; Jarrett Bell, *Condon has big clients, a lot of clout, Elite agent's negotiating plate full*, USA Today, Jan. 27, 2012, available at 2012 WLNR 1855278.
- 73 Doug Tatum, *The Power Brokers*, New Orleans Times Picayune, Mar. 2, 2012, available at 2012 WLNR 4602944.
- 74 See Florio, *supra* note 70 (mentioning that Luck's father, Oliver Luck, also West Virginia University's Athletic Director, is an attorney); Mike Florio, *Trent Richardson lands with CAA*, ProFootballTalk (Jan. 25, 2012, 1:32 PM), <http://profootballtalk.nbcsports.com/2012/01/25/trent-richardson-lands-with-caa/>, archived at <http://perma.cc/MW7P-2H62> (mentioning that Luck chose not to be represented by CAA).
- 75 Mike Florio, *Report: Alex Smith may part ways with CAA*, ProFootballTalk (Mar. 17, 2012, 6:33 PM), <http://profootballtalk.nbcsports.com/2012/03/17/report-alex-smith-may-part-ways-with-caa/>, archived at <http://perma.cc/SPQ3-FQPR>.
- 76 See Mike Florio, *Impasse lingers between Alex Smith, Chiefs*, ProFootballTalk (Aug. 9, 2014, 8:18 PM) <http://profootballtalk.nbcsports.com/2014/08/09/impasse-lingers-between-alex-smith-chiefs/>, archived at <http://perma.cc/4LA4-UJR2> (discussing contract negotiations between CAA, on Smith's behalf, with the Chiefs prior to the 2014 season).
- 77 Mike Florio, *Conflict Of Interest Issue Comes Back Into Focus*, ProFootballTalk (Apr. 14, 2009, 12:36 PM), <http://profootballtalk.nbcsports.com/2009/04/14/conflict-of-interest-issue-comes-back-into-focus/>, archived at <http://perma.cc/598K-XM2U>; Mike Florio, *Goff, Wentz have same agents*, ProFootballTalk (Apr. 14, 2016, 7:30 PM), <http://profootballtalk.nbcsports.com/2016/04/14/goff-wentz-have-same-agents/>, archived at <https://perma.cc/MH46-B44V>.
- 78 For more on potential conflicts of interests among sports agents, see Jeffrey C. Meehan, *Harvard or Hardball? An Examination of the Ethical Issues Faced by Lawyer-Agents*, 21 Sports L.J. 45 (2014); Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA Ent. L. Rev. 193 (2004); Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 Tex. Rev. Ent. & Sports L. 37 (2003).
- 79 See 2012 NFLPA Contract Advisor Regulations, § 3(A)(16).
- 80 Contract Advisor Regulations, § 5(A). The Contract Advisor Regulations also govern disputes between Contract Advisors. See *id.*
- 81 See 2012 Contract Advisor Regulations, § 5 (discussing the arbitration procedures).
- 82 See *Weinberg v. Nat'l Football League Players Ass'n*, 06-cv-2332, 2008 WL 4808920, at *2 (N.D.Tex. Nov. 5, 2008) (citing affidavit from Kaplan in which he explained he has been the NFLPA arbitrator since 1994).
- 83 Contract Advisor-player lawsuits occurred occasionally prior to the NFLPA arbitration mechanism. See, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F.Supp. 542 (E.D.Mi. 1984) (Court rescinded contract between player and USFL club because of agent's interest in USFL club); *Zinn v. Parrish*, 644 F.2d 360 (7th Cir. 1981) (Contract Advisor entitled to damages for breach of contract on contract commissions). But see also *Hilliard v. Black*, 125 F. Supp. 2d 1071 (2000) (denying contract advisor's motion to dismiss breach of fiduciary duty, conversion, conspiracy and securities law claims); *Total Economic Athletic Management of America, Inc. v. Pickens*, 898 S.W.2d 98 (Mo.App. 1995) (Contract advisor entitled to damages for anticipatory breach of contract). The *Black* case may not have been subject to the NFLPA's arbitration mechanism because it concerned statutory claims. Additionally, the *Pickens* case may not have been subject to the NFLPA's arbitration mechanism because the alleged wrongdoing occurred at the time the NFLPA was dissolved as a union, which would have made the contract advisor Regulations unenforceable.
- 84 NFLPA Case No. 03-64 (Kaplan, Arb. Nov. 1, 2004).
- 85 Contract Advisor Regulations, § 6(A).
- 86 See 2012 Contract Advisor Regulations, § 6 (describing disciplinary process).
- 87 Contract Advisor Regulations, § 6(D).
- 88 See 2012 Contract Advisor Regulations, § 6 (describing disciplinary process).
- 89 Andrew Brandt, Peer Review Response (Oct. 30, 2015).
- 90 See 2012 Contract Advisor Regulations, § 3(B)(2).
- 91 NFLPA Contract Advisor Regulations, § 3(A)(6).
- 92 For more on the complicated process of athletes transferring from the amateur to professional ranks, see Glenn M. Wong, Warren Zola and Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 Cardozo Arts & Ent. L.J. 553 (2011).
- 93 *Pipeline to the Pros*, NFLPA, <https://www.nflpa.com/pipeline> (last visited Aug. 7, 2015), archived at <https://perma.cc/M8VS-4BM4>; *Getting To Know Mark Levin*, NFLPA, Jun. 19, 2014, <http://www.nflpa.com/news/all-news/getting-to-know-mark-levin>, archived at <http://perma.cc/27VK-G784>.
- 94 *How to Pick Your Agent*, NFLPA, <https://nflpa.com/active-players/how-to-pick-your-agent> (last visited Aug. 7, 2015), archived at <https://perma.cc/TA4L-8VM9>.
- 95 See *Rule 1.7: Conflict of Interest: Current Clients*, Am. Bar Ass'n, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html (last visited Aug. 7, 2015), archived at <http://perma.cc/7UVR-44A6>.
- 96 See Christopher Tarver Robertson, *Biased Advice*, 60 Emory L.J. 653, 666–68 (2011) (explaining study showing that disclosing parties “apparently felt that the disclosure gave them a ‘moral license’ to be even more biased” and that the people to the whom biases are disclosed “failed to effectively use the disclosure to adjust for the inaccuracy of the given advice[.]”)

Chapter 13

Financial Advisors



As we discussed in the Introduction to this Report, our goal is to examine all the inputs that may influence players' health, including the so-called "social determinants of health." Financial health is a major contributor to physical and mental health, and also, in turn, affected by physical and mental health.^a Indeed, many studies have shown a correlation between financial debt and poor physical health.¹ For these reasons, financial advisors are a critical stakeholder in players' long-term health. Despite multiple layers and the availability of well-qualified financial professional regulation (discussed below), there are many stories of NFL players suffering from financial difficulties. While the

^a Many experts have recognized that "financial insecurity can cause people to 'cut corners in ways that may affect their health and well-being,' like spending less on food, clothing, or prescriptions." Nadia N. Sawicki, *Modernizing Informed Consent: Expanding the Boundaries of Materiality*, Univ. Ill. L. Rev. (2016), citing Kevin R. Riggs and Peter A. Ubel, *Overcoming Barriers to Discussing Out-of-Pocket Costs With Patients*, 174 *Jama Int. Med.* 849 (2014); Peter A. Ubel, Amy P. Abernethy, and S. Yousuf Zafar, *Full Disclosure—Out-of-Pocket Costs as Side Effects*, 369 *New Eng. J. Med.* 1484 (2013). Indeed, to many, "financial well-being is certainly within the boundaries of most peoples' concept of health." *Id.*, quoting Michael S. Wilkes and David L. Schriger, *Caution: The Meter is Running: Informing Patients About Health Care Costs*, 165 *Western J. Med.* 74, 78 (1996) (noting that "discussions about the cost of care are an important part of the physician-patient relationship").

actual career earnings of NFL players are difficult to ascertain,^b there have been multiple studies about NFL player financial health with a variety of results.

According to a 2009 *Sports Illustrated* article, by the time NFL players have been retired for two years, 78 percent of them are bankrupt or in financial distress.² However, according to a 2009 NFL-funded study of former NFL players by the University of Michigan, the median income of a former player between the ages of 30 and 49 is \$85,000, compared to \$55,000 for the general population. The study also found that 8.4 percent of former players between ages 30 and 49 were below the poverty level, as compared to 9.5 percent of the general population. A 2015 academic study also refuted the figures in the *Sports Illustrated* article, finding that within two years of the end of their career, only 1.9 percent of players were bankrupt, while also finding that one in six players was bankrupt within 12 years of leaving the NFL.^c Moreover, in 2012, ESPN released the documentary “Broke” detailing the financial problems of professional athletes, and exploring how they had gotten there.³ And in a 2014–2015 survey of 763 former players by *Newsday*, 50.59 percent of former players interviewed said they had struggled financially since their playing career ended.⁴

There are, however, important limitations to the above-mentioned studies.

To support its findings *Sports Illustrated* cited “reports from . . . athletes, players’ associations, agents and financial advisers” but no additional details and no information that can be independently verified.

b Based on an average career length of approximately three years, the NFLPA has estimated that the average career earnings of an NFL player are \$4 million after taxes. See Adam Molon, *Why So Many Ex-NFL Players Struggle With Money*, CNBC (Jan. 31, 2014, 12:29 PM), www.cnbc.com/id/101377457#, archived at <http://perma.cc/F5YN-FJE2>. Using an average salary of \$1.9 million and an average career length of 3.5 years, others have estimated NFL players earn about \$6.7 million in their careers, a figure largely on par with that of the NFLPA’s. See Nick Schwartz, *The Average Career Earnings Of Athletes Across America’s Major Sports Will Shock You*, USA Today, Oct. 24, 2013, <http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls>, archived at <http://perma.cc/9DFP-WPQ2>. However, the NFL has disputed the 3.5 years figure generally provided by the NFLPA, stating instead that players who actually make an NFL Club have, on average, careers of about 6 years. See *What is average NFL player’s career length? Longer than you might think*, Commissioner Goodell says, NFL (Apr. 18, 2011), <http://nflcommunications.com/2011/04/18/what-is-average-nfl-player%E2%80%99s-career-length-longer-than-you-might-think-commissioner-goodell-says/>, archived at <http://perma.cc/PX5U-9SFK>. Finally, it is important to point out that the average in this case does not reflect the median career earnings of NFL players, *i.e.*, the career earnings of a typical NFL player.

c Kyle Carlson, et al., *Bankruptcy Rates Among NFL Players with Short-Lived Income Spikes*, Nat’l Bureau of Econ. Research (April 2015). The study found that the rate of bankruptcy among the general population in the 25–34 year age group was very similar to the bankruptcy rate of NFL players. However, the general population’s average income is almost certainly substantially less than that of the average NFL player’s.

There are two potential limitations to the Michigan Study. First, the Michigan Study population only included players who had vested rights under the NFL’s Retirement Plan, meaning that the players generally had been on an NFL roster for at least three games in at least three seasons. There is likely a significant but unknown percentage of NFL players who never become vested under the Retirement Plan. Second, responders to the survey were 36.8 percent African American and 61.4 percent white—almost a complete reversal of the NFL’s population of current players. While the racial demographics of former players is likely closer to the population of the Michigan Study, *i.e.*, there were more white players than in the current NFL, the Michigan Study did not provide such data on the former player population and did not adjust or account for the racial demographics of the former player population.

In a telephone call with Dr. David Weir, the lead author of the Michigan Study, he explained that: (1) due to limited resources, the population of players to be studied and contacted was limited to the data and contact information available to and provided by the NFL; and, (2) the NFL did not provide racial demographics of former players and thus the study could not adjust for that factor. Weir also believes that the racial demographics of former players is substantially similar to the racial demographics of the Michigan Study’s participants. Finally, Weir explained that, during the internal review process with the NFL, the study was leaked to the media, preventing the study from being amended and submitted to a peer-reviewed publication.

Finally, there are also limitations to the *Newsday* survey: (1) the survey was sent via email and text message by the NFLPA to more than 7,000 former NFL players, thus eliminating former players who were less technologically savvy and also possibly skewing the sample towards those former players closer to the NFLPA; (2) the response rate for the survey was low (approximately 11 percent); and, (3) the study does not discuss the demographics of those that responded, making it difficult to ascertain whether those who responded are a representative sample of all former players.

Despite these limitations, we provide the reader with the best existing data. Moreover, while there are limitations to the data collected to date as well as differences in the figures presented, it is clear that there are serious concerns about former players’ financial difficulties.⁵

The relationship between physical and financial health goes in both directions. Without adequate savings and benefits during and after NFL play, players may find themselves insufficiently prepared to meet their physical and mental health needs, especially in the event of crisis. On the flip side, crises in physical and mental health are closely tied to bankruptcy, home foreclosure, and other serious financial setbacks.⁶ At its worst, these two outcomes can lead to a vicious cycle—poor health outcomes lead to financial losses, which worsen the ability to combat physical and mental health impairments, which in turn further deplete financial resources.

Financial health is also in and of itself an important component of a person’s health. Financial difficulties can cause stress that contributes to or exacerbates psychological and physical ailments.

For all of the above reasons, it is thus critical to consider a stakeholder with a key role in helping players cope and plan financially—financial advisors. It is also critical to recognize that even though NFL players may make a sizeable income during their playing years, they do not all have million dollar contracts, and depending on their career options outside of football, the money they earn may need to see them and their families through decades.

To better inform our understanding of financial advisors’ obligations and practices, we conducted 30–60 minute interviews with three active financial advisors. On average, the financial advisors interviewed had been NFLPA-registered financial advisors for 15 years and had 34 active or former NFL players as clients. The interviews were not intended to be representative of the entire financial advisor population or to draw scientifically valid inferences, but were instead meant to be informative of general practices among financial advisors. We provide quotes from these interviews and urge the reader to keep that caveat in mind throughout. We then invited all three financial advisors to review a draft of this chapter prior to publication. Although two agreed to review a draft of the chapter, only one, Mark Doman of The Doman Group, provided comments. Finally, while two of the financial advisors we interviewed preferred to remain anonymous, Doman preferred to be identified by name in the Report.

(A) Background

Financial advisors are a variety of professionals whose services depend on their area of expertise but can include services such as tax planning, investment advice and services, budgeting, financial planning, insurance, estate planning, and retirement planning.^d While many financial advisors working on behalf of NFL players try to focus their efforts in the world of professional sports, the majority of them have a wide range of clients.

As described in Chapter 12: Contract Advisors, under the National Labor Relations Act (NLRA), the NFLPA is the exclusive representation of players in negotiations with NFL clubs. By choosing to delegate this authority to contract advisors, the NFLPA has the legal authority to certify, regulate and discipline contract advisors. The NFLPA is able to further strengthen its control over contract advisors by requiring NFL clubs to only deal with contract advisors who have been certified by the NFLPA, or be subject to a \$30,000 fine.⁷

Without adequate savings and benefits during and after NFL play, players may find themselves insufficiently prepared to meet their physical and mental health needs.

The NFLPA has no such authority over financial advisors. Neither the NLRA nor any other law confers any status on the NFLPA that gives it the right to regulate financial advisors. More specifically, financial advisors are not involved in the labor dynamics that create the NFLPA’s legal authority over contract advisors, *i.e.*, financial advisors do not negotiate contracts and generally have no contact with the NFL or NFL clubs.

^d The NFLPA Financial Advisor Regulations define “Financial Advice” as “any form of advice, guidance, recommendation, direction, or control, directly or indirectly, over a Player’s funds, property and/or investments, and shall include, but not be limited to, investment advice (including securities, commodities, banking, insurance, or real estate), financial planning, budgeting, money management, retirement planning, the purchase of insurance, tax and estate planning, and any other form of financial consultation that permits the advisor to exercise discretion or control over a Player’s funds, property, and/or investments. As such, ‘Financial Advisors’ includes ‘Brokers,’ ‘Dealers,’ ‘Investment Advisers,’ and ‘Financial Planners,’ each as defined herein. ‘Financial Advisors’ also expressly includes insurance agents, accountants, and attorneys.” 2012 NFLPA Financial Advisor Regulations, § 1.

Nevertheless, after an estimated 78 players were defrauded of \$42 million in a three-year period, the NFLPA began a system of regulating financial advisors in 2002.⁸ That year, the NFLPA launched a program whereby financial advisors could register with the NFLPA and released its Regulations and Code of Conduct Governing Registered Player Financial Advisors (“Financial Advisor Regulations”).^e The NFLPA’s financial advisor program was, and remains, the only one of its kind among the major American sports unions, and deserves praise in this regard.

It is important to note that the NFLPA only “registers” financial advisors while it “certifies” contract advisors. This distinction likely exists for several reasons: the NFL lacks legal authority over financial advisors as described above; and, the NFLPA does not want to be seen as endorsing any financial advisor and becoming liable for the wrongdoing of any financial advisor.⁹ Indeed, the NFLPA requested and received a No-Action Letter from the Securities and Exchange Commission (SEC) agreeing with the NFLPA’s position that by operating the financial advisor program, the NFLPA would not be considered an investment adviser or solicitor within the meaning of federal securities laws.¹⁰

Significantly, this distinction means that while contract advisors are *required* to be certified by the NFLPA to perform their duties, financial advisors are under no obligation to register with the NFLPA.

There are many financial advisors who refuse to engage in recruiting as a matter of professional ethics.

The Financial Advisor Regulations have been amended from time to time, most recently in 2012.¹¹ Like the NFLPA’s Contract Advisor Regulations, the Financial Advisor Regulations contain extensive eligibility requirements, including: a bachelor’s degree; a minimum of eight years of experience with appropriate financial industry licensure; minimum of \$4 million in insurance coverage; and, no civil, criminal or regulatory history relevant to financial services or fiduciary duties.¹²

e The Financial Advisor Regulations define a “Financial Advisor” as “any person who, for compensation in any form, gives any financial advice with respect to a Player’s funds, property, and/or investments of any kind, including, but not limited to, any ‘Alternative Investment’ as defined herein, as well as any other security, commodity, or financial product, whether or not traded on an organized public market in the United States (*e.g.*, The New York Stock Exchange or the NASDAQ) or abroad.” 2012 NFLPA Financial Advisor Regulations, § 1.

While there are currently 262 NFLPA-registered financial advisors, there are many financial advisors working with NFL players who are not NFLPA-registered, many of whom likely could not meet the registration requirements.

I) FORMATION OF THE PLAYER-FINANCIAL ADVISOR RELATIONSHIP

The financial advisor industry has become as competitive as the contract advisor industry, if not more so.¹³ Many financial advisors recruit clients in the same manner as contract advisors, by calling them, texting them, and sending recruitment materials as soon as the player demonstrates that he might become an NFL player.^f In addition, some financial advisors offer financial incentives as inducements to hire them, including payments in the tens or hundreds of thousands of dollars to players. Indeed, it was reported that one firm offered 2015 draft picks six-month loans of \$55,000–75,000.¹⁴ Such payments are not expressly prohibited by the Financial Advisor Regulations, as discussed in more detail below in Section E: Recommendations. Financial Advisor Mark Doman explained that, in addition to receiving interest on the loans provided to the players, some financial advisors (but not he) will advise the players to use some of the loaned money to purchase financial products, such as an annuity or insurance, from or through the financial advisor, off which the financial advisor can make additional income.

Nevertheless, as will be discussed more below, there are many financial advisors who refuse to engage in recruiting as a matter of professional ethics. These financial advisors generally receive their clients through referrals from other players or contract advisors. Because contract advisors are often recruiting the player at the same time as the financial advisor, contract advisors often do not have the ability to recommend a financial advisor to a player. Additionally, since college players are generally permitted by NCAA Bylaws to have financial advisors while they cannot have contract advisors, players often retain a financial advisor before a contract advisor.

Ultimately, the college players, with the help of their family, friends and college, will sort through the multitude of financial advisors, meet with a few, and choose one. The player and financial advisor formalize the relationship by executing the financial advisor’s individualized services agreement,

f During the recruiting process, the financial advisor will generally make the player aware of other players with whom the financial advisor purportedly work, to try and demonstrate the financial advisor’s skill. For those financial advisors registered with the NFLPA, the NFLPA is the best resource for confirming a financial advisor’s bona fides, as is discussed in the Recommendations section. Players should also seek to discuss the quality of a financial advisor’s services with current and/or former clients.

as the NFLPA does not have a standard services agreement like with contract advisors.

II) SERVICES PROVIDED TO PLAYERS (CURRENT AND FORMER)

Financial advisors generally provide advice and assistance concerning any of the player's financial matters, including investment management, income tax preparation, budgeting, estate planning, post-career planning, and insurance (including, *e.g.*, homeowner's, renter's, car, life, disability). In addition, some financial advisors will provide a bill paying service or recommend a firm that can handle these tasks for the players.^g Perhaps one of the financial advisor's most important responsibilities is making sure players are aware of and take advantage of the various financial benefits under the CBA, including but not limited to the Retirement Plan, Player Annuity Program, Tuition Assistance Plan, Severance Pay, Second Career Savings Plan, and Health Reimbursement Account.^h

Financial advisors generally work with players and their family for the player's entire life. In this respect, financial advisors are more important than contract advisors and are crucial stakeholders when it comes to the player's post-career health. A 2014–2015 survey of 763 former players by *Newsday* shows the importance of post-career planning: 34.5 percent of former players interviewed said they had difficulty finding employment after their NFL career ended, and 37.1 percent said they did not prepare for life after football during their playing career.ⁱ The financial advisors interviewed explained that retirement is the opportunity to show the player that the post-career plan they had put together works and to begin to take the next steps, including for the player to potentially finish his education and obtain another job.^j

The level of communication between the financial advisor's firm and the player varies depending on the needs of the player. Younger players may speak with their financial advisor once a week while more experienced players might only

communicate with their financial advisors once a month. The financial advisors generally send monthly statements concerning the player's finances, even though the NFLPA only requires them to be sent quarterly.¹⁵

More specifics on some of these services will be discussed below, in Section C: Current Practices.

(B) Current Legal Obligations^k

The financial advisor industry is heavily regulated by both governmental and private organizations that perform quasi-governmental functions. Financial advisors are subject to federal and state statutes and regulations concerning the various financial industries in which they may practice. Most importantly, all financial advisors must comply with the Securities Exchange Act and its regulations, as enforced by the SEC.

In addition, many financial advisors are subject to oversight by the Financial Industry Regulatory Authority (FINRA). FINRA is a private, non-profit "self-regulatory organization" within the meaning of the Securities and Exchange Act, registered with the SEC, and responsible for enforcing FINRA rules, SEC regulations, and federal securities statutes against FINRA members.¹⁶ FINRA promulgates and enforces rules governing more than 4,000 securities firms and approximately 630,000 financial professionals.¹⁷ FINRA brings disciplinary actions against its members and also provides an arbitration mechanism that is the chief forum for resolving disputes between financial advisors and their clients.¹⁸

A financial advisor's precise legal obligations might depend on his or her qualifications, licensure, and the services he or she provides to a player. While we briefly describe these possible distinctions below, none of our recommendations turns on the exact nature of the financial advisor's legal duty to his or her player-client. Moreover, there is an ongoing debate in the financial services industry about the duties owed by certain types of financial professionals to their clients, and much will depend on specific facts.

Some financial advisors might only be registered as "brokers" or "dealers" under the Securities Exchange Act of 1934. Broker-dealers are individuals engaged in the business of buying and selling stocks,¹⁹ who traditionally earn the majority of their income from commissions on the stock sales or purchases.²⁰ Broker-dealers are historically held to a "suitability," as opposed to a fiduciary standard.²¹

g Bill paying services generally are responsible for ensuring the timely and proper payment of a player's various expenditures, including housing payments, utilities, car payments, cellular telephone payments, contract advisor, financial advisor and attorneys' fees, child support, etc. Nevertheless, Financial Advisor 1 explained that he prefers players pay their own bills so that players are aware of their expenses and "feel[] the same pain that anybody else feels."

h Financial Advisor 1 estimated that the annual value of benefits players are entitled to is "almost \$200,000."

i See Jim Baumbach, *Life After Football*, *Newsday*, Jan. 22, 2015, <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>. In the introduction to this chapter, we described some limitations to *Newsday's* analysis.

j To assist players in preparing for careers after football, Financial Advisor Mark Doman offers his players the opportunity to intern at his office during the offseason. During the internship, the players study their own financial portfolios and the related concepts.

k The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

The suitability standard only requires broker-dealers to recommend investments that are suitable based on the client's needs and goals.²² The broker-dealer "must have an adequate and reasonable basis for any recommendation that [he or she] makes,"²³ but are not necessarily required to provide investment advice that puts the client's interest first, as a fiduciary would.²⁴ This looser standard permits broker-dealers to recommend its clients to buy stocks currently owned by the broker-dealer's firm, thus benefiting the firm. Nevertheless, broker-dealers can develop fiduciary relationships with their clients if the broker-dealer takes on greater responsibilities towards the client, such as having discretionary authority over the client's account.²⁵

The potentially limited obligations of broker-dealers are complicated by the Investment Advisers Act of 1940.²⁶ An investment adviser is "any person, who, for compensation is engaged in a business of providing advice to others or issuing reports or analyses regarding securities."²⁷ Traditionally, investment advisers, charge a fee based on the amount of assets managed by the investment adviser.²⁸ Investment advisers *do* have a fiduciary relationship with their clients, requiring them to put the interests of their clients first and to avoid conflicts of interest.²⁹ Under common law,¹ from which the securities statutes and regulations are generally derived, a fiduciary is "a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor; . . . [o]ne who must exercise a high standard of care in managing another's money or property."³⁰

Depending on the broker-dealer's compensation structure, he or she too may also be subject to the higher standards of the 1940 Act. A broker-dealer who provides investment advice to clients is not considered an investment adviser only so long as the broker-dealer's advice is "solely incidental" to the broker-dealer's services and the broker-dealer charges only commissions and not asset-based fees.³¹ Nevertheless, the interpretation of this exception remains open to debate and is often a fact-specific inquiry.³²

In 2016, the Department of Labor potentially further complicated matters with a new regulation set to take effect in April 2017. The new regulation requires that individuals that invest a client's money as part of a tax-deferred retirement account, such as a 401(k) or IRA, act in a fiduciary capacity toward the client, regardless of whether they are a broker-dealer or investment adviser.³³

While the above uncertainty demonstrates that some NFL player financial advisors might be able to avoid having a fiduciary relationship with their clients, they almost certainly cannot if they choose to register with the NFLPA. The Financial Advisor Regulations, which are a quasi-legal/ethical code, dictate that financial advisors "have the duty to act in the best interest of his/her Player-clients."³⁴ Moreover, by agreeing to be registered with the NFLPA, each financial advisor

acknowledges^m that it is a fiduciary with respect to each of its Player-clients and agrees to perform its duties as a Financial Advisor to such Player-client in good faith and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and consistent with the Registered Player Financial Advisor's obligations and duties under applicable law, and consistent with the Registered Player Financial Advisor's existing practices and procedures, obligations, powers and duties under its written contract with the Player-client required under Section Three (H) of the Regulations.³⁵

Despite the fiduciary standard imposed by the Financial Advisor Regulations, as will be discussed below in Section E: Enforcement, the Financial Advisor Regulations provide players with minimal recourse in the event of a violation.

Generally, the Financial Advisor Regulations require financial advisors to "[f]ully comply with all federal and state laws governing the . . . Financial Advisor's professional activities."³⁶ The Financial Advisor Regulations prohibit a wide variety of conduct subject to abuse in the financial advisor industry, including:

1. Employing any device, scheme, or artifice to defraud a Player;
2. Inducing any activity in a Player's account that is excessive in size or frequency in view of the Player's financial resources and/or sophistication, and the character of the account;
3. Soliciting or obtaining any general power of attorney from a Player over his assets or investment;

¹ Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009).

^m A broker-dealer might theoretically argue that since he or she never had a fiduciary relationship with a player-client, he or she cannot "acknowledge" such an obligation. It nonetheless seems more likely that a financial advisor who registers with the NFLPA who otherwise would not be in a fiduciary relationship with his or her clients voluntarily assumes fiduciary obligations as part of the NFLPA registration.

4. Soliciting or obtaining any limited power of attorney or discretionary authority which is not specifically and reasonably necessary for the Registered Player Financial Advisor to perform his/her services;
5. Commingling any Player's funds or other property with the Registered Player Financial Advisor's personal funds. Commingling one or more client funds together is permitted, subject to applicable legal requirements and proper accounting;
6. Having custody of a Player's funds or other property unless the Registered Player Financial Advisor is a Qualified Custodian;
7. Placing an order for the purchase or sale of a security if that security is not either registered or exempt from registration under applicable law;
8. Providing false or misleading information to any Player, or concealing material facts from any Player, in the course of recruiting the Player as a client, or in the course of representing or consulting with that Player as a Registered Player Financial Advisor;
9. Making any false or misleading statement about his or her ability, degree, or area of competence;
10. Engaging in any unlawful conduct and/or conduct involving dishonesty, fraud, deceit, misrepresentation, or any other activity which reflects adversely on his/her honesty, trustworthiness, professional competence, and fitness as a Registered Player Financial Advisor, or which otherwise jeopardizes his/her effective representation of Players;
11. Representing or suggesting to anyone that his/her status as a Registered Player Financial Advisor constitutes an endorsement or recommendation by the NFLPA of the Registered Player Financial Advisor, or his/her qualifications, or services;
12. Providing or offering money or any other thing of value, or extending credit or loaning money, to any Player, or member of a Player's family, or anyone in a position to influence the Player, where such payment or loan would violate any applicable law, regulations, rule, or ethical standard;
13. Engaging in any activity which creates an actual or potential conflict of interest with the effective representation of a Player, including, but not limited to, the following:
 - a) Convincing a Player to purchase stock or property, or to invest in any manner, or loan money or extend credit from, any enterprise or entity in which the Registered Player Financial Advisor fails to disclose, in advance and in writing, his/her own financial or ownership interest, or that of an affiliate or a family member, to the Player;
 - b) Failing to disclose, in advance and in writing, any commission, finder's fee, or other thing of value that the Registered Player Financial Advisor receives, or is to receive, from any third party or entity, in return for convincing a Player to make or not make an investment, or to retain or not to retain a Certified Contract Advisor, or any other person;
 - c) Failing to disclose, in advance and in writing, any commission, finder's fee, or referral fee, promised and/or paid to, any third party, in return for that party's agreement to refer a Player to him or her[.]³⁷

(C) Current Ethical Codes

In addition to legal obligations, depending on the financial advisor's expertise or experience, he or she is likely subject to additional ethics rules. For example, the Chartered Financial Analyst Institute (CFA Institute),³⁸ Certified Financial Planner Board of Standards (CFP Board),³⁹ National Association of Personal Financial Advisors (NAPFA),⁴⁰ National Association of Insurance and Financial Advisors (NAIFA),⁴¹ and American Institute of Certified Public Accountants (AICPA)⁴² all have an ethics code of some kind regulating the professional responsibilities of their members.

The codes of ethics for the CFP Board, NAPFA, and NAIFA are not particularly lengthy and instead generally identify principles by which members are required to act. For example, the totality of the CFP Board's Code of Ethics and Professional Responsibility reads as follows:

Principle 1—Integrity: Provide professional services with integrity.

Integrity demands honesty and candor which must not be subordinated to personal gain and advantage. Certificants are placed in positions of trust by clients, and the ultimate source of that trust is the certificant's personal integrity. Allowance can be made for innocent error and legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles.

Principle 2—Objectivity: Provide professional services objectively.

Objectivity requires intellectual honesty and impartiality. Regardless of the particular service rendered or the capacity in which a certificant functions, certificants should protect the integrity of their work, maintain objectivity and avoid subordination of their judgment.

Principle 3—Competence: Maintain the knowledge and skill necessary to provide professional services competently.

Competence means attaining and maintaining an adequate level of knowledge and skill, and application of that knowledge and skill in providing services to clients. Competence also includes the wisdom to recognize the limitations of that knowledge and when consultation with other professionals is appropriate or referral to other professionals necessary. Certificants make a continuing commitment to learning and professional improvement.

Principle 4–Fairness: Be fair and reasonable in all professional relationships. Disclose conflicts of interest.

Fairness requires impartiality, intellectual honesty and disclosure of material conflicts of interest. It involves a subordination of one’s own feelings, prejudices and desires so as to achieve a proper balance of conflicting interests. Fairness is treating others in the same fashion that you would want to be treated.

Principle 5–Confidentiality: Protect the confidentiality of all client information.

Confidentiality means ensuring that information is accessible only to those authorized to have access. A relationship of trust and confidence with the client can only be built upon the understanding that the client’s information will remain confidential.

Principle 6–Professionalism: Act in a manner that demonstrates exemplary professional conduct.

Professionalism requires behaving with dignity and courtesy to clients, fellow professionals, and others in business-related activities. Certificants cooperate with fellow certificants to enhance and maintain the profession’s public image and improve the quality of services.

Principle 7–Diligence: Provide professional services diligently.

Diligence is the provision of services in a reasonably prompt and thorough manner, including the proper planning for, and supervision of, the rendering of professional services.

The CFA Institute’s Code of Ethics and Standards of Professional Conduct is similar, but provides more specific guidance in the following areas: professionalism; integrity of capital markets; duties to clients; duties to employers; investment analysis, recommendations, and actions; conflicts of interest; and, responsibilities as a CFA Institute member or CFA candidate.

In contrast, the AICPA’s Code of Professional Conduct is far more complicated and includes interpretations of the relevant rules. Moreover, the AICPA’s Code is divided into

the following sections: Principles of Professional Conduct; Independence, Integrity and Objectivity; General Standards Accounting Principles; Responsibilities to Clients; Responsibilities to Colleagues; and, Other Responsibilities and Practices. The AICPA’s Code is likely longer to ensure its’ members compliance with generally accepted accounting principles.

(D) Current Practices

Players were near unanimous in explaining the importance of financial advisors and financial health, while having mixed feelings about financial advisors themselves:ⁿ

- **Current Player 2:** “Those financial advisors are huge.” “[F]inancial health is important and that is a great opportunity for a young man to jumpstart their lives financially, and put themselves at an advantage moving forward to their next career.”
- **Current Player 4:** “I personally was able to find a financial advisor who I trust and I think he’s doing an excellent job. But I would say probably about one in three guys have a problem with their Financial Advisor.”
- **Current Player 5:** “Financial education is hugely important. And we get some but not nearly enough.” “I think there are some good financial advisors, some bad financial advisors They have a vested interest in helping to make sure the player keeps his money but they have a bigger vested interest in keeping the player as a client. So, whether the player is burning through his money or not, the financial advisor he keeps getting paid a percentage until the player runs out of money . . . [but] in general, financial advisors do a pretty good job of advising their clients and preparing them for life outside the NFL.”
- **Current Player 6:** “That’s the biggest question I’d like to try to figure out. What can be done to help players be better with their finances?”
- **Current Player 9:** “Financial health is important to NFL players and everybody So I think planning and education is very important.”

ⁿ We reiterate that our interviews were intended to be informational but not representative of all players’ views.

- **Former Player 3:** “You have the full gamut . . . Good financial advisors are the ones that can tell their clients ‘no,’ [but] you’ll probably get fired but players need to hear ‘no’ a lot more than they tell them ‘yes.’”

The financial advisors interviewed were similarly unanimous in their assessment that players are generally not well served by the current crop of financial advisors.^o The financial advisors’ sentiment matched that of contract advisors interviewed. The contract advisors noted that while there are some well-qualified and ethical financial advisors, there are many who are not. However, some contract advisors recognized that financial advisors often have difficulty convincing the players to take certain financially responsible actions.^p Below, we discuss the most important areas where financial advisors have an opportunity to influence player health, including Recruiting, Educating and Budgeting, Insurance, and Fees.

1) RECRUITING

As discussed in the background to this chapter, the recruiting of prospective clients is intensely competitive in the financial advisor industry. As a result, some financial advisors offer players payments and other inducements in order to obtain the client. All of the financial advisors we interviewed worried about this practice. Mark Doman, one of the financial advisors we interviewed, explained:

I think [financial advisor recruiting] is without any exaggeration or hyperbole, the most dangerous of the issues that face professional athletes off the field. Aside from their own personal health, the financial health of these young men and these horrible statistics of them going bankrupt due to . . . being exposed to people that are not sophisticated enough to actively manage the financial needs of these athletes. And even more specifically providing the financial literacy that they so desperately need.^q

-
- o Financial Advisor 2: “I think there are a lot of people that don’t know what they’re doing . . . And you see some of the people in the room [at the NFLPA Financial Advisor conferences] and . . . it’s scary that they’re thinking about trying to work with players. They don’t know anything.” Also Financial Advisor 2: There are “a lot of people out there running around trying to work with players for all the wrong reasons . . . but I don’t know how you regulate incompetency.” We reiterate that our interviews were intended to be informational but not representative of all financial advisors’ views. Additionally, we acknowledge the possibility of bias among the financial advisors we interviewed—they believe they are conducting themselves competently and professionally while their competitors are not.
 - p Contract Advisor 1: “[Y]ou can only take a horse to water, you can’t make them drink.”
 - q Doman also explained that he thinks the problem “has gotten infinitely worse” since he started working with NFL players.

While competition in industry is often good,^r the intensity and form of competition in the financial advisor industry may raise concerns. Indeed, Former Player 1 described being recruited by financial advisors as “a crazy experience . . . a meat market.”

The financial advisors interviewed further explained that their firms refused to recruit out of principle. Instead, these financial advisors generally obtain clients via referrals from players and contract advisors.

2) EDUCATING AND BUDGETING

The financial advisors and players we interviewed expressed that financial literacy among the players remains a major issue.^s Most NFL players and their families are unlikely to have ever had the type of money that is available through an NFL career. In addition, most NFL players are young men in their 20s with limited time spent having lived on their own. Thus, most NFL players are unfamiliar with the different types of financial products and services that might be available to them and are unlikely to have a good understanding of how to spend and save their money.

All of the financial advisors we interviewed stressed the importance of an initial meeting with their clients where they can try to explain to the player the various financial issues he will likely have to address, how to develop responsible financial habits, and to plan properly for the future.^t Financial Advisor 1 also explained a method his firm uses to help reign in client spending. The player’s paycheck is directly deposited into an account to which the financial advisor has access. On the first of each month, a budgeted amount is transferred from the initial account to a checking account that the player is able to access for his personal spending. The arrangement prevents the player from

-
- r Indeed, in *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862 (7th Cir. 1999), Judge Richard Posner dismissed tortious interference and unfair competition claims brought by one sports agent against another, stating “[t]here is in general nothing wrong with one sports agent trying to take a client from another if this can be done without precipitating a breach of contract. That is the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system.”
 - s Financial Advisor 1: “[I]t’s really just about capitalizing on [the benefits offered], understanding them and capitalizing on them. Most guys just don’t understand them.” Financial advisor Mark Doman: “I emphasize to them that trust is great but knowledge is better. I don’t need them to trust me. I need them to understand what we’re doing. And if they understand what we’re doing then they don’t need to trust. Trust is a luxury.” Current Player 9: “The PA and the NFL, there are some programs in place that players can learn [about financial matters]. But you know a lot of it is about motivating guys to actually take hold of it and actually become involved and engaged.”
 - t Financial Advisor 1: “If I have a guy who’s in his first year in the league, we’re already talking about post-career. . . . I think it goes without saying that the NFL career has a very short life expectancy. So we usually talk to the guys right from the beginning about worst case scenario and this might be your only year in the league, so you need to plan as such.”

spending beyond his means while still having control over his spending choices.

In addition to their financial advisors, players also are exposed to some financial education through the Rookie Transition Program. The Rookie Transition Program is a three-day program offered by each club in which rookies are presented with seminars, discussions, and information on a variety of topics intended to help the rookie make a successful transition to the NFL and to avoid some of the problems past NFL players have suffered.⁴³ The Rookie Transition Program replaced the Rookie Symposium in 2016, an event which previously hosted all incoming NFL rookies in one central location and provided the same types of services.⁴⁴ Nevertheless, there are questions as to whether players are sufficiently understanding the information presented to them.

Despite the Rookie Symposium and Transition Program, the financial advisors interviewed were mixed in their feelings towards existing programs and support for players in their financial matters. Appendix D includes a list of programs offered by the NFL's Player Engagement Department on financial and other matters. Financial Advisor 1 believes the NFLPA has not done a good job of educating players about financial issues but does provide useful resources to the financial advisors. Doman believes that both the NFL and NFLPA "could do a lot better" when it comes to educating players about financial matters.^u Meanwhile, Financial Advisor 2 expressed uncertainty as to whether the NFLPA could do anything more to educate players. Additionally, the financial advisors were generally pleased with the type and availability of benefits (Financial Advisor 2: "I think they've done a tremendous job of improving the benefits.")

3) INSURANCE

One potentially important aspect of a financial advisor's duties is obtaining a disability or career ending insurance policy for the player. The financial advisors are generally responsible for soliciting, reviewing, and negotiating the insurance policies on behalf of the player. The financial

advisors interviewed explained that whether players require the insurance is judged on a case-by-case basis, including an analysis of the player's age, contract structure, and status and financial security. For \$1 million in coverage, a rookie will pay approximately \$10,000 (1 percent) in premiums while a player in his mid-thirties can easily pay over \$100,000 (10 percent) in premiums.^v

There are other insurance options players might consider. For example, players might obtain an insurance policy on the unguaranteed portions of their contract in the event their contracts are terminated. Players might also obtain "loss of value" insurance policies when they are approaching free agency. The loss of value insurance policy will let a player recover in the event his next contract is not as expected due to injury or diminished skill.⁴⁵

4) FEES

For their services, financial advisors are generally paid an amount equal to 1 percent (annualized) of assets under management. Thus, if a financial advisor is overseeing \$1 million of a player's money, he or she will be paid \$10,000 per year. Financial advisors with more total assets under management may charge lower fees.

There are concerns that financial advisors find a number of ways to inflate their fees. For example, some financial advisors include as assets under management the amount in the player's retail checking account, even though the financial advisor is not investing those assets. Additionally, some financial advisors invest players' money in investment vehicles which provide the financial advisor a referral fee or commission, even though such fees are in violation of the Financial Advisor Regulations. Doman explained:

[T]he other things that these advisors are doing these days is they will tell the client that they'll do investment services and they won't charge them And the reality is what they are, are conduits to mutual funds and other very basic types of structured bank investment vehicles where there are built-in expense ratios and people who refer those funds money are able to get some sort of fee. Now, separately what they do is instead of charging them for business management . . . they'll sell a young person who has no dependents a multimillion dollar annuity or whole life product which has an enormous commission for [the financial advisor].

^u The St. Louis Rams provide an interesting example of a Club that perhaps takes educating its rookies on financial matters seriously. In 2012, Rams head coach Jeff Fisher had a Brinks truck deliver \$1 million in cash to the Club's facility. Fisher put the money on the table in front of his rookies and took away portions for taxes, parents, cars, and living and other expenses to show how much money the rookies would actually have left. Jason La Canfora, *Rams' Calculated Risk-Taking On Prospects Working Wonders So Far*, CBS Sports (Aug. 9, 2013, 10:52 AM), <http://www.cbssports.com/nfl/writer/jason-la-canfora/23082070/rams-calculated-risktaking-on-prospects-working-wonders-so-far>, archived at <http://perma.cc/X3HV-FYCZ>. In addition, the Rams hold educational classes on financial planning, home ownership, investing and other everyday items. Nick Wagoner, *Rams Will Have Rookies Signed Soon*, ESPN (Jun. 10, 2014), http://espn.go.com/blog/st-louis-rams/post/_/id/9148/rams-will-have-rookies-signed-soon, archived at <http://perma.cc/G6UZ-FXL4>.

^v Financial Advisor 1 explained that each week his firm reviews which of its clients were injured and provides notice to disability insurers to protect the player's right to a possible future claim.

(E) Enforcement of Legal and Ethical Obligations^w

Despite the Financial Advisor Regulations' rigorous standards, the NFLPA currently lacks meaningful enforcement authority over financial advisors. The NFLPA requires registered financial advisors to consent to arbitration, but the arbitration mechanism only governs disputes concerning denial, suspension or revocation of the financial advisor's registration.⁴⁶ The totality of the NFLPA's disciplinary authority where the Financial Advisor Regulations have been violated is the issuance of a letter of reprimand or to suspend or revoke the financial advisor's registration.⁴⁷ Moreover, the NFLPA and its arbitration mechanism, unlike the contract advisor arbitration mechanism, have no authority to provide damages to a player adversely affected by a financial advisor as a result of a breach of the Financial Advisor Regulations.⁴⁸

The relatively meek regulatory enforcement scheme begs the question why financial advisors register with the NFLPA at all. Indeed, while there are currently about 262 NFLPA-registered financial advisors, there are many players involved with financial advisors who are not NFLPA-registered and the NFLPA has no recourse other than to advise its players to only use registered financial advisors.^x

^w Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

^x There are no data on how many players use financial advisors not registered with the NFLPA. Current Player 10 commended the NFLPA for its financial advisor program: "I think the NFLPA has done a good job in terms of making financial advisors register and doing background checks and the criminal checks on all the financial advisors that are trying to come in. So there's a long list of guys that have been okayed by the PA."

As discussed above, financial advisor recruiting is extremely intense and thus players are inundated with recruitment pitches and might choose to hire a non-registered financial advisor. Nevertheless, it benefits financial advisors to register with the NFLPA for a variety of reasons: the financial advisor can explain the importance of meeting the NFLPA's registration requirements and having been vetted by the NFLPA; the NFLPA gives financial advisors financial, salary and benefit information relevant to NFL players, which can assist in their work;⁴⁹ and, a quality contract advisor will likely encourage the player to use only an NFLPA-registered financial advisor for the same reasons.

NFL players seeking recompense for damages caused by a financial advisor cannot rely on the Financial Advisor Regulations. Players can and have brought lawsuits or arbitrations (typically via FINRA) against financial advisors alleging breach of fiduciary duty, negligence, breach of contract, fraud, and other relevant causes of action.⁵⁰ Some courts have recognized a cause of action for financial advisor or stockbroker malpractice,⁵¹ and most recognize a cause of action for accountant malpractice, if appropriate.⁵² Lastly, causes of action and restitution claims likely exist under various federal and state securities laws.⁵³

Enforcement of the ethics codes of the CFA Institute, CFP Board, NAPFA, NAIFA, and AICPA are of minimal importance to NFL players. While the organizations are empowered to expel their members and retract their certifications, these punishments provide no benefit to NFL player-clients.

While there are currently about 262 NFLPA-registered financial advisors, there are many players involved with financial advisors who are not NFLPA-registered.



(F) Recommendations Concerning Financial Advisors

Financial advisors play perhaps the most important role in a player's long-term health. Proper financial advice and planning can help a player determine when to retire (if he has that choice), maximize a player's career earnings, potentially provide the player with a comfortable retirement, help mitigate the consequences of the health issues suffered by many former players, and help avoid financial distress evolving into physical or mental distress. Additionally, financial advisors are governed by many robust codes of ethics that echo some of the same principles we incorporated into this Report, including Respect, Health Primacy, Empowered Autonomy, Transparency, Managing Conflicts of Interest, and Collaboration and Engagement. However, there are a variety of industry practices and realities that are preventing players from receiving the best possible financial guidance. Below are recommendations designed to improve the financial support provided to players.

Goal 1: To make sure players get the best financial advice possible.

Principles Advanced: Respect; Empowered Autonomy; Transparency; and, Collaborative Engagement.

Recommendation 13:1-A: Players should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors.

There is significant concern and evidence that players are not well-served by the financial advisor industry and otherwise are prone to mishandling their finances. The NFLPA's financial advisor program is a well-intentioned program that at least sets basic requirements for financial advisors and attempts to weed out those with criminal and otherwise concerning pasts. In addition, the financial advisor registration scheme provides the NFLPA with at least some oversight over the financial advisor industry as it concerns NFL players. Nevertheless, a significant (but unknown) portion of players are persuaded to retain financial advisors who do not register with the NFLPA and whose experience and intentions may be questionable. The NFLPA should encourage players to use those financial advisors which it has determined have at least the minimal qualifications it is able to impose through its registration program. In so doing, the NFLPA should remind players of the advantages of using NFLPA-registered financial advisors, including access to NFL-specific benefit and financial information through the NFLPA.

One possible mechanism by which the NFLPA could encourage players to use NFLPA-registered financial advisors is to collect the names of players' financial advisors each preseason. If a player is using a financial advisor who is not registered with the NFLPA, the NFLPA should advise the player of the purposes and benefits of the NFLPA's registration system. If the player does not have a financial advisor, the NFLPA could advise the player to retain one and follow-up with the player to ensure that he does.⁵⁴

Although the NFLPA financial advisor registration system does not guarantee a player will receive sound financial advice and assistance, it increases the odds as compared to non-registered financial advisors.

Recommendation 13:1-B: The NFLPA should strengthen its Financial Advisor Regulations.

The current Financial Advisor Regulations are robust and align well with other regulations and codes of ethics in the financial industry. Nevertheless, there are potential areas of improvement, including:

- **Requiring financial advisors to pass an examination concerning NFL economic and benefit provisions in order to be registered.** The NFLPA has long required contract advisors to pass an examination concerning the NFL CBA to be certified. There is no reason why financial advisors should be treated differently. It is clear that financial advisors are as much a part of players' lives as contract advisors

Recommendations Concerning Financial Advisors – continued

and perhaps even more important considering that they handle players' money. Nevertheless, financial advisors are not regulated as closely as contract advisors and thus have the potential to be more destructive to the health of players. An examination would provide an additional and meritorious barrier to entry into the NFL player-financial advisor industry. Financial advisors should understand the unique circumstances of NFL player employment while also understanding the variety of benefits available to players. An examination will force financial advisors to educate themselves on these issues while also eliminating the financial advisors unable or unwilling to do so.

- **Prohibiting registered financial advisors from providing or offering money or any other thing of value to any player or any other person (e.g., the player's family member) to induce or encourage the player to utilize the financial advisor's services.** The Financial Advisor Regulations currently prohibit “[p]roviding or offering money or any other thing of value, or extending credit or loaning money, to any Player, or member of a Player’s family, or anyone in a position to influence the Player, where such payment or loan would violate any applicable law, regulations, rule, or ethical standard.”⁵⁵ This rule, however, is unnecessarily vague. There is no reason for the NFLPA to defer to other laws, regulations, rules or ethical standards. There is clearly a problem whereby financial advisors are inducing players to retain them with large payments and players are thereafter receiving poor financial advice and assistance. The NFLPA should prohibit such payments to ensure players are choosing financial advisors based exclusively on their merit and qualifications.
- **Providing the NFLPA with greater authority to conduct audits of financial advisors' activities.** Section 3(I)(D) requires financial advisors to consent to audits by a Certified Public Accountant (CPA) at the player's request. Players are unlikely to know when an audit might be necessary and are also unlikely to take advantage of this right. The NFLPA in coordination with the right financial professionals could undertake this action on behalf of players randomly. Even though the NFLPA would be unable to catch every bad actor, making it known that it conducts such audits should have at least some deterrent effect.

The NFLPA could also require financial advisors to provide the NFLPA with copies of the itemized statements they provide to players. Section 3(I)(A) of the Financial Advisor Regulations requires financial advisors to provide players “at regular intervals, but in no event less than quarterly, itemized statements setting forth the amount charged to the Player-client for Financial Advice, the identity of any investments made in conjunction with that advice, and an accurate account of the increase or decrease in the economic value of any such investments.” However, the majority of players are unlikely to review or understand the statements provided to them, and thus identify possible inconsistencies or troubling activities. While the NFLPA likely does not have the resources (and would probably have to hire financial experts) to check quarterly statements for all of its members, it could at a minimum conduct a random review of selected statements. Collection of the statements would identify those financial advisors who failed to follow a simple record production requirement while also having at least some deterrent effect. An alternative approach would be to rely on contract advisors to police financial advisors through inspection of these statements. More broadly, this recommendation could be extended from audits of itemized statements to audits of any financial advisor's activity concerning NFL players.

- **Requiring financial advisors to send the itemized statements required by Section 3(I)(A) of the Financial Advisor Regulations to the player's contract advisor, unless the player objects.** As discussed above, there is currently a lack of oversight concerning financial advisor fees and services. Contract advisors, like financial advisors, are professionals with a fiduciary obligation to look out for the player's best interests. Almost every player has a contract advisor and almost every player has a financial advisor. Thus, in the absence of NFLPA resources to do the same, contract advisors can provide a valuable check on financial advisor fees and activities.^y
- **Requiring that financial advisors provide the NFLPA with a copy of any agreement with a player.** Section 3(I)(H) of the Financial Advisor Regulations requires all agreements between a financial advisor and player comply with applicable laws and regulations and be in writing. However, financial advisors are only required to provide a copy of the agreement to the NFLPA “upon request.” In contrast, contract advisors are required to provide the NFLPA with a copy of any agreement between the contract advisor and player.⁵⁶ The NFLPA also generally reviews the contract advisor-player agreements to ensure they are in compliance with Contract Advisor Regulations. Similarly, the NFLPA should review financial advisor-player agreements to ensure they are in compliance with the Financial Advisor Regulations and not otherwise concerning.

^y Conversely, there is no need for contract advisors to provide statements of their fees to financial advisors. First, the financial advisors likely have access to the accounts and can see the fees anyway. Second, contract advisor fees are capped at 3 percent of a player's compensation by the Contract Advisor Regulations, eliminating much of the worry that contract advisors can financially take advantage of players.

Recommendations Concerning Financial Advisors – continued

- **Requiring financial advisors to stay abreast of current issues affecting NFL players (with the NFLPA providing the necessary courses and information).** The economics of the NFL are unique, complicated and often changing. Moreover, the application of mainstream financial issues might incur unexpected complications due to the dynamics of the NFL. It is thus important that financial advisors remain current on issues affecting NFL players. The NFLPA could provide relevant information, materials, and updates to financial advisors on a more regular basis or also require financial advisors to attend conferences more regularly. Section 3(l)(J) of the Financial Advisor Regulations only requires financial advisors to attend a conference every two years. In contrast, contract advisors are required to attend a conference every year. Requiring financial advisors to attend conferences more regularly not only ensures that they stay abreast of current financial issues affecting NFL players but also serves as another opportunity to weed out those who are less professional and do not attend.

* * *

We recognize that the above recommendations would increase the NFLPA's involvement in the financial advisor industry and would potentially require delicate maneuvering through complicated financial laws and regulations. Nevertheless, the NFLPA is in the most powerful position, and has as its mission to help players. Thus, it should take every step that it reasonably can to help players by overseeing the actions of financial advisors.

Recommendation 13:1-C: The NFLPA should consider investing greater resources in investigating and enforcing the Financial Advisor Regulations.

As discussed above, there are serious problems with the financial advisor industry that frequently result in substandard representation for and advice to the players, including poor handling of player health matters. Without meaningful enforcement, the Regulations lose their effectiveness to the detriment of players. One possibility is hiring more attorneys to focus on these matters.

Recommendation 13:1-D: Players should be given information to ensure that they choose financial advisors based on their professional qualifications and experience and not the financial benefits the financial advisor has or is willing to provide to the player.

As discussed in more detail above, prospective NFL players are routinely choosing their financial advisors not based on the financial advisor's professional qualifications but instead on how much the financial advisor provides the player at the outset. The players are excited about the opportunity to receive tens if not hundreds of thousands of dollars from the financial advisors for letting the financial advisor provide services to them. However, players do so at their own peril, sometimes agreeing to retain substandard financial advisors.

If the Financial Advisor Regulations are not amended to explicitly prohibit such arrangements as recommended above, it is important that the players understand the downsides of choosing their financial advisor based on loans or advances.

However, presently, there are minimal to no resources for players about how to choose a financial advisor. The NFLPA has the potential to be the best resource for helping players choose financial advisors appropriately but it is unclear what efforts it makes on this topic. The NFLPA conducts "Pipeline to the Pros" with current college football players to try to inform them about the process of becoming an NFL player, including hiring a contract advisor,⁵⁷ but it is unknown whether that advice also extends to financial advisors. Similarly, while the NFLPA's website includes a page advising "Active Players" on "How to Pick Your Agent,"⁵⁸ there is no similar advice concerning financial advisors.

Recommendations Concerning Financial Advisors – continued

The NFLPA is in a powerful position to help prospective NFL players pick financial advisors. While such players are not yet in the NFLPA's bargaining unit (and thus the NFLPA has no legal obligations toward them, see Chapter 7: The NFL and NFLPA), hundreds of college players will soon be NFLPA members and their decisions concerning a financial advisor while still in college can have a significant impact on their NFL career. Yet it does not appear that the NFLPA currently provides players with any assistance concerning the selection of financial advisors. The NFLPA could expand and intensify the information made available to prospective NFL players and could work with both the NCAA and the NFL (both of which more closely track potential NFL players) to ensure that the right players are receiving the necessary information. The NFLPA should also consider creating a system whereby players able to rate their financial advisors' performance and that data could be made available, including but not limited to a regular survey, a Yelp-like service, or some other means of information-sharing.

Goal 2: To help players better manage their finances.

Principles: Health Primacy; and, Empowered Autonomy.

Recommendation 13:2-A: The NFLPA and NFL should consider holding regular courses on financial issues for players.

As is true of the population more generally, players often lack the financial sophistication to make sound financial decisions, such as budgeting expenditures, saving for retirement, and planning for a post-career life. Additionally, players' lack of financial sophistication prevents them from monitoring the actions of their financial advisors and leaves them vulnerable to others who might seek to take advantage of them.

To assist players in learning important financial skills, the NFL has partnered with Money Management International, the country's largest non-profit credit and counseling service, to provide players with an educational website and a 24 hours a day, seven days a week advice hotline.⁵⁹ The NFLPA has established a near identical partnership with Financial Finesse, a company that provides financial education services.⁶⁰ Both the NFL and NFLPA should be commended for these partnerships.

However, players might not take advantage of these services. Consequently, an in-person introductory financial course would help to bridge the knowledge gap. Although the NFL's annual Rookie Transition Program likely includes discussions of financial issues (as its predecessor the Rookie Symposium did⁶¹), those are just some of the many issues players are presented with in a three-day event. Moreover, the Rookie Transition Program occurs before the player's first season and thus before players begin to receive their weekly pay, which is almost certainly the largest check the player has ever received. It would be beneficial to hold additional financial-focused courses or seminars after players begin to receive (and thus have the ability to spend) money. Two of the financial advisors interviewed recommended players take such a course. These would be useful supplements to the kinds of courses already offered by the NFL and NFLPA.

Relatedly, such courses could advise players of their rights concerning financial advisors, including the right to have their financial advisors' work audited.

Recommendations Concerning Financial Advisors – continued**Recommendation 13:2-B: The NFL and NFLPA should consider amending the player payment schedule so that players, by default, are paid over a 12-month period.**

Players receive a check for each game they play. Thus, players generally only receive pay during the season.^z As discussed above, some players might spend recklessly during the season, causing financial problems in the off-season or when their career is over. By paying a player over an entire year or deferring a player's salary payments for some period of time, the player will have additional income at a later point when he may not have otherwise saved for it. Indeed, in June 2014, the NFLPA was reportedly considering approaching the NFL about players being paid in 26 installments over a year,⁶² and the issue is regularly considered at NFLPA Executive Committee meetings.⁶³

In reviewing a draft of this Report, the NFL stated that “[t]here is no evidence cited in the Report that players face short-term stress during the year (or that they do so any more than other people), or that any longer-term financial problems would be alleviated by moving to a 12-month payment schedule.”⁶⁴ Nevertheless, at least one club, the Tennessee Titans, does pay their players over a longer period of time, through March (when the League Year ends).⁶⁵ While it is uncertain if there is a problem with players spending too much money during the season, many players and contract advisors believe there is.⁶⁶ At a minimum, it is an issue in need of further consideration.

Andrew Brandt, a peer reviewer of this Report and a former Green Bay Packers executive, noted in his review that he used to provide players with the option of receiving their salary year-round in light of concerns he had about players' spending. While some players took the Packers up on the offer, the majority of players did not, as contract advisors often wanted interest to be paid on the deferred compensation.⁶⁷ While contract advisors are correct that players paid year round would be receiving slightly less based on the time value of money, a revised payment schedule would likely benefit players more than hurt them.

Making a 12-month payment schedule the default option could help ensure that all players have the opportunity to benefit from this possible change in payment schedule. Players should be free to opt out of a 12-month payment schedule if they like, but research suggests that most players will stay with the default option.⁶⁸

Our recommendation supplements deferred compensation plans that the NFL offers, including the Player Annuity Plan and a 401(k) plan (the Second Career Savings Plan), discussed in detail in Appendix C. While these deferred compensation plans are retirement-focused, our recommendation is meant to help players better handle their income in the short term.^{aa}

^z Players might receive bonuses during the offseason.

^{aa} In Chapter 7: The NFL and NFLPA, Recommendation 7:3-B recommends that the NFL and NFLPA undertake a comprehensive actuarial and choice architecture analysis of the various benefit and retirement programs to ensure they are maximally beneficial to players.

Endnotes

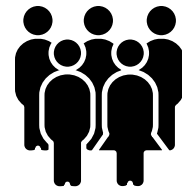
- 1 See Thomas Richardson et al., *The relationship between personal unsecured debt and mental and physical health: A systematic review and meta-analysis*, *Clinical Psychol. Rev.* 2013;33(8):1148–62.
- 2 Pablo S. Torre, *How (and Why) Athletes Go Broke*, *Sports Illustrated*, Mar. 23, 2009, <http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke>, archived at <http://perma.cc/4E3Z-NHL6>.
- 3 Linda Holmes, *ESPN's 'Broke' Looks At The Many Ways Athletes Lose Their Money*, *NPR* (Oct. 2, 2012 1:35 PM), <http://www.npr.org/blogs/monkeysee/2012/10/02/162162226/espn-broke-looks-at-the-many-ways-athletes-lose-their-money>, archived at <http://perma.cc/4HDY-6AZ2>.
- 4 See Jim Baumbach, *Life After Football*, *Newsday*, Jan. 22, 2015, <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.
- 5 See Ken Belson, *When Settlement Buys Time*, *N.Y. Times*, Jul. 19, 2014, <http://www.nytimes.com/2014/07/19/sports/football/former-nfl-players-make-difficult-choice-in-opposing-concussion-settlement.html>, archived at <http://perma.cc/5P3D-9A48>; Sally Jenkins and Rick Maese, *Do No Harm: Who Should Bear The Costs Of Retired NFL Players' Medical Bills?* *Wash. Post*, May 9, 2013, http://www.washingtonpost.com/sports/redskins/do-no-harm-who-should-bear-the-costs-of-retired-nfl-players-medical-bills/2013/05/09/2dae88ba-b70e-11e2-b568-6917f6ac6d9d_story.html, archived at <http://perma.cc/VER2-EM24>.
- 6 See, e.g., Melissa B. Jacoby, Teresa A. Sullivan, & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 *N.Y.U. L. Rev.* 375 (2001) (empirical data demonstrating how many American families declare bankruptcy in the aftermath of illness or other healthcare crisis); Christopher Tarver Robertson, Richard Egelhof, & Michael Hoke, *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 *Health Matrix* 65 (2008) (empirically demonstrating and discussing the role that health crises have in home foreclosures).
- 7 CBA, Art. 48, § 3.
- 8 *Report: Players Getting Bilked*, *N.Y. Daily News*, Feb. 4, 2002, available at 2002 WLNR 13839496. The figures in this report were aggregated by the NFLPA and include a variety of incidents, the details of which were not disclosed by the NFLPA in this publication.
- 9 Indeed, in *Atwater v. Nat'l Football League Players Ass'n*, 06-cv-1510, 2009 WL 3254925 (N.D.Ga. Mar. 27, 2009) *aff'd* 626 F.3d 1170 (11th Cir. 2010), six former players sued the NFLPA for losses they suffered by investing with NFLPA-registered Financial Advisors. The Court granted the NFLPA summary judgment, holding that the players' claims were preempted by the Labor Management Relations Act.
- 10 SEC No-Action Letter, *Nat'l Football League Players Ass'n* (Jan. 25, 2002), available at 2002 WL 100675.
- 11 The Financial Advisor Regulations are available from the NFLPA's website at http://nflpareources.blob.core.windows.net/mediareources/files/PDFs/SCAA/2012_NFLPA_Regulations_Contract_Advisors.pdf, archived at <https://perma.cc/D6E4-7USM?type=pdf>.
- 12 See 2012 Financial Advisor Regulations, § 2(II).
- 13 See Julie Steinberg, *Colleges Push to Keep Financial Advisers Away From Athletes*, *Wall St. J.*, Nov. 6, 2014, http://www.wsj.com/articles/colleges-push-to-keep-financial-advisers-away-from-athletes-1415331002?mod=WSJ_hp_RightTopStories, archived at <http://perma.cc/HP9N-CKKF> (discussing the increased recruiting efforts and unscrupulous practices of Financial Advisors).
- 14 Daniel Kaplan, *Show Me The Money: Morgan Stanley Offering Loans To Top NFL Draft Picks*, *Sports Bus. Daily* (May 11, 2015), <http://www.sportsbusinessdaily.com/Daily/Issues/2015/05/11/Finance/Morgan-Stanley.aspx>, archived at <http://perma.cc/R3QV-MVA7>.
- 15 See 2012 Financial Advisor Regulations, § 3(I)(A).
- 16 See *Fiero v. Financial Industry Regulatory Authority, Inc.*, 660 F.3d 569 (2d Cir. 2011); *About FINRA*, *Fin. Indus. Regulatory Auth.*, <http://www.finra.org/AboutFINRA/> (last visited Aug. 7, 2015).
- 17 *Id.*
- 18 *About FINRA – What We Do*, *Fin. Indus. Regulatory Auth.*, <http://www.finra.org/AboutFINRA/WhatWeDo/> (last visited Aug. 7, 2015), archived at <http://perma.cc/HWJ3-FCX7>. In 2013, former NFLPA-registered Financial Advisor Jinesh “Hodge” Brahmabatt was banned by FINRA for his participation in an alleged fraud that cost NFL and NBA players an estimated \$18 million. Rand Getlin, *Former Financial Adviser For NFL Players Banned From Industry By FINRA*, *Yahoo! Sports* (Nov. 18, 2013 1:33 PM), <http://sports.yahoo.com/blogs/not-for-attribution/former-financial-adviser-nfl-players-banned-industry-finra-183315178.html>, archived at <http://perma.cc/7ZCW-EJHC>.
- 19 *Guide to Broker-Dealer Registration*, U.S. Securities and Exchange Comm'n, <https://www.sec.gov/divisions/marketreg/bdguide.htm> (last visited Apr. 25, 2016), archived at <https://perma.cc/W3G3-2K3Y>.
- 20 Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 *Vill. L. Rev.* 701, 701 (2010).
- 21 *Guide to Broker-Dealer Registration*, U.S. Securities and Exchange Comm'n, <https://www.sec.gov/divisions/marketreg/bdguide.htm> (last visited Apr. 25, 2016), archived at <https://perma.cc/W3G3-2K3Y>; Michael S. Barr, Howell E. Jackson, Margaret E. Tahyar, *Financial Regulation: Law and Policy* 470 (2016).
- 22 *Id.*
- 23 *Id.*
- 24 Laby, *supra* note 20 at 702.
- 25 *Id.* at 714.
- 26 U.S.C. § 80b-3.
- 27 Michael S. Barr, Howell E. Jackson, Margaret E. Tahyar, *Financial Regulation: Law and Policy* 481 (2016).
- 28 Laby, *supra* note 20 at 702.
- 29 *Id.* at 716.
- 30 “Duty,” *Black's Law Dictionary* (9th ed. 2009).
- 31 *Id.* at 702.
- 32 See Barr et al., *supra* note 27 at 480, citing RAND Institute for Civil Justice, *Investor and Industry Perspectives on Investment Advisors and Broker-Dealers* (2008).
- 33 C.F.R. § 2509–§ 2510; Tara Siegel Bernard, *'Customers First' to Become the Law in Retirement Investing*, *N.Y. Times*, Apr. 6, 2016, <http://www.nytimes.com/2016/04/07/your-money/new-rules-for-retirement-accounts-financial-advisers.html>, archived at <https://perma.cc/5V38-4S2Q>.
- 34 NFLPA Financial Advisor Regulations, § 4.
- 35 *Id.* at § 4(III).
- 36 *Id.* at § 3(I)(C).
- 37 *Id.* at § 4(II)(A).
- 38 See *Code of Ethics & Standards of Professional Conduct, Cfa Inst.*, <http://www.cfainstitute.org/ethics/codes/ethics/pages/index.aspx> (last visited Aug. 7, 2015), archived at <http://perma.cc/6T2Q-BF7V>.
- 39 See *Code of Ethics & Professional Responsibility*, CFP Board, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/code-of-ethics-professional-responsibility> (last visited Aug. 7, 2015), archived at <http://perma.cc/JQ4J-S4W4>.

- 40 See *NAPFA Code of Ethics*, Nat'l Ass'n of Personal Fin. Advisors, <http://napfa.org/about/CodeofEthics.asp> (last visited Aug. 7, 2015), archived at <http://perma.cc/Q96W-AXTK>.
- 41 See *Id.*
- 42 See *Professional Ethics*, Am. Ass'n of CPAs, <http://www.aicpa.org/interestareas/professionalethics/Pages/professionalethics.aspx> (last visited Aug. 7, 2015), archived at <http://perma.cc/NF7D-DAJS>.
- 43 Michael David Smith, *NFL replaces rookie symposium with new rookie transition program*, ProFootballTalk (Apr. 5, 2016, 1:51 PM), <http://profootballtalk.nbcsports.com/2016/04/05/nfl-replaces-rookie-symposium-with-new-rookie-transition-program/>, archived at <https://perma.cc/ML6Z-LVR5>.
- 44 See Robert Klemko, *So This is the NFL, Part I*, The MMQB (July 8, 2014), <http://mmqb.si.com/2014/07/08/nfl-rookie-symposium-part-1/>, archived at <http://perma.cc/2E8R-3S38>; Robert Klemko, *So This is the NFL, Part II*, The MMQB (July 9, 2014), <http://mmqb.si.com/2014/07/09/nfl-rookie-symposium-part-2/>, archived at <http://perma.cc/A9ZM-3WDD>.
- 45 For more on the insurance options in professional sports, see Glenn M. Wong, Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 Vill. Sports & Ent. L.J. 473, 495 (2010).
- 46 Financial Advisor Regulations at § 3(E).
- 47 *Id.* at App. C, ¶ D.
- 48 *Id.* at § 6.
- 49 See 2012 Financial Advisor Regulations, Introduction.
- 50 See, e.g., *McFadden v. Vick*, 16-cv-319 (E.D. Ark.); *Vick v. Wong*, 263 F.R.D. 325 (E.D. Va. 2009); *Anderson v. Branch Banking and Trust Company*, 2013-cv-62381 (S.D.Fla.); *Johnson v. Amerus Life Ins. Co.*, 05-cv-61363, 2006 WL 3826774 (S.D.Fla. Dec. 27, 2006); *Clark v. Weisberg*, 98-cv-6214, 1999 WL 543191 (N.D. Ill. Jul. 23, 1999); Josh Alper, *Jared Odrick Sues Investment Adviser In Alleged Fraud*, ProFootballTalk (Apr. 21, 2013, 11:23 AM), <http://profootballtalk.nbcsports.com/2013/04/21/jared-odrick-sues-investment-adviser-in-alleged-fraud/>, archived at <http://perma.cc/4U6D-R7KB>.
- 51 See, e.g., *Devonshire v. Johnston Group First Advisors*, 338 F. Supp. 2d 823 (N.D. Ohio 2004); *Dymm v. Cahill*, 730 F.Supp. 1245 (S.D.N.Y. 1990).
- 52 See, e.g., *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 958 P.2d 1062 (Cal. 1998); *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1997); *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503 (Ill. 1994); *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990).
- 53 See, e.g., Thomas Lee Hazen, *Treatise on the law of securities Regulation* (2009).
- 54 Columnist Mike Freeman has made a similar recommendation. See Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* 225 (2015) (“as part of the CBA, every player in the league must show proof to the union that he meets with a union-approved financial advisor once every six months.”).
- 55 Financial Advisor Regulations, § 4(II)(A)(12).
- 56 Contract Advisor Regulations, § 3(A)(6).
- 57 *Pipeline to the Pros*, NFLPA, <https://www.nflpa.com/pipeline> (last visited Aug. 7, 2015), archived at <https://perma.cc/M8VS-4BM4>; *Getting To Know Mark Levin*, NFLPA, Jun. 19, 2014, <http://www.nflpa.com/news/all-news/getting-to-know-mark-levin>, archived at <http://perma.cc/27VK-G784>.
- 58 *How to Pick Your Agent*, NFLPA, <https://nflpa.com/active-players/how-to-pick-your-agent> (last visited Aug. 7, 2015), archived at <https://perma.cc/TA4L-8VM9>.
- 59 *Financial Education*, NFL Player Engagement, <https://www.nflplayerengagement.com/financial-education/> (last visited Aug. 7, 2015), archived at <https://perma.cc/8FFU-ANMA?type=image>.
- 60 *Financial Finesse*, Trust, <http://playerstrust.com/your-trust/financial/financial-finesse> (last visited Aug. 7, 2015), archived at <http://perma.cc/Z7TM-FCNG>.
- 61 See Robert Klemko, *So This is the NFL, Part I*, The MMQB (July 8, 2014), <http://mmqb.si.com/2014/07/08/nfl-rookie-symposium-part-1/>, archived at <http://perma.cc/2E8R-3S38>; Robert Klemko, *So This is the NFL, Part II*, The MMQB (July 9, 2014), <http://mmqb.si.com/2014/07/09/nfl-rookie-symposium-part-2/>, archived at <http://perma.cc/A9ZM-3WDD>.
- 62 Tom Pelissero, *Debates Simmer Over NFLPA Deferred Pay Proposal*, USA Today, Jun. 3, 2014, <http://www.usatoday.com/story/sports/nfl/2014/06/03/kevin-williams-nflpa-payment-plan/9930969/>, archived at <http://perma.cc/3KPN-QX6B>.
- 63 This information was provided by the NFLPA.
- 64 NFL Comments and Corrections (June 24, 2016).
- 65 Praesh Dave, *By Deferring Some Earnings, Athletes Can Help Themselves And Their Teams*, L.A. Times (Nov. 17, 2013, 5:00 AM), <http://www.latimes.com/sports/la-sp-worst-sports-contracts-20131117-story.html#page=1>.
- 66 Pelissero, *supra* n. 62.
- 67 Andrew Brandt, Peer Review Response (Oct. 30, 2015).
- 68 See Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 3 (2013).



Chapter 14

Family Members



Families can play a crucial role in protecting and promoting player health, including by encouraging players to seek proper medical care and appropriately consider long-term interests, and they can offer support through challenging times. Unfortunately, in some cases, family members can also put inappropriate pressure on players or otherwise negatively influence their health. Thus, players' families, which include spouses, siblings, parents, adult children, and extended relatives, are an important set of stakeholders whose roles we must address.^a

Additionally, friends often play a similar role to that of family members and thus much of what we say in this chapter can also apply to them.

^a We acknowledge that the issue of NFL players and domestic violence is an important one. However, these issues are outside the scope of this Report. Our focus here is on the effect of a family on the player and his health, not the effect of a player on family health.

In order to ensure that this chapter was as accurate and valuable as possible, the President of the Off the Field Players' Wives Association (a group of NFL player wives), Ericka Lassiter, who is also a Family Advisor to The Football Players Health Study at Harvard University, arranged for three wives of former NFL players to review a draft of this chapter prior to publication. Two of the wives provided comments.

(A) Background

When it comes to a person's health, family is extremely important.¹ NFL players are no different. Family members can provide guidance, comfort, love and support. NFL players—given the multitude of issues with which they must deal—certainly benefit from having a caring and supportive family.

However, NFL family members sometimes may be the source of problems for players. In 2016, the minimum salary for an NFL player is \$450,000 for a rookie and \$675,000 for a player with at least three years' experience.² Clearly, NFL players are paid well while playing as compared to the general population. Thus, it should not be surprising that NFL players frequently feel pressure from family members for financial support.³ Coupled with the short careers of NFL players, it is also not surprising that family pressure can financially ruin current or former professional athletes.⁴

As with the general population, NFL players marry and divorce. A 2009 NFL-funded study of former NFL players by the University of Michigan (Michigan Study) provides some data.⁵ The Michigan Study found that, of 1,063 former players interviewed, 76.3 percent between the ages of 30 and 49 at the time of the study were married before or during their NFL careers.⁶ In addition, of the former players interviewed and between 30 and 49, 75.5 percent were currently married (a statistic that would include second marriages).⁷ By comparison, only 64.4 percent of American men between 30 and 49 are married.⁸

The divorce rate for professional athletes has been estimated at 60 to 80 percent,⁹ though the figures obtained as part of the Michigan Study are very different. The Michigan Study found that only 19.7 percent of former players between 30 and 49 had ever been divorced.¹⁰ By contrast, 25.6 percent of all American men between 30 and 49 have been divorced.¹¹

Of those former players aged 30–49 at the time of the study and who had married before or during their NFL career, 7.6 percent had their marriage end during their career, 13.3 percent had their marriage end less than five years after their career ended, and 6.9 percent had their marriage end five or more years after their career ended.¹²

Figures from a 2014–2015 survey of 763 former players by *Newsday* paint a different picture than those from the Michigan Study. The *Newsday* survey found that 29.8 percent of former players interviewed experienced “marital problems” during their career and 48.2 percent experienced “marital problems” after their career.¹³ While “marital problems” are different from divorce, the *Newsday* survey suggests that former players' family lives are not as stable as was suggested in the earlier Michigan Study.

Also, the Michigan Study found that former players between 30 and 49 had a mean of 2.28 children.¹⁴

Clearly there are many factors that affect the constitution and stability of NFL families. Some players are lucky to have excellent support systems before, during, and after their careers, while others do not. The question is what are the legal and ethical obligations of family members as they concern an NFL player's health?

Before moving on, it is important to know that there are limitations to the *Newsday* and Michigan Study analyses.

The *Newsday* survey is limited as follows: (1) the survey was sent via email and text message by the NFLPA to more than 7,000 former NFL players, thus eliminating former players who were less technologically savvy and also possibly skewing the sample towards those former players closer to the NFLPA; (2) the response rate for the survey was low (approximately 11 percent); and, (3) the study does not discuss the demographics of those that responded, making it difficult to ascertain whether those who responded are a representative sample of all former players.

There are also two potential limitations to the Michigan Study. First, the Michigan Study population only included players who had vested rights under the NFL's Retirement Plan; meaning, the players generally had been on an NFL roster for at least three games in at least three seasons. There is likely a significant but unknown percentage of NFL players who never become vested under the Retirement Plan. Second, responders to the survey were 36.8 percent African American and 61.4 percent white—almost a complete reversal of the NFL's population of current players. While the racial demographics of former players is likely closer to the population of the Michigan

Study, *i.e.*, there were more white players than in the current NFL, the Michigan Study did not provide such data on the former player population and did not adjust or account for the racial demographics of the former player population. In a telephone call with Dr. David Weir, the lead author of the Michigan Study, he explained that: (1) due to limited resources, the population of players to be studied and contacted was limited to the data and contact information available to and provided by the NFL; and, (2) the NFL did not provide racial demographics of former players and thus the study could not adjust for that factor. Weir also believes that the racial demographics of former players is substantially similar to the racial demographics of the Michigan Study's participants. Finally, Weir explained that, during the internal review process with the NFL, the study was leaked to the media, preventing the study from being amended and submitted to a peer-reviewed publication.

(B) Current Legal Obligations^b

At the outset, it is important to be clear that we are analyzing the obligations of family members to players, rather than the obligations of players to their families. Although players have obligations to their families, that is outside the scope of this Report.

When it comes to legal obligations of family members, there is a significant body of law, family law, that governs these relationships but little of it is relevant to the health of NFL players. The most common understanding of the legal relationship between spouses results from cases of divorce, where the parties have to divide their property and determine alimony and child support obligations in accordance with state law. However, divorce law generally does not elucidate the obligations of spouses to one another while married. Moreover, any such obligations would generally extinguish upon divorce.^c

There is some case law holding spouses and parents to be fiduciaries and thus subject to fiduciary duties under law.¹⁵ Generally speaking, a fiduciary is “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor; . . . [o]ne who must exercise a high standard of care

in managing another's money or property.”¹⁶ Whether a fiduciary relationship exists is a fact-based inquiry into the nature of the relationship.¹⁷ In other words, where an individual trusts and relies on a person to look out for his or her best interests, a fiduciary, and thus a legal, relationship can be formed.

If an NFL player consults with his family about health concerns, *and* a family member is held to be a fiduciary to the player (which may be unlikely), then the family member is legally obligated to provide advice that is in the best interests of the player, regardless of the effect on the family member. For example, if a player explains to his wife-as-fiduciary that he is suffering from post-concussion symptoms and is considering retirement, the wife's advice must be principally concerned with the player's best interests as opposed to how the wife might benefit from the player's continued playing. As a practical matter, these types of conversations and balancing of pros and cons often occur naturally and are the subject of a mutual decision making process. Nevertheless, it is important to understand that family members may have legal obligations to one another. That said, these obligations, even where legally recognized, may not often be enforced.

Several professional athletes claim to have been led to bankruptcy as a result of letting their parents handle their financial affairs.

In addition, family members might assume fiduciary, contractual or other legal obligations by virtue of taking on roles and responsibilities beyond just being a family member. For example, if a family member undertakes to handle a player's financial or legal affairs, then the family member will likely have assumed a fiduciary role on behalf of the player and could be held to the legal and ethical standards of financial and legal professionals. Indeed, several professional athletes claim to have been led to bankruptcy as a result of letting their parents handle their financial affairs.¹⁸ The legal and ethical obligations of contract advisors are discussed in Chapter 12, and the obligations of financial advisors are discussed in Chapter 13. If and when family members play either of these roles, the content of those chapters would also apply.

^b The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

^c Similarly, family law statutes control the obligations of parents to their children, but only until the child reaches a certain age (typically 18). As all NFL players are legally adults, their parents no longer have any obligations to them that would be governed by family law statutes.

(C) Current Ethical Codes

There are no known ethical codes for family members.

(D) Current Practices

Interviews with players and contract advisors confirmed that family members play a role, but often a secondary one, in player health decisions. Players, of course, have varying relationships with their families, which dictate how involved a family member might be in advising a player or the player's contract advisor on various matters. A family member's involvement might vary depending on the player's point in his career.

When it comes to current players, while they generally discuss their current injuries and health concerns with their partners or other significant family members, they tend to rely most on their contract advisor and the doctors involved (e.g., club and second opinion) to determine the appropriate course of action. Relatedly, it is likely the contract advisor who will handle the logistics of the care.

The below quotations show the differences in player opinion about the involvement of family in player health matters:^d

- **Current Player 1:** “[T]hey just kinda offer moral support . . . whatever happened they would have my back . . . [B]ut it’s really up to me – I’ll make those decisions for myself.”
- **Current Player 2:** “[Family members] play a huge role in the mental and emotional health of players.”
- **Current Player 4:** “I think parents are huge.”
- **Current Player 5:** “I’m very close to my parents. And they’re always actively informed of what my injuries are, they make suggestions. But I would say my family’s very, very limited in their involvement in my health and safety.”
- **Current Player 6:** “As far as career decisions, I think family is a major, major factor . . . The family can be helpful if somebody has a wife and kids to come home to and they have this structure at home.”
- **Former Player 3:** “I don’t think you can overstate the importance of a solid family unit behind you.”

Players approaching retirement are particularly likely to consult with their family members concerning their health. The players we interviewed discussed sometimes being

“torn” between the desires of their family members that they stop playing and their own desires to keep playing.^e Family members often see a player when he is at his worst, perhaps even unable to move after a game, practice or particular injury. It is in these moments that family members often encourage players to stop playing for the sake of their future health. Nevertheless, encouragement and convincing are often two very different things.

Anna Welker, the wife of wide receiver Wes Welker, provides a positive example. As Wes continued to suffer concussions during his career, Anna educated herself about brain injuries in professional football. Then, at Anna’s behest, Wes agreed to get regular MRIs and to see his own neurologist twice a week.¹⁹ Although Anna still had concerns about Wes’ continuing to play, she took a proactive step in furthering the health of her husband.

Several players, contract advisors, and financial advisors also affirmed that family members sometimes place excessive pressures, particularly financial, on players. Family members might expect or request gifts, jobs or cash.²⁰ Former NFL player Phillip Buchanon claimed that his mother demanded \$1 million from him when he was drafted in 2002.²¹ Current players explained these concerns:

- **Current Player 2:** “[T]he wrong kind of family member can put a strain on your health. . . . [Y]ou have those family members that are maybe looking for handouts.” “They think it’s an easy meal ticket. I think some women are smart enough to see that and try to take advantage of it.”
- **Current Player 4:** “There’s definitely family members, girlfriends, friends, acquaintances, all those people [that] will ask you for money.”
- **Current Player 6:** “I know situations where families were a cancer to players . . . Football players have gotten into a lot of trouble because they have problems with their brother who is a troublemaker and they trust in their brother but their brother might have been the worst thing for them.”
- **Current Player 9:** “It’s family members, it’s friends, it’s those people that it’s very hard to say ‘no’ to.”
- **Former Player 3:** Players might feel pressure from family to continue playing “because the players might be the breadwinner for, not just for themselves, but maybe for a parent, or taking care of siblings, cousins, uncles, etc.”

^d We reiterate that our interviews were intended to be informational but not representative of all players’ views and should be read with that limitation in mind.

^e Family members might also want players to keep playing, as was apparently the case when former San Francisco 9ers defensive end Justin Smith retired after the 2014 season. See Josh Alper, *Eric Reid: Even Justin Smith’s Wife Wants Him To Come Back*, ProFootballTalk (Apr. 9, 2015, 6:33 AM), <http://profootballtalk.nbcsports.com/2015/04/09/eric-reid-even-justin-smiths-wife-wants-him-to-come-back/>, archived at <http://perma.cc/9E8F-RRCG>.

Additionally, family members might set out to be substantially involved in the player's career, including potentially handling the player's financial matters. These situations can lead to mismanaged finances and broken family relationships. During the 2014 Rookie Symposium, when discussing family members or old friends or girlfriends that do not have the player's best interests in mind, St. Louis Rams running back Zac Stacy bluntly advised rookie players to "cut 'em off."²² At the same Symposium, former NFL player Donovan Darius discussed the "most consistent concerns of players: How do you deal with females understanding that you're now a target? How do you deal with the entitlement of family members who now see you for what you can give them? Who can I trust to support my interests in the NFL?"²³

(E) Enforcement of Legal and Ethical Obligations^f

Litigation between professional athletes and their family members is rare but not without precedent.

^f Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

In 2013, Philadelphia Phillies (Major League Baseball) first baseman Ryan Howard was sued by his twin brother, Corey Howard, alleging that Ryan had breached agreements to employ Corey and other family members.²⁴ Ryan countersued, alleging that Corey and his family members had fraudulently stolen millions of dollars from Ryan under the guise of handling Ryan's financial and legal affairs.²⁵ Ryan specifically alleged that Corey had abused the relationship of "trust and confidence,"²⁶ *i.e.*, a fiduciary relationship, between the brothers. The lawsuit was settled on undisclosed terms in October 2014.²⁷

In 2012, Dallas Cowboys offensive lineman Tyron Smith was forced to obtain a protective order against his parents and siblings after they allegedly continued to harass him with financial requests.²⁸

However, as discussed above, there are minimal legal and ethical obligations between NFL players and their family members in the absence of additional duties like those alleged in the *Howard* case. Thus, while NFL players could conceivably sue family members for breach of contract or breach of fiduciary duty in the appropriate circumstances, such claims are not unique to the relationships between NFL players and their family members.



(F) Recommendations Concerning Family Members

Family members often are and should be one of a player's most trusted allies and confidants in matters concerning their health. In most cases, family members love and care for the players who are their husbands, fathers, sons, or brothers. Nevertheless, just as some players are not prepared for an NFL career, the same is sometimes true for family members. Below are recommendations concerning family members that can help improve the ways in which they support players.

Goal 1: To maximize the supportive role of players' family members in protecting and promoting player health.

Principles Advanced: Respect; Health Primacy; Empowered Autonomy; and, Collaboration and Engagement.

Recommendation 14:1-A: Family members should be cognizant of the gaps in their knowledge concerning the realities of an NFL career, and the NFL and NFLPA should offer programs or materials to help them become better health advocates.

The lives of players and their families are obviously intertwined. A player's career can have meaningful implications for his family members, particularly financially. Nevertheless, despite their best intentions, family members, like most people, might not have an accurate understanding of an NFL player's likely career length and earnings, as well as the physical risks players face in playing the game. Ideally, family members, with the help of the NFL and NFLPA, can understand the tenuous nature of an NFL career and encourage players to think long term. At the same time, family members should be careful about the pressures they might place on players.

Family members often are more in touch with concerns about the player's life than a contract advisor or financial advisor might be. Consequently, family members can help themselves and players by learning about a player's health situations and understanding what might be done to safeguard them, including but not limited to the player's physical, mental, and financial situations.

We do not suggest any formal legal or ethical responsibility for family members to advance player health in these ways, but we do recommend that interested family members be supported with adequate resources. For example, the NFL and NFLPA could provide information and seminars on relevant health issues or support systems and programs for players and families suffering from various conditions.

Goal 2: To separate family members from professional management of players' careers and affairs.

Principles Advanced: Empowered Autonomy; and, Managing Conflicts of Interest.

Recommendation 14:2-A: Players should select and rely on professionals rather than family members for managing their business, financial, and legal affairs.

Player financial and legal matters are complicated issues that should be handled by qualified professionals. Even if a player's family member is qualified, it is often best to preserve relationships by avoiding the conflicts that may arise by mixing family and finances. In Chapter 12: Contract Advisors and Chapter 13: Financial Advisors, we make recommendations for improving those industries to ensure that the professionals player do rely on are well-qualified.

Endnotes

- 1 See Laura A. Siminoff, *Incorporating patient and family preferences into evidence-based medicine*, 13(Suppl. 3) BMC Med. Informatics and Decision Making S6 (2013) (“recognition of the influences family members and other caregivers have within the clinical encounter—by offering opinions and participating in treatment-related decision making—is needed and could lead to more efficient and effective health care.”); Carin Reust, *Family involvement in medical decision making*, 28 Fam. Med. 39 (1996) (“patients acknowledge the context of family life in medical decision making, while families actively promote patient autonomy. Consideration of nonmedical burdens related to family roles and relationships takes an equal or higher priority than consideration of medical burdens. Family is, and should be treated as, a significant moral participant in medical decision making.”)
- 2 CBA, Art. 26, § 1(a).
- 3 See Tim Keown, *Financial Requests Overwhelm Smith*, ESPN (Nov. 26, 2014), http://espn.go.com/nfl/story/_/page/hotread141125/dallas-cowboys-tyro, archived at <http://perma.cc/G8QQ-FUEK>; Anna Katherine Clemmons et al., *Money Confidential*, ESPN (Nov. 25, 2014), http://espn.go.com/espn/story/_/id/11931251/nfl-nba-nhl-mlb-stars-divul, archived at <http://perma.cc/MT5K-CHM9> (survey of 37 professional athletes revealed that, on average, players were asked for a loan from a friend or family member 25.5 times in the last year and that only 27.6 percent of loans are paid back); Robert Pagliarini, *Why Pro Athletes Go Broke*, Chi. Trib., Aug. 6, 2013, http://articles.chicagotribune.com/2013-08-06/lifestyle/sns-201308061630--tms--pagliarictrnp-a20130806-20130806_1_athletes-nfl-player-financial-stability, archived at <http://perma.cc/M49C-6UST>; Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated, Mar. 23, 2009, <http://www.si.com/vault/2009/03/23/105789480/how-and-why-athletes-go-broke>, archived at <http://perma.cc/4E3Z-NHL6>; Melissa Isaacson, *Paradise Lost, Paradise Found, Big Money Brings Out ‘Friends’ Young Stars Don’t Know They Had*, Chi. Trib., Mar. 5, 2000, available at 2000 WLNR 8289967; Mary Judice, *Pro Football Players Make More Money in a Few Years than Most People Do in a Lifetime, But Spend it Like There’s No Tomorrow*, New Orleans Times Picayune, Sept. 12, 1999, available at 1999 WLNR 1256308.
- 4 *Id.*
- 5 David R. Weir, et al., *National Football League Player Care Foundation Study of Retired NFL Players*, Inst. for Social Research at Univ. of Mich. (2009), <https://ns.umich.edu/Releases/2009/Sep09/FinalReport.pdf>, archived at <https://perma.cc/6G5Q-LN2M?type=pdf>.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 Torre, *supra* note 3.
- 10 Weir *supra* note 5.
- 11 *Id.*
- 12 *Id.* at 15.
- 13 See Jim Baumbach, *Life After Football*, Newsday, Jan. 22, 2015, <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.
- 14 Jim Baumbach, *Life After Football*, Newsday, Jan. 22, 2015, <http://data.newsday.com/projects/sports/football/life-football/>, archived at <http://perma.cc/77DP-LUUE>.
- 15 See Swanson v. Morrison, 172 Wash.App. 1040, *2 (Wash. Ct. App. 2013) (“spouses... owe each other the highest fiduciary duties”) (internal quotations omitted); Vickery v. Vickery, 999 S.W.2d 342, 357 (Tex. 1999) (“A husband and wife owe each other special fiduciary duties”); Smith v. Smith, 860 P.2d 634, 643 (Idaho 1993) (“The marital relationship imposes the high duty of care of a fiduciary upon each of the parties”); Unander v. Unander, 506 P.2d 719, 722 n.2 (Or. 1973) (“spouses . . . have a fiduciary duty to each other”); Murphy v. Murphy, 694 A.2d 932, 936 (Me. 1997) (discussing fiduciary duty owed by parent to child); L.C. v. A.D., 971 S.W.2d 512, 517 (Tex. App. 1997) (same); Robinson v. State, Dept. of Health and Rehabilitative Services on Behalf of Robinson, 473 So.2d 228, 230 (Fla. Dist. Ct. App. 1985) (same).
- 16 “Duty,” Black’s Law Dictionary (9th ed. 2009).
- 17 Ritani, LLC v. Aghjayan, 880 F. Supp. 2d 425, 455 (S.D.N.Y. 2012) (applying New York law); Carcano v. JBSS, LLC, 684 S.E.2d 41, 53 (N.C. Ct. App. 2009); L.C. v. R.P., 563 N.W.2d 799, 802 (N.D. 1997); Allen Realty Corp. v. Holbert, 318 S.E.2d 592, 595 (Va. 1984); Murphy v. Country House, Inc., 240 N.W.2d 507, 511 (Minn. 1976).
- 18 See Katie Strang, *Jack Johnson: Little Left Of Earnings*, ESPN (Nov. 21, 2014), http://espn.go.com/nhl/story/_/id/11908361/columbus-blue-jackets-d-jack-johnson-files-bankruptcy-parents-reportedly-blame, archived at <http://perma.cc/5UEA-CNMK> (Columbus Blue Jackets defenseman Jack Johnson forced to file for bankruptcy after entrusting \$18 million in career earnings to his parents); Tim Russo, *Bernie Kosar & His Cowardly Dad on ESPN Outside The Lines Story*, Cleveland Leader, Nov. 2, 2014, <http://www.clevelandleader.com/node/23339>, archived at <http://perma.cc/7499-HMD5> (former Cleveland Browns quarterback Bernie Kosar forced to file for bankruptcy after entrusting his career earnings to his father).
- 19 Kevin Van Valkenburg, *Wes Welker Will Not Be Denied*, ESPN The Magazine, Dec. 18, 2014, http://espn.go.com/espn/feature/story/_/id/12046903/is-denver-broncos-wes-welker-putting-future-danger, archived at <http://perma.cc/V5N6-Q3DW>.
- 20 See Michael David Smith, *Trent Richardson says greedy friends and family affected his career*, ProFootballTalk (Aug. 6, 2016, 5:45 AM), <http://profootballtalk.nbcsports.com/2016/08/06/trent-richardson-says-greedy-friends-and-family-affected-his-career/>, archived at <https://perma.cc/5FZV-GYCT>.
- 21 Michael David Smith, *Phillip Buchanon’s Cautionary Tale: My Mom Demanded \$1 Million*, ProFootballTalk (Apr. 11, 2015, 9:50 AM), <http://profootballtalk.nbcsports.com/2015/04/11/phillip-buchanons-cautionary-tale-my-mom-demanded-1-million/>, archived at <http://perma.cc/3ASQ-FZXN>; see also Michael David Smith, *When T-Rich got rich, friends and family had their hands out*, ProFootballTalk (Mar. 26, 2016, 1:09 PM), <http://profootballtalk.nbcsports.com/2016/03/26/when-t-rich-got-rich-friends-and-family-had-their-hands-out/>, archived at <https://perma.cc/Z8EX-QZXR>.
- 22 Robert Klemko, *So This is the NFL, Part I*, MMQB (Jul. 8, 2014), <http://mmqb.si.com/2014/07/08/nfl-rookie-symposium-part-1/>, archived at <http://perma.cc/2E8R-3S38>.
- 23 Robert Klemko, *So This is the NFL, Part II*, MMQB (Jul. 9, 2014), <http://mmqb.si.com/2014/07/09/nfl-rookie-symposium-part-2/>, archived at <http://perma.cc/A9ZM-3WDD>.
- 24 See Complaint, Howard v. RJH Enterprises, LLC, 13-cv-2518 (E.D.Mo. Dec. 18, 2013), ECF #1.
- 25 See Answer and Counterclaim, Howard v. RJH Enterprises, LLC, 13-cv-2518 (E.D.Mo. Jan. 27, 2014), ECF #8.
- 26 *Id.* at ¶ 36.
- 27 Joint Stipulation of Dismissal With Prejudice, Howard v. RJH Enterprises, LLC, 13-cv-2518 (E.D.Mo. Oct. 22, 2014), ECF #40; David Murphy, *The Family Legal Fight Over Ryan Howard’s Finances*, Philly (Nov. 19, 2014, 8:43 AM), http://www.philly.com/philly/sports/phillies/The_family_legal_fight_over_Ryan_Howards_finances.html, archived at <http://perma.cc/H7LD-GNAQ>.
- 28 Tim Keown, *Financial Requests Overwhelm Smith*, ESPN (Nov. 26, 2014), http://espn.go.com/nfl/story/_/page/hotread141125/dallas-cowboys-tyro, archived at <http://perma.cc/G8QQ-FUEK>.





Part 6: **Other Stakeholders**



Officials



Equipment
Mfrs.



Media



Fans



NFL
Business
Partners



Part 6 discusses several other stakeholders with a variety of roles in player health, including: Officials; Equipment Manufacturers; The Media; Fans; and, NFL Business Partners. Additionally, we remind the reader that while we have tried to make the chapters accessible for standalone reading, certain background or relevant information may be contained in other parts or chapters, specifically Part 1 discussing Players and Part 3 discussing the NFL and the NFLPA. Thus, we encourage the reader to review other parts of this Report as needed for important context.





Chapter 15

Officials



Officials, as the individuals responsible for enforcing the Playing Rules, have an important role in protecting player health on the field.

In order to ensure that this chapter was as accurate and valuable as possible, we invited the National Association of Sports Officials (NASO) and the National Football League Referees Association (NFLRA), both described below, to review a draft version of this chapter prior to publication. NASO provided brief comments but also stated that it did “not have any changes [it] feel[s] must be made.”⁶² The NFLRA declined our invitation.⁶³

(A) Background

There are seven officials in an NFL game: Referee; Umpire; Head Linesman; Line Judge; Field Judge; Side Judge; and, Back Judge.¹ Each official is equally responsible for calling penalties during a game.² Each official is positioned differently on the field and the Referee is in charge of the officiating crew.

There were 122 officials during the 2015 season, with a mean of 11.5 years' experience in the NFL.³ Most NFL officials have 10 to 20 years of experience at the high school and college levels before becoming an NFL official.⁴ The NFL typically hires its officials from the best college football conferences.⁵

NFL officials are represented by the NFLRA. The NFLRA collectively bargains the terms and conditions of the officials' employment with the NFL. In fall 2012, the NFL locked out the officials after the parties were unable to agree on a new collective bargaining agreement (CBA).⁶ The lockout stretched from the preseason through the first quarter of the regular season, during which time replacement officials made numerous questionable calls, drawing the ire of players, coaches, and fans.⁷ In early September 2012, NFLPA General Counsel Tom DePaso wrote a letter to the NFL warning that the NFLPA would take "appropriate action" if it was determined that the replacement officials jeopardized the health and safety of the players.⁸ The NFLPA may have been concerned that the replacement officials would miss certain penalties, thereby effectively allowing riskier and more dangerous play.

In late September 2012, the parties reached a new CBA running through the 2019 season.⁹ The new CBA included a modified retirement structure through which the officials would partially contribute, an increase in pay to \$173,000 per year in 2013, rising to \$205,000 in 2019, and the option for the NFL to retain full-time officials (officials previously only worked during the preseason and season).¹⁰ The NFL-NFLRA CBA does not address player health issues.¹¹

Every NFL official is a member of NASO.¹² The NFLRA automatically enrolls all of its members as NASO members.¹³ NASO is a voluntary organization of approximately 22,000 member officials, ranging from the lowest levels of youth sports to the professionals.¹⁴ NASO provides an extensive list of services to its members, including educational programs, legal advocacy, and insurance policies.¹⁵

NASO, however, does not certify officials.¹⁶ Each sports organization, whether it is a state high school athletic association, the National Collegiate Athletic Association (NCAA), or the NFL, judges the qualifications of its officials during its hiring process.¹⁷

(B) Current Legal Obligations^a

Sports officials of all levels of play have generally been held to have the following legal duties: (1) inspect the field of play to ensure it is safe; (2) keep the playing field free of spectators and hazards; (3) ensure the game is played in safe weather conditions; and, (4) enforce equipment rules.¹⁸ These duties might appear limited but courts are historically reluctant to consider review of officials' on-field decisions during the course of play, such as whether an official failed to call a penalty or to apply a rule properly.¹⁹ Additionally, if players or other individuals seek to hold officials liable for a breach of one of the aforementioned duties, they must generally prove that the official acted with "gross negligence," as opposed to simple negligence.²⁰ The gross negligence requirement has historically applied to volunteer officials²¹ and thus it is unclear whether the same standard would apply to professional officials.

Official liability has also been shaped by robust lobbying efforts of the NASO.²² Sixteen states have passed laws requiring proof of gross negligence by an official before liability can be imposed.²³ The application of these laws is limited to youth sports, amateur sports, or volunteer officials in 13 states.²⁴ Three states (Tennessee, Mississippi, and Nevada) have laws restricting liability against officials that are not restricted to youth sports, amateur sports, or volunteer officials, and thus would protect NFL officials.²⁵ However, Tennessee is the only one of these states in which NFL clubs play.

NASO is aware of, and concerned about, the reach of state-level concussion-related legislation, discussed at length in Part 7: Other Interested Parties, Section 3: Governments.²⁶ NASO is concerned that these laws improperly require lay officials to make medical determinations.²⁷ NASO is working to educate officials on the skills to recognize and report players with suspected medical conditions, and to always err on the side of caution by requiring players to be removed from play.²⁸

a The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

(C) Current Ethical Codes

NASO also issues a Code of Conduct for Sports Officials, but none of NASO's stated principles concern player health and safety.²⁹ Moreover, NASO does not itself enforce its Code of Conduct.³⁰ Instead, it is NASO's intention that its Code of Conduct be adopted and enforced by the athletic associations and sports leagues that have authority over the officials.³¹

The NFLRA does not have a code of ethics.³²

(D) Current Practices

Many people have argued that the Playing Rules, and thus perhaps also the officials, have become overprotective of players' health and safety. That is, people often think that the Playing Rules, and thus also the officials, too frequently penalize players for certain types of tackles or hits, particularly on quarterbacks.³³ This opinion is held by many members of the media,³⁴ fans,³⁵ and players,^{36,b} among others.

Officials do play some role in the rulemaking process; they attend NFL Competition Committee meetings and participate in the discussion on proposed rule changes.³⁷ Moreover, certain rules do permit the official to take into consideration the likelihood of injury in determining whether to call a penalty, including roughing the passer³⁸ and roughing the holder on a place kick.³⁹ Nevertheless, the NFL makes the Playing Rules and it is the officials' principal job is to enforce them. On that front, there is generally no criticism that officials are failing to enforce the Playing Rules as enacted by the NFL.

In addition to calling penalties, NFL officials are empowered to call an "Injury Timeout" if he or she "determines a player to be injured."⁴⁰ In recent years, the NFL has actively encouraged officials to try and pay particular attention to see if players might be injured and to stop play accordingly.⁴¹ While it might be challenging for officials to determine whether a player is actually injured or faking an injury for competitive reasons, according to NASO, officials are taught to err on the side of caution.⁴² However, the Playing Rules also direct that the official "should not try to determine if [a] player is injured."⁴³ There are likely concerns about officials attempting to make medical determinations. Nevertheless, these two provisions seem to contradict and thus clarification may be warranted.

Despite the officials' ability to prevent play from continuing when a player is injured, during the 2014 season there were several publicized examples of players who continued to play in games after suffering concussions.⁴⁴ In the case of San Diego Chargers safety Jahleel Addae, "he looked disoriented and seemed to go into a convulsion while remaining on his feet, but he stayed in the game while fans on social media questioned why he was still playing while displaying such obvious distress."⁴⁵ While the Addae incident caused the NFL to advise team medical staffs to be more vigilant about spotting concussions,⁴⁶ it also raised concerns about the officials' failure to spot Addae's odd movements and to stop play as a result. Similar concerns were raised when New England Patriots wide receiver Julian Edelman looked "woozy" after suffering a hit in the 2015 Super Bowl.⁴⁷ Due partially to these incidents, in 2015 the NFL approved a rule that permits an athletic trainer stationed in the press box to stop play if it appears a player has suffered a head injury.⁴⁸

In recent years, the NFL has actively encouraged officials to try and pay particular attention to see if players might be injured and to stop play accordingly.

Players that we interviewed seemed to believe that officials are doing an adequate job in enforcing the current rules but are not likely to take any other action concerning player health:^c

Current Player 5: "I think that they're doing as good of a job as they can. They're trying to do their best. I think with the targeting rules and the head to head contact, I think they've been overly cautious which, when it comes to protecting players, is probably on the right end. But besides that, I've never seen an official step outside the rule book to protect a player."

Former Player 2: "I don't think they play much role other than if they see a guy banged up, they're just going to make sure he seeks medical attention and that's what they're supposed to do. But I don't see them going above and beyond."

b Current Player 7: "It's . . . taking away from the game that we'll all learned how to play, by being too protective."

c We reiterate that our interviews were intended to be informational but not representative of all players' views.

(E) Enforcement of Legal and Ethical Obligations^d

Neither the CBA nor the Constitution and Bylaws address officials' conduct. Thus, it seems that a player would not be bound to arbitrate a claim against an official.⁴⁹

Moreover, litigation against officials seems to be an available remedy for players. It is unclear whether in any such litigations the gross negligence standard that has been applied to volunteer officials would also apply to professional officials officiating professional sports as research has revealed almost no cases where a professional official was sued.

There are only two known litigations concerning NFL officials, neither of which has clearly articulated a standard for judicial review of an official's actions.

In 1972, Baltimore Colts defensive end Charles "Bubba" Smith was injured during a preseason game when he collided with an aluminum yardage marker stuck in the ground on the sideline and which an official had not removed.⁵⁰ Smith was forced to sit out the 1972 season and sued the official.⁵¹ After a mistrial resulted in the case being retried, a jury found the official not liable for Smith's injury.⁵²

^d Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

In 1999, Cleveland Browns offensive lineman Orlando Brown was injured when an official threw a penalty flag (weighted with the standard BB pellets) into the air, which struck Brown in the eye.⁵³ The incident left Brown partially blind in the eye and seemingly unable to continue his football career.⁵⁴

Brown sued the NFL (but not the official) in a New York state court alleging that the NFL had failed to hire and employ competent officials and to properly train and supervise the officials.⁵⁵ In addition, Brown sought to hold the NFL vicariously liable for the official's alleged negligence.⁵⁶

The NFL sought to remove Brown's case to federal court and have it dismissed by asserting that his claims were preempted by the Labor Management Relations Act (LMRA) and the terms of the CBA.⁵⁷ The United States District Court for the Southern District of New York disagreed, holding that Brown's claims were state law claims which did not require interpretation of the CBA so as to trigger preemption.⁵⁸

The case was remanded to New York state court and reportedly settled for \$15 million to \$25 million in 2002.⁵⁹ Brown nevertheless actually returned to the NFL in 2003 and continued playing through 2005.⁶⁰

There are only two known litigations concerning NFL officials, neither of which has clearly articulated a standard for judicial review of an official's actions.



(F) Recommendations Concerning Officials

Indications are that officials are generally performing their jobs well concerning player health and safety and thus we have no formal recommendations for them. Officials should be praised for their efforts, particularly considering the high level of scrutiny around these issues. While officials should continue their solid work, they must always be diligent and open to change for additional ways to protect player health. In particular, it has been established that players who suffer brain injuries are at risk of serious aggravation of their conditions if they are injured again shortly after the first injury.⁶¹ While the athletic trainers designated for spotting injuries from the press box can help, officials should exercise their discretion to stop play liberally to ensure, as much as possible, that injured athletes do not remain on the field where they can be exposed to further injury.

Endnotes

- 1 E-mail from Barry Mano, President, National Association of Sports Officials, to author (Mar. 23, 2016, 2:28 PM) (on file with authors).
- 2 E-mail from Michael C. Arnold, Arnold, Newbold, Winter & Jackson P.C., to author (Apr. 22, 2016, 10:58 AM), (on file with authors).
- 3 Official Playing Rules of the National Football League (NFL Playing Rules), Rule 15, Art. 2.
- 4 *Id.* at Art. 6–7.
- 5 *NFL Officials*, Nat'l Football League, <http://operations.nfl.com/the-officials/officiating-development/scouting-the-next-nfl-officials/2015-nfl-officials/> (last visited Sept. 23, 2015), *archived at* <http://perma.cc/K36J-W9LY>.
- 6 Gary Mihoes, *Path To Becoming NFL Referee Is Usually Long*, USA Today, Sept. 19, 2012, <http://usatoday30.usatoday.com/sports/nfl/story/2012/09/19/path-to-becoming-nfl-referee-is-usually-long/57809626/1>, *archived at* <http://perma.cc/R6EG-HB7N>.
- 7 *Id.*; see Josh Katzowitz, *NFL releases list of all officials for 2014 season*, CBSSPORTS.COM (May 22, 2014, 11:38 AM), <http://www.cbssports.com/nfl/eye-on-football/24569855/nfl-releases-list-of-all-officials-for-2014-season>, *archived at* <https://perma.cc/A2ZW-F2GY> (discussing that the 12 newest officials previously refereed in the Pac-12, SEC, Big 10, Big 12 and ACC).
- 8 Judy Battista, *N.F.L. Reaches Labor Deal With Referees*, N.Y. Times, Sept. 26, 2012, http://www.nytimes.com/2012/09/27/sports/football/nfl-and-referees-reach-labor-deal.html?_r=0, *archived at* <https://perma.cc/XTZ8-WWYT?type=pdf>.
- 9 *Id.*
- 10 Mike Florio, *NFLPA Threatens “Appropriate Action” Over Replacement Officials*, ProFootballTalk (Sept. 9, 2012, 7:49 PM), <http://profootballtalk.nbcsports.com/2012/09/09/nflpa-threatens-appropriate-action-over-replacement-officials/>, *archived at* <http://perma.cc/X887-RPKF>.
- 11 *NFL, NFLRA Reach Eight-Year Agreement*, NFL (Sept. 27, 2012 12:34 AM), <http://www.nfl.com/news/story/0ap100000066739/article/nfl-nflra-reach-eightyear-agreement>, *archived at* <http://perma.cc/4C9Z-CZLR>.
- 12 *Id.*
- 13 Interview with Jim Quirk, Executive Director, NFLRA (March 25, 2015).
- 14 Interview with Barry Mano, President, National Association of Sports Officials (Oct. 29, 2014).
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* For more information on NASO, see its website at <http://www.naso.org>.
- 18 Interview with Mano, *supra* note 14.
- 19 *Id.* The Commissioner and the Supervisor of League Game Officials are responsible for selecting officials. See NFL Constitution and Bylaws (2012), § 8.7.
- 20 Glenn M. Wong, *Essentials of Sports Law*, § 4.7 (4th ed. 2010) (discussing duties of officials and gathering cases); Eric T. Gilson, *Sports Officiating and the Law: A Survey of Risks and Protections*, 7 Willamette Sports L.J. 32 (2009) (same).
- 21 See Alan S. Goldberger, *Sports Officiating: A Legal Guide*, 206–210 (2007) (stating “[t]he American legal system is traditionally reluctant to become involved in second guessing decisions of referees” and collecting cases); Order, Ind. School Dist. No. I-89 of Okla. County, Okla. v. Okla. Secondary School Activities Ass’n, 2014-cv-2235 (Okla. Cnty. Dec. 11, 2014) (dissolving temporary injunction after high school sued to replay state playoff game based on erroneous application of a rule: “it borders on the unreasonable, and in some respects extends far beyond the purview of the judiciary, to this Court more equipped or better qualified than Defendant to decide the outcome or any portion of a high school football game.”); Georgia High School Ass’n v. Waddell, 285 S.E.2d 7 (Ga. 1981) (holding that Courts do not possess the authority to review the decisions of high school football referees).
- 22 See Marc T. Wolin, Robert D. Lang, *Legal Liability for Sports Referees in Today’s Litigious World – If You Can’t Kill the Ump Then Sue Him*, 15 U. Den. Sports & Ent. L.J. 83, 85 (2013); John Cadkin, *Sports Official Liability: Can I Sue If the Ref Missed a Call?* 2008 Den. U. Sports & Ent. L.J. 51, 52 (2008).
- 23 *Id.*
- 24 See Gilson, *supra* note 20, at 41 (discussing NASO’s lobbying efforts); Cadkin, *supra* note 22, at 56–57 (same).
- 25 *Sports Officials Legislative Scorecard*, Nat’l Ass’n Sports Officials, <http://www.naso.org/Resources/Legislation/LegislationStatus/SportsOfficialsLegislativeScorecard.aspx> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/JV5L-98PD>.
- 26 See M.G.L.A. 231 § 85V (Massachusetts statute restricting liability against volunteer officials and those working in youth sports); 745 ILCS 80/1 (Illinois statute restricting liability against volunteer officials and those working in youth sports); 42 Pa.C.S.A. § 8332.1 (Pennsylvania statute restricting liability against volunteer officials and those working in youth sports); Gen.Laws 1956, § 9-1-48 (Rhode Island statute restricting liability against officials in youth sports); R.C. § 3707.511 (Ohio statute restricting liability against officials in youth sports); NDCC, 32-03-46 (North Dakota statute restricting liability against volunteer officials); LSA-R.S. 9:2798 (Louisiana statute restricting liability against volunteer officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6 (New Jersey statute restricting liability against volunteer officials); 16 Del.C. § 6836 (Delaware statute restricting liability against volunteer officials); Ga. Code Ann.,

- § 51-1-41 (Georgia statute restricting liability against officials for amateur sports); A.C.A. § 16-120-102 (Arkansas statute restricting liability against officials for amateur sports); V.T.C.A., Civil Practice & Remedies Code § 84.004 (Texas statute restricting liability against volunteers of youth sports organizations); MD Code, Courts and Judicial Proceedings, § 5-802 (Maryland statute restricting liability against officials of amateur sports).
- 27 See T. C. A. § 62-50-202 (Tennessee statute restricting liability against officials “at any level of competition”); Miss. Code Ann. § 95-9-3 (Mississippi statute restricting liability against officials “at any level of competition”); N.R.S. 41.630 (Nevada statute restricting liability against officials “at any level of competition”).
- 28 Interview with Barry Mano, President, National Association of Sports Officials (Oct. 29, 2014).
- 29 *Id.*
- 30 *Id.*
- 31 See *Code of Conduct for Sports Officials*, Nat’l Ass’n Sports Officials, http://www.naso.org/Portals/0/downloads/code_of_conduct.pdf (last visited Aug. 7, 2015), *archived at* <https://perma.cc/35SA-8C6H?type=pdf>.
- 32 Interview with Mano, *supra* note 14.
- 33 *Id.*
- 34 Interview with Jim Quirk, Executive Director, NFLRA (March 25, 2015).
- 35 See Kevin Seifert, *NFL Nation Says: Too Much QB Protection?* ESPN (Nov. 21, 2013), http://espn.go.com/blog/nflnation/post/_id/102074/nfl-nation-says-too-much-qb-protection, *archived at* <http://perma.cc/J5YP-V78Y>.
- 36 Mark Kiszla, *NFL Appears to Prefer Two-Hand Touch*, Denver Post, Aug. 8, 2014, *available at* 2014 WLNR 21946260; Marshall Faulk, *Stupid rule endangers running backs’ well-being*, NFL (March 20, 2013, 11:04 PM) <http://www.nfl.com/news/story/0ap1000000152312/article/crownofhelmet-ban-nfl-rule-draws-criticism-understanding>, *archived at* <http://perma.cc/WW22-6HHJ>.
- 37 Mike Florio, *On Concussions, Players and Fans Can’t Have it Both Ways*, ProFootballTalk (May 6, 2012, 10:15 AM), <http://profootballtalk.nbcsports.com/2012/05/06/on-concussions-players-and-fans-cant-have-it-both-ways/>, *archived at* <http://perma.cc/9KRW-TJGA>.
- 38 Michael David Smith, *Vinny Testaverde Thinks the NFL is Overprotective of Quarterbacks*, ProFootballTalk (Nov. 20, 2012, 10:45 AM), <http://profootballtalk.nbcsports.com/2012/11/20/vinny-testaverde-thinks-the-nfl-is-overprotective-of-quarterbacks/>, *archived at* <http://perma.cc/W6NQ-586T>; Kevin Seifer, Tim MacMahon, The Associated Press, *Critics Blast Kickoff Rule Change*, ESPN (Aug. 24, 2011), http://espn.go.com/nfl/story/_id/6887856/donnie-nickey-formerly-tennessee-titans-latest-rip-new-nfl-kickoff-rule, *archived at* <http://perma.cc/ZVB8-WG36>; Gregg Rosenthal, *Woodley upset that football is “turning soft”*, ProFootballTalk (May 25, 2011, 4:32 PM), <http://profootballtalk.nbcsports.com/2011/05/25/woodley-upset-that-football-is-turning-soft/>, *archived at* <http://perma.cc/2722-L2ZX>.
- 39 NFL Comments and Corrections (June 24, 2016).
- 40 NFL Playing Rules, § 2, Art. 9.
- 41 NFL Playing Rules, § 2, Art. 11.
- 42 NFL Playing Rules, § 5, Art. 2.
- 43 Interview with Jim Quirk, Executive Director, NFLRA (March 25, 2015).
- 44 E-mail from Barry Mano, President, National Association of Sports Officials, to author (Mar. 23, 2016, 2:28 PM) (on file with authors).
- 45 NFL Playing Rules, § 5, Art. 2.
- 46 Mike Florio, *Giants LB Played Nearly Three Quarters with Concussion*, ProFootballTalk (Nov. 13, 2014, 8:30 PM), <http://profootballtalk.nbcsports.com/2014/11/13/giants-lb-played-nearly-three-quarters-with-concussion/>, *archived at* <http://perma.cc/LM4Z-YQJG>; Lions’ Michael David Smith, *Laadrian Waddle Returned to Game After Concussion*, ProFootballTalk (Oct. 23, 2014, 10:41 AM), <http://profootballtalk.nbcsports.com/2014/10/23/lions-laadrian-waddle-returned-to-game-after-concussion/>, *archived at* <http://perma.cc/27UM-X5BJ>.
- 47 Michael David Smith, *Chargers Now Admit Jahleel Addae Had a Concussion*, ProFootballTalk (Oct. 25, 2014, 6:45 AM) <http://profootballtalk.nbcsports.com/2014/10/25/chargers-now-admit-jahleel-addae-had-a-concussion/>, *archived at* <http://perma.cc/S96G-CKRW>.
- 48 Mike Florio, *Doctors Advise Team Medical Staffs to Be More Vigilant About Concussions*, ProFootballTalk (Oct. 30, 2014, 4:42 PM), <http://profootballtalk.nbcsports.com/2014/10/30/doctors-advise-team-medical-staffs-to-be-more-vigilant-about-concussions/>, *archived at* <http://perma.cc/QFB8-JSX7>.
- 49 Darin Gantt, *Injury Timeout Proposal Unanimously Approved by NFL Owners*, ProFootballTalk (Mar. 24, 2015, 1:38 PM), <http://profootballtalk.nbcsports.com/2015/03/24/injury-timeout-proposal-unanimously-approved-by-nfl-owners/>, *archived at* <http://perma.cc/4C5W-ULP9>.
- 50 *Id.*
- 51 See 2011 CBA, Art. 43, § 1 (Non-Injury Grievances are the exclusive method for resolving claims concerning “any provision of [the CBA], the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players”).
- 52 Marc T. Wolin, Robert D. Lang, *Legal Liability for Sports Referees in Today’s Litigious World – If You Can’t Kill the Ump Then Sue Him*, 15 U. Den. Sports & Ent. L.J. 83, 88 (2013); Byron Rosen, *Denver Baseball Flame Brightens*, Wash. Post, Feb. 2, 1978, *available at* 1978 WLNR 229812.
- 53 *Id.*
- 54 *Id.*
- 55 *Brown v. Nat’l Football League*, 219 F. Supp. 2d 372, 376 (S.D.N.Y. 2002).
- 56 *Id.*
- 57 *Id.* at 376.
- 58 *Id.*
- 59 *Id.* at 377.
- 60 *Id.*
- 61 Daniel Slotnik, *Orlando Brown, Who Sued N.F.L. Over Errant Flag, Dies at 40*, N.Y. Times, Sept. 23, 2011, http://www.nytimes.com/2011/09/24/sports/football/orlando-brown-who-sued-nfl-over-errant-flag-dies-at-40.html?_r=0, *archived at* <https://perma.cc/32U3-C4SS?type=pdf>.
- 62 *Id.*
- 63 Ruben Echemendia et al., *Developing guidelines for return to play: consensus and evidence-based approaches*. 29 Brain Inj. 185 (2015) (“Risk for recurrent concussion was greater for individuals with prior concussions and appeared greatest in the first 10 days after a sports-related concussion.”).



Chapter 16

Equipment Manufacturers



One major strategy for protecting and promoting player health is to offer them the appropriate type and amount of injury-reducing equipment. For this reason, equipment manufacturers play an important role in player health.

In order to ensure that this chapter was as accurate and valuable as possible, we invited two leading equipment manufacturers, Riddell and Schutt, as well as the National Operating Committee on Standards for Athletic Equipment (NOCSAE), described below, to review a draft version of this chapter prior to publication. All three reviewed the chapter and provided comments.

(A) Background

The football equipment market is dominated by Riddell and Schutt, each of which hold at least a 45 percent share of the football equipment market,¹ across all levels of football. Riddell and Schutt offer all pads necessary for the game of football, including but not limited to helmets, faceguards, chin straps, mouth guards, shoulder pads, hip pads, thigh pads, knee pads, and rib pads.² Adams, another manufacturer of football equipment, was sold to Schutt's parent company, in 2014.³ Additionally, Rawlings, also once a manufacturer of football equipment, announced in 2015 that it was leaving the market.⁴ Xenith is seemingly one of the lone competitors left to Riddell and Schutt, though it only manufactures helmets and shoulder pads.⁵

The equipment manufacturers have not surprisingly had important interactions with the NFL. In 1988, the NFL and Riddell entered into an agreement without duration whereby Riddell provided free helmets, pads, and jerseys to all NFL clubs in exchange for Riddell receiving the exclusive right to display its logo on NFL helmets.⁶ Players were still nonetheless free to wear a helmet from any manufacturer, provided it met NFL standards.⁷ Schutt unsuccessfully challenged the NFL-Riddell agreement as a violation of antitrust laws.⁸ After litigation was initiated against both the NFL and Riddell concerning concussions (*see* Chapter 7: The NFL and NFLPA), the NFL renegotiated the agreement to conclude with the 2013 season.⁹ Following the expiration of NFL's deal with Riddell, the NFL said it would no longer have an official helmet sponsor.¹⁰ Similarly, the NFL does not have an official equipment sponsor. Players are permitted to wear whatever equipment they like, provided it meets NOCSAE standards, as will be discussed below.

For many years, the helmet manufacturers have attempted to develop helmets that reduced the risks of concussions—and market them accordingly—even though it is questionable to what extent helmets can actually reduce the risk of concussions.¹¹ In comments provided after reviewing a draft of this chapter, Schutt CEO Robert Erb described the challenges of reducing the incidence of concussion as follows:

[W]hat is happening inside the skull, with the brain suspended in cerebrospinal fluid, is an extraordinarily complex event. There is an infinite array of possible trajectories and circumstances at the point of impact in a game of football, including field conditions, position played, girth and length of neck, medical history, whether one saw the hit

coming, temperature, altitude, genetic make-up, area struck, type of turf, helmet implements and accessories, mass, speed, velocity of impact, fit of the helmet, etc., etc.

Indeed, the competition in the equipment manufacturer industry and the concerns about concussions have made the equipment manufacturing industry a challenging landscape. Riddell's development and marketing of the Revolution football helmet is a helpful example.

In 2002, Riddell provided a grant to be used to partially fund a study at the University of Pittsburgh Medical Center (UPMC) of Riddell's recently released Revolution helmet.¹² The study was designed to compare the concussion rates and recovery times for athletes wearing Riddell's Revolution helmet compared to athletes wearing older model helmets manufactured by both Riddell and its competitors.¹³ The study was conducted by Micky Collins and Mark R. Lovell, co-owners of ImPACT, the leading concussion diagnostic tool which was used to measure recovery time from concussion during the study.¹⁴

The study took three years and examined 2,141 high school football players: 1,173 using Revolution helmets and 968 using other helmets.¹⁵ The authors found 5.3 percent of players using Revolution helmets suffered concussions as compared to 7.6 percent of players using other helmets.¹⁶ The authors described the difference as “statistically significant” and said the results “demonstrated a trend toward a lowered incidence of concussion” but that the “limited sample size precludes a more conclusive statement of findings at this time.”¹⁷ The study also highlighted that there was a 31 percent decreased relative risk for athletes wearing the Revolution helmet, comparing the 5.3 percent and 7.6 percent concussion rates.^{18,a}

Riddell seized on that last statistic and began to advertise that the Revolution helmet reduced the risk of concussion by 31 percent.¹⁹ Although this percentage improvement is technically accurate, the more relevant number in practice (or to players) is likely the absolute reduction in concussion rates, which was only 2.3 percent. Riddell also expanded the claim to all of its helmets even though they had not been a part of the study.²⁰

As part of a patent lawsuit brought by Riddell against Schutt, Schutt counterclaimed, alleging Riddell had violated state and federal false advertising laws by claiming that

a When providing comments for this Report, Riddell highlighted the fact that the UPMC study authors extrapolated that, if 1.5 million high school students participate in football each year, the risk reduction found with the Revolution helmet could theoretically mean 18,600–46,500 less concussions per year. Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).

Revolution helmets decreased the risk of concussion by 31 percent.²¹ The United States District Court for the Western District of Wisconsin ultimately granted Riddell summary judgment,^b finding that Riddell's claim that "technology" used in its helmets had been "shown to reduce the incidence of concussion" was not "literally false" as required to state a claim.²²

The 31 percent statistic has also been the subject of other litigation. In at least three cases brought by consumers (none of whom were NFL players), the plaintiffs alleged that Riddell's use of the 31 percent figure was misleading.²³ All three cases are ongoing as of the date of publication.²⁴ In two court decisions thus far, courts found that the 31 percent statistic could be considered misleading if it was used in advertising helmets that were not involved in the UPMC study.²⁵

However, Riddell's claims also caught the attention of the Federal Trade Commission (FTC). The FTC investigated Riddell and concluded that the UPMC study "did not prove that Revolution varsity football helmets reduce concussions or the risk of concussions by 31%."²⁶ The FTC nevertheless did not sanction Riddell since the company had already discontinued using the 31 percent statistic in marketing.²⁷ According to Riddell, it ceased using the statistic because it was no longer relevant—the helmets that the Revolution helmet had been compared to in the UPMC study "had largely been phased out of the market."²⁸

Notwithstanding the FTC's conclusion about Riddell's characterization of the UPMC study, the Revolution helmet has in other research been shown to reduce the risk of concussions as compared to older model helmets. A 2014 study determined that 2.82 percent of a population of college football players wearing a Revolution helmet suffered a concussion, as compared to 4.47 percent of players using an older Riddell model.²⁹ The study, like the UPMC study, found this difference to be statistically significant.³⁰

Perhaps counterintuitively, there has been an ongoing debate about whether the best way to improve player health is for players to wear *less* equipment. Coaches, commentators and others have long lamented that the helmet and shoulder pads are often used as a weapon by would-be tacklers, offering the first and hardest blow to ball carriers.³¹ Although the NFL has recently increased the penalties for plays on which a player delivers a forcible blow with the top or crown of the helmet,³² the helmet arguably still

provides players with a level of protection that enables them to play the game with a degree of reckless abandon.³³

A recent rule change provides a relevant example. In 2013 the NFL reinstated a rule requiring players to wear thigh and knee pads.³⁴ One might then have expected a reduction in contusions to the hips, thighs and knees that season. However, no such reduction occurred. During the 2013 season, there were 61 reported contusions to these areas.³⁵ In the four prior seasons, there was a mean of 55.75 contusions to these areas.³⁶ To be fair, this change was taking place simultaneously with other changes, confounding any strong causal inference, but it does give a reason to resist the assumption that more equipment necessarily equals fewer injuries.

Also of note, the NFL does not mandate the use of mouth guards,³⁷ despite some but still disputed evidence that mouth guards can help prevent concussions.³⁸

Attached as Appendix J is a timeline of equipment-related events and policies in the NFL.

(B) Current Legal Obligations^c

The principal source of equipment manufacturers' legal obligations is products liability law.³⁹ Products liability is an area of tort law, which can vary from state to state. The American Law Institute publishes "Restatements of the Law," which are useful summaries of general principles about various areas of law. According to the Restatement of the Law Third, Torts: Products Liability, a manufacturer of consumer products, such as sports equipment, has a duty not to cause personal injury as a result of:

1. selling or distributing products which contain manufacturing defects;⁴⁰
2. selling or distributing products which are defective in design;⁴¹
3. selling or distributing products without adequate instructions or warnings;⁴²
4. misrepresenting a material fact concerning the product;⁴³
5. failing "to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning";⁴⁴ and
6. failing to recall harmful products.⁴⁵

b Summary judgment is "[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law." Black's Law Dictionary (9th ed. 2009).

c The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

While the above list addresses an equipment manufacturers' principal legal obligations concerning player health, it is not an exhaustive list. For example, equipment manufacturers could potentially be subject to liability for common law fraud claims, for violating consumer protection statutes, or for misrepresenting their products.

Although every state legislature has passed a law concerning the treatment of concussions in youth athletes (*see* Part 7: Interested Parties, Section 3: Governments), there are no federal or state laws directly governing athletic equipment standards.⁴⁶

The safety standards for athletic equipment that currently exist are almost exclusively determined by the National Operating Committee on Standards for Athletic Equipment (NOCSAE). NOCSAE is a non-profit organization with the stated purpose of improving athletic equipment and reducing injuries through equipment standards.⁴⁷ NOCSAE was formed in 1969 in response to more than 100 high school and college football players killed by skull fractures and acute brain bleeding during the 1960s.⁴⁸ NOCSAE's Board of Directors consists of representatives from the American Academy of Pediatrics, American College Health Association, American College of Sports Medicine, American Football Coaches Association, American Medical Society for Sports Medicine, American Orthopaedic Society for Sports Medicine, Athletic Equipment Managers Association, National Athletic Equipment Reconditioners Association, National Athletic Trainers Association, and the Sports & Fitness Industry Association.⁴⁹

The safety standards for athletic equipment that currently exist are almost exclusively determined by the National Operating Committee on Standards for Athletic Equipment (NOCSAE).

Today, NOCSAE sets general safety standards for equipment in all sports while also providing specific guidance for baseball, softball, football, hockey, lacrosse, polo, and soccer.⁵⁰ Equipment manufacturers themselves and not NOSCAE are responsible for testing their equipment and

evaluating compliance with the NOSCAE standards.⁵¹ Compliance with NOCSAE standards must then be confirmed by the Safety Equipment Institute, an independent organization that specializes in testing and certifying personal protective equipment.⁵² If the equipment complies, the equipment manufacturer may place a NOCSAE trademarked logo on the equipment indicating that it meets NOCSAE standards.⁵³

NOCSAE's funding is derived from manufacturers' use of the NOCSAE logo as a symbol of certification.⁵⁴ NOCSAE enters into licensing agreements with sports equipment manufacturers whereby the manufacturers are permitted to place the NOCSAE logo on its equipment provided the equipment meets NOCSAE's standards.⁵⁵ The licensing agreements also impose ongoing quality control and assurance requirements on the manufacturers.⁵⁶ If the equipment does not meet NOCSAE standards, then the manufacturer cannot use the NOCSAE logo, and presumably, NOCSAE does not receive any licensing money from the manufacturer.^d

Certainly a significant portion of NOCSAE's work has been related to football helmets and concerns about concussions. In reviewing a draft of this chapter, NOCSAE made three points it identified as framing its approach to these matters:

1. There is no concussion specific helmet standard in the world, in ANY activity, sport or otherwise.
2. There is no scientific consensus as to what a concussion performance standard should incorporate as a pass/fail injury threshold.
3. Ethical standards for personal protective equipment must be based on consensus science, must be feasible and effective, and must not create a new risk of injury or increase the risk of injury in other areas.⁵⁷

NOCSAE has two standards relevant to football helmets. First, NOCSAE has a standard that governs helmets in sports generally, known as the ND001 standard.⁵⁸ Second, NOCSAE has a standard governing football helmets specifically, known as the ND002 standard.⁵⁹ The ND002 standard is subject to any changes made to the broader ND001 standard.⁶⁰ While some have suggested that NOCSAE's standards have not meaningfully changed over time,⁶¹ in reviewing this chapter, NOCSAE strongly disagreed.⁶²

d According to NOCSAE, since 1996 it has funded more than \$8 million of independent research at universities concerning equipment safety. Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).

Indeed, a review of the relevant standards demonstrates that the ND001 standard has been substantively revised 16 times since it was first published in 1973, and the ND002 standard has been revised 3 times since it split from the ND001 standard in 1998.⁶³ Nevertheless, we are not engineers or scientists and thus we cannot opine on the significance of these revisions. Finally, it is important to understand that NOCSAE's standards are performance standards—they measure the helmet's ability to withstand certain physical forces—they do not specify materials or design.⁶⁴

Under NOCSAE's standard, the football helmet is placed on a synthetic head model that is filled with glycerin and fitted with various measuring instruments. The head model fitted with the helmet is then dropped sixteen times onto a polymer anvil with two of the drops from a height of sixty inches onto six different locations of the helmet at varying temperatures determined by NOCSAE to simulate different potential game temperatures. After each drop a "Severity Index," which measures the severity of the impact absorbed by the head model at the moment of impact, is determined. Helmets are graded on a pass-fail basis, and the helmets that pass are those meeting an acceptable Severity Index.⁶⁵

In June 2014, NOCSAE proposed a new standard that would include rotational forces into the analysis for football helmets.⁶⁶ The proposed standard was open for comment through June 2015 with NOCSAE scheduled to vote on its adoption in 2016.⁶⁷ Again, we lack the scientific expertise to opine on the appropriateness of NOCSAE's standards.^e Nevertheless, a report by the National Academy of Sciences on youth concussions, citing NOCSAE's research into rotational forces, suggested that NOCSAE's standards are at the forefront of the science in evaluating the efficacy of helmets.⁶⁸

The Consumer Product Safety Commission (CPSC), the federal agency responsible for regulating the safety of thousands of consumer products,⁶⁹ does not have any standards for football helmets.⁷⁰ Indeed, in 1980 the CPSC denied a petition requesting it set standards for football helmets "to reduce the risks of head, neck, and spinal injuries," citing voluntary standards and purported decreasing injury

^e In reviewing a draft of this chapter, NOCSAE stated that its standards for football helmets, including third-party certification, exceed those set by the Consumer Product Safety Commission for bicycle helmets and by the Department of Transportation for motorcycle helmets. Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors). We lack the scientific expertise to evaluate NOCSAE's statement.

rates.⁷¹ In 2011, New Mexico Senator Tom Udall proposed the Children's Sports Athletic Equipment Safety Action that would have required the CPSC to develop standards for football helmets, mandate third-party testing of youth football helmets, and instruct the Federal Trade Commission to regulate the manner in which helmet manufacturers advertise the safety specifications of their products.⁷² However, the bill was never enacted.^{73,f}

(C) Current Ethical Codes

There are no known codes of ethics for sports equipment manufacturers.

(D) Current Practices

Equipment manufacturers have seemingly altered their behavior due to the increased litigation and scrutiny, as discussed above in the background to this chapter. For example, in touting its new SpeedFlex helmet in 2014, Riddell's senior vice president for research and product development was careful not to claim that the helmet could help reduce concussions:

We'll let the medical researchers weigh in on the medical data around concussions, because that's kind of a moving target right now because of all the things that are being learned[.] But what we can do is try to reduce the forces of impact to the player's head. I think reducing those forces is unequivocally a good thing.^{74,g}

^f There is also the possibility (albeit unlikely) that football equipment, helmets in particular, could be regulated by the Food and Drug Administration (FDA). The FDA regulates "medical devices," which includes, among many other things, "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory which is . . . intended for use . . . in the cure, mitigation, treatment, or prevention of disease, in man[.]" *What is a Medical Device?*, U.S. Food and Drug Admin., <http://www.fda.gov/aboutfda/transparency/basics/ucm211822.htm> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/VJ9Q-GCUH>, quoting Federal Food Drug & Cosmetic Act (FDCA) § 201(h), 21 USC 321(h). To the extent that football equipment and helmets are intended to prevent injuries and diseases, they appear to fit within the definition of a medical device. If the FDA chose to regulate football equipment, the manufacturers would be subject to a variety of regulatory requirements, likely including registering the product with the FDA, providing information to the FDA before the product can be sold publicly, and providing accurate and descriptive labeling and literature concerning the product. *Overview of Device Regulation*, U.S. Food and Drug Admin., <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/#labeling> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/GA6M-SU55>. Nevertheless, there is no indication that the FDA is considering regulating football equipment and, as will be discussed below, it appears that football equipment manufacturers are providing the types of warnings that the FDA would likely require.

^g Former Player 2 complained that equipment manufacturers were often misleading about their products: "This helmet is supposed to be safer for your head, but then you go hit somebody and you have a concussion. You're saying 'What the hell is going on?'"

Riddell's website also now contains a wealth of information, articles, and links concerning concussions,^{75,h} all of which would militate against claims that Riddell failed to warn consumers about the risks of concussions. Similarly, Schutt's homepage contains a lengthy warning about the risks of concussions that a visitor to the website must check off as having "read and underst[ood]" before visiting any other Schutt webpage.ⁱ

At the current time, NOCSAE appears to be taking a proactive approach in assessing whether equipment actually meets its standards. In December 2014, NOCSAE announced that the two most popular lacrosse helmets on the market did not meet NOCSAE standards.⁷⁶ The helmet manufacturer quickly offered to increase the padding in the helmets at no cost to the consumer, a modification NOCSAE accepted.⁷⁷ Had it not made changes to the helmets, the manufacturer would not have been able to continue using the NOCSAE logo as evidence of its compliance with NOCSAE standards.⁷⁸

In addition to NOCSAE, Virginia Tech has also provided valuable information concerning football helmets. Since 2011, The Virginia Tech Department of Biomedical Engineering and Mechanics has been evaluating helmets using a series of biomechanical tests and assigning them a rating from zero stars up to five stars based on the helmet's perceived ability to minimize the risk of concussions.⁷⁹ The Virginia Tech ratings have become incredibly important in the industry, as consumers are reluctant to

buy anything that has not received five stars from Virginia Tech.⁸⁰ According to Virginia Tech, the research "is done as part of Virginia Tech's service mission and is 100% independent of any funding or influence from helmet manufacturers."⁸¹

(E) Enforcement of Legal and Ethical Obligations^j

Players' only recourse against equipment manufacturers is a civil lawsuit.

Riddell, along with the NFL, is a defendant in the Concussion Litigation, discussed at length in Chapter 7: The NFL and NFLPA. The plaintiffs' claims against Riddell are summarized by the header to the section of the plaintiffs' Complaint concerning Riddell: "The Riddell Defendants Duty to Protect Against the Long-Term Risk of Concussions."⁸² The plaintiffs alleged a variety of intentional and negligent acts on the part of Riddell concerning the design, manufacture, inspection, testing and warnings related to Riddell helmets which allegedly caused plaintiffs to suffer injuries. The plaintiffs further alleged that Riddell has never "acknowledge[d] a link between repeat concussions and later life cognitive problems" and that Riddell has "never warned any Plaintiff or retired player of the long-term health effects of concussions."⁸³

In August 2012, Riddell sought to dismiss the plaintiffs' claims arguing, like the NFL, that the claims were preempted by the Labor Management Relations Act (LMRA).⁸⁴ Common law claims such as negligence are generally preempted by the LMRA.⁸⁵ The LMRA bars or "preempts" state common law claims^k where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA."⁸⁶

Riddell argued that claims against it are subject to preemption "even though the Riddell Defendants were not parties to the CBAs, because, as the Supreme Court has explained, the doctrine of complete preemption barring state-law claims 'is more aptly expressed not in terms of parties but in terms of the purpose of the lawsuit.'"⁸⁷

h In reviewing this chapter, Riddell indicated that since 1981 its helmets have included a warning that "NO HELMET CAN PREVENT ALL HEAD OR NECK INJURIES A PLAYER MIGHT RECEIVE WHILE PARTICIPATING IN FOOTBALL" and that improper use of the helmet "can result in severe head or neck injuries, paralysis or death." In addition, Riddell indicated that beginning in 2002, its helmets have included warnings that contact in football can result in "CONCUSSION-BRAIN INJURY" and advised players not to "return to a game until all symptoms are gone and you have received MEDICAL CLEARANCE." Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).

i The entire message reads:

WARNING

Scientists have not reached agreement on how the results of impact absorption tests relate to concussions. No conclusions about a reduction of risk or severity of concussive injury should be drawn from impact absorption tests.

NO HELMET SYSTEM CAN PREVENT CONCUSSIONS OR ELIMINATE THE RISK OF SERIOUS HEAD OR NECK INJURIES WHILE PLAYING FOOTBALL.

Keep your head up. Do not butt, ram, spear or strike an opponent with any part of the helmet or faceguard. This is a violation of football rules and may cause you to suffer severe brain or neck injury, including paralysis or death and possible injury to your opponent. Contact in football may result in Concussion/Brain Injury which no helmet can prevent. Symptoms (sic) include loss of consciousness or memory, dizziness, headache, nausea or confusion. If you have symptoms, immediately stop and report them to your coach, trainer and parents. Do not return to a game or contact until all symptoms are gone and you receive medial (sic) clearance. Ignoring this warning may lead to another and more serious or fatal brain injury.

NO HELMET SYSTEM CAN PROTECT YOU FROM SERIOUS BRAIN AND/OR NECK INJURIES INCLUDING PARALYSIS OR DEATH. TO AVOID THESE RISKS, DO NOT ENGAGE IN THE SPORT OF FOOTBALL.

See <http://www.schuttsports.com/>, archived at <http://perma.cc/6K6F-PEU9>.

j Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

k Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

The NFL settled the Concussion Litigation in August 2013, approved by the United States District Court for the Eastern District of Pennsylvania in April 2015,⁸⁸ and by the United States Court of Appeals for the Third Circuit in April 2016.⁸⁹ Riddell was not a party to the settlement and has not reached any settlement of its own. Thus, the Concussion Litigation continues as against Riddell.

Riddell's argument that the LMRA preempts the claims against it seems unlikely to succeed, if for no other reason than it would leave players with no ability to enforce equipment manufacturers' obligations. Players cannot pursue grievances against equipment manufacturers under the CBA because the manufacturers are not parties to the CBA and thus did not agree to arbitrate any such claims.

In addition, as mentioned above, Riddell is currently the subject of several ongoing lawsuits brought by non-NFL player consumers who, like the plaintiffs in the Concussion Litigation, allege a variety of intentional and negligent acts on the part of Riddell concerning the design, manufacture,

inspection, testing, warnings, and marketing related to Riddell helmets that allegedly caused plaintiffs to suffer injuries.⁹⁰ Schutt is also a defendant in at least one of the lawsuits.⁹¹

There is, however, one case against Schutt brought by an NFL player that bears mentioning. In 2016, Ryan Mundy, who played in the NFL from 2009 to 2014, sued Schutt alleging that a defect in the helmet caused a laceration on his forehead when he impacted another player.⁹² Mundy alleged that the laceration required 17 stitches and left him with permanent scarring.⁹³ The lawsuit is ongoing as of the date of publication.

Lastly, NOCSAE has minimal enforcement authority against equipment manufacturers. As mentioned above, NOCSAE can only prevent non-conforming equipment from using the NOCSAE logo, substantially precluding the product from being sold. Since all NFL equipment meets NOCSAE standards, there is nothing more that NOCSAE can do in offering players recourse.



(F) Recommendations Concerning Equipment Manufacturers

It appears that equipment manufacturers are generally working to create the safest equipment possible. Equipment manufacturers for a variety of reasons (including both liability and brand image) have generally sought to make equipment safer and the recent increased emphasis on player health and safety can only have accelerated that interest. We thus expect and recommend that equipment manufacturers continue to invest in the research and development of safer equipment. Similarly, at present time it appears equipment manufacturers have been more careful in ensuring they accurately convey the benefits and limitations of their equipment. In this regard, equipment manufacturers should continue to do what they have been doing and there is no need for formal recommendations.

NOCSAE has minimal enforcement authority against equipment manufacturers. As mentioned above, NOCSAE can only prevent non-conforming equipment from using the NOCSAE logo, substantially precluding the product from being sold. Since all NFL equipment meets NOCSAE standards, there is nothing further NOCSAE can offer in terms of player health, other than continued research.

Considering the public interest at hand, football equipment might be an area where additional regulation would be appropriate. Nevertheless, it is unclear who might fill this role of regulating equipment manufacturers. One possibility is for the Government, including the CPSC, to play a greater role in establishing and enforcing equipment standards. For this and other reasons we have included the Government as an Interested Party in Part 7.

Endnotes

- 1 See Lisa Brown, *Rawlings Chases Growth in Football Equipment*, St. Louis Post-Dispatch, Oct. 27, 2013, http://www.stltoday.com/business/local/rawlings-chases-growth-in-football-equipment/article_06babb3c-9483-5115-b42b-8e818693901c.html (last visited Aug. 7, 2015), archived at <http://perma.cc/MDR4-YFFN> (describing each company's market share as exceeding 40%); Lisa Brown, *Rawlings Gaining Ground in the Football Equipment Market*, St. Louis Post-Dispatch, Sept. 18, 2011, http://www.stltoday.com/business/local/rawlings-gaining-ground-in-the-football-equipment-market/article_69329d3b-dd8d-5079-a9a9-9cf8b473b832.html (last visited Aug. 7, 2015), archived at <http://perma.cc/924L-C74G> (describing Riddell and Schutt's combined market share as over 90%).
- 2 See Shop, RIDDELL, <http://www.riddell.com/> (last visited Aug. 7, 2015); Football, Schutt Sports, <http://www.schuttsports.com/asp/sport/ProductLanding.aspx?sp=3> (last visited Aug. 7, 2015), archived at <http://perma.cc/HL4K-2EJE>.
- 3 E-mail from Robert Erb, Chief Executive Officer, Kranos Corporation to authors (Mar. 16, 2016) (on file with authors).
- 4 Lisa Brown, *End of the line for Rawlings' football helmets*, St. Louis Post-Dispatch, June 21, 2015, http://www.stltoday.com/business/local/end-of-the-line-for-rawlings-football-helmets/article_c2a1a349-104c-504e-80d7-ea37c7ddd951.html, archived at <https://perma.cc/F98N-XUV5>.
- 5 See *Xenith Products*, Xenith, www.xenith.com/products/ (last visited Aug. 7, 2015).
- 6 See Jenny Vrentas, *The First Line of Defense*, MMQB (Oct. 22, 2013), <http://mmqb.si.com/2013/10/22/nfl-helmets-head-injury-concussion/>, archived at <http://perma.cc/WL9Q-7PXT> (describing Riddell agreement as "indefinite"); see also *Schutt Athletic Sales Co. v. Riddell, Inc.*, 727 F.Supp. 1220 (N.D.Ill. 1989) (dismissing Schutt's claim that the NFL-Riddell agreement violated antitrust law).
- 7 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).
- 8 See *Schutt Athletic Sales Co. v. Riddell, Inc.*, 727 F.Supp. 1220 (N.D.Ill. 1989)
- 9 Darren Rovell, *NFL, Riddell Ending Helmet Deal*, ESPN, (Oct. 25, 2013, 2:44 PM), http://espn.go.com/nfl/story/_/id/9875758/nfl-end-official-helmet-deal-riddell-2013-14-season, archived at <http://perma.cc/8LRU-CJHT>.
- 10 Vrentas, *supra* note 6.
- 11 Steven Rowson et al., *Can Helmet Design Reduce the Risk of Concussion in Football?* 120 J Neurosurgery 919 (2014) ("Although helmet design may never prevent all concussions from occurring in football, evidence illustrates that it can reduce the incidence of this injury."); Don Comrie et al., *Letters to the editor: football helmet design and concussion*, 121 J. Neurosurgery 491 (2014) (criticizing the findings of the Rowson paper); Timothy A. McGuine, et al., *Protective equipment and player characteristics associated with the incidence of sport-related concussion in high school football players: a multifactorial prospective study*, 42 Am. J. Sports Med. 2470 (2014) ("Incidence of SRC [sport-related concussion] was similar regardless of the helmet brand (manufacturer) worn by high school football players. Players who had sustained an SRC within the previous 12 months were more likely to sustain an SRC than were players without a history of SRC.");
- 12 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors); Micky Collins et al., *Examining Concussion Rates and Return to Play in High School Football Players Wearing Newer Helmet Technology: A Three-Year Prospective Cohort Study*, 58 Neurosurgery 275 (2006).
- 13 *Id.*; *Riddell, Inc. v. Schutt Sports, Inc.*, 724 F. Supp. 2d 963, 967 (W.D.Wis. 2010).
- 14 Collins et al., *supra* n. 12.
- 15 *Riddell, Inc. v. Schutt Sports, Inc.*, 724 F. Supp. 2d 963, 968 (W.D.Wis. 2010).
- 16 *Id.*
- 17 *Id.*
- 18 *Id.* 7.6% less 31% of 7.6% = approximately 5.3%.
- 19 *Id.*
- 20 *Id.* at 969.
- 21 See *id.* at 966.

- 22 *Id.* at 965.
- 23 See *In re Riddell Concussion Reduction Litigation*, 121 F. Supp.3d 402 (D.N.J. 2015); *DuRocher v. Riddell, Inc.*, 97 F. Supp.3d 1006 (S.D. Ind. 2015); *Midwestern Midget Football Club Inc. v. Riddell Inc.*, 15-cv-244, 2015 WL 4727438 (S.D. W. Va. Aug. 10, 2015).
- 24 See *Thiel v. Riddell, Inc.*, 13-cv-7585 (D.N.J.); *DuRocher v. Nat'l Collegiate Athletic Ass'n*, 13-cv-1570 (S.D. Ind.); *Midwestern Midget Football Club Inc. v. Riddell, Inc.*, 15-cv-244 (S.D. W. Va.).
- 25 See Memorandum Opinion and Order, *Midwestern Midget Football Club Inc. v. Riddell, Inc.*, 15-cv-244 (S.D. W. Va. June 17, 2016), ECF No. 78; *In re Riddell Concussion Reduction Litigation*, 121 F. Supp.3d 402, 416–17 (D.N.J. 2015).
- 26 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 316–317 (2013). The FTC's investigation followed an October 19, 2011 hearing before the Senate Commerce entitled "Concussions and the Marketing of Sports Equipment." *Id.*
- 27 *Id.*
- 28 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).
- 29 Steven Rowson et al., *Can Helmet Design Reduce the Risk of Concussion in Football?* 120 *J. Neurosurgery* 919 (2014).
- 30 *Id.*
- 31 See Stephen Chapman, *Football Doesn't Have to Resemble Battlefield Footage*, *Chi. Trib.*, Oct. 20, 1988, available at 1988 WLNR 1727333; Red Smith, *Headgear as a Weapon*, *N.Y. Times*, Feb 23, 1981, <http://www.nytimes.com/1981/02/23/sports/red-smith-headgear-as-weapon.html>, archived at <http://perma.cc/2LJV-K2RQ>.
- 32 David Barron, *Football: Prevent Defense: From NFL Down, Sport is Legislated to Create a Safer Playing Environment*, *Hous. Chron.*, Aug. 18, 2013, available at 2013 WLNR 20617460.
- 33 To help teach players not to use their heads while making tackles, the University of New Hampshire football team occasionally practices without helmets. See Jenny Ventras, *Helmetless Football? It's the New Practice at New Hampshire*, *MMQB*, (Dec. 4, 2014), <http://mmqb.si.com/2014/12/04/helmetless-football-practice-university-of-new-hampshire/>, archived at <http://perma.cc/6CBB-8Y5J>.
- 34 Tom Pelissero, *More Padding Mandatory in NFL, Protection of Knees, Thighs Now Required*, *USA Today*, July 12, 2013, available at 2013 WLNR 16937591.
- 35 Quintiles, *NFL Injury Data Analysis* (Feb. 19, 2014) (on file with authors).
- 36 *Id.*
- 37 Jeffri Chadiha, *10 Steps to Make the Game Safer*, *ESPN*, (Aug. 30, 2012), http://espn.go.com/nfl/story/_id/8061129/nfl-10-steps-make-game-safer (last visited Aug. 7, 2015), archived at <http://perma.cc/E49Q-A6SC>.
- 38 See Daniel H. Daneshvar et al., *Helmets and Mouth Guards: The Role of Personal Equipment in Preventing Sport-Related Concussions*, 30 *Clinical Sports Med.* 145 (2011), <http://www.bu.edu/cte/files/2011/07/Daneshvar-et-al.-Helmets-and-Mouth-Guards.-2011.pdf>, archived at <https://perma.cc/Y3DR-UZU5?type=pdf> (discussing conflicting evidence as to whether mouthguards help prevent concussions); Paul McCrory, *Do Mouthguards Prevent Concussions?*, 35 *Br. J. Sports Med.* 81 (2001) (same).
- 39 "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Restatement (Third) of Torts: Products Liability § 1 (1998).
- 40 A product "contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." Restatement (Third) of Torts: Products Liability § 2 (1998).
- 41 A product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2 (1998). This definition has proven controversial and some states have adopted alternative definitions. See Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 *Brook. L. Rev.* 1039 (2009); Patrick Lavelle, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 *Duq. L. Rev.* 1059 (2000).
- 42 A product "is defective because of inadequate instructions or warnings . . . when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2 (1998).
- 43 "One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation." Restatement (Third) of Torts: Products Liability § 9 (1998).
- 44 "A reasonable person in the seller's position would provide a warning after the time of sale if: (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning." Restatement (Third) of Torts: Products Liability § 10 (1998).
- 45 "One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if: (a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or (2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and (b) the seller or distributor fails to act as a reasonable person in recalling the product." Restatement (Third) of Torts: Products Liability § 11 (1998).
- 46 See Jason Navia, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 *Admin. L. Rev.* 265 (2012) (discussing generally youth football helmet regulation and proposed or possible legislation).
- 47 *About NOCSAE*, Nat'l Operating Comm. Standards for Athletic Equipment, <http://nocsae.org/about-nocsae/> (last visited Aug. 7, 2015), archived at <http://perma.cc/J5DG-43JE>.
- 48 Alan Schwarz, *As Concussions Rise, Scant Oversight for Football Helmet Safety*, *N.Y. Times*, Oct. 21, 2010, <http://www.nytimes.com/2010/10/21/sports/football/21helmets.html?pagewanted=all>, available at <http://perma.cc/2LJV-K2RQ>.
- 49 *NOCSAE Board of Directors*, Nat'l Operating Comm. Standards for Athletic Equipment, <http://nocsae.org/board-of-directors/> (last visited May 2, 2016), archived at <https://perma.cc/5V87-GJAN>.
- 50 *Standards—General*, Nat'l Operating Comm. Standards for Athletic Equipment, <http://nocsae.org/standards/general/> (last visited Aug. 7, 2015), archived at <http://perma.cc/G9H4-BKNY>.
- 51 *Id.*
- 52 Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors); Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).
- 53 *Standards—Statement on Shared Responsibilities*, Nat'l Operating Comm. Standards for Athletic Equipment, <http://nocsae.org/nocsae-standard/statement-on-shared-responsibilities/> (last visited Aug. 7, 2015), archived at <http://perma.cc/G9LB-526U>; Letter from Mike Oliver,

- Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).
- 54 Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).
- 55 *Id.*
- 56 *Id.*
- 57 Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).
- 58 See NOCSAE, *Standard Test Method and Equipment Used in Evaluating the Performance Characteristics of Headgear/Equipment* (Modified June 2015), available at <http://nocsa.org/standards/general> (last visited Apr. 29, 2016).
- 59 See NOCSAE, *Standard Performance Specification for Newly Manufactured Helmets* (Modified June 2015), available at <http://nocsa.org/standards/general> (last visited Apr. 29, 2016).
- 60 See *id.* at ¶ 1.2.
- 61 See Alan Schwarz, *As Concussions Rise, Scant Oversight for Football Helmet Safety*, N.Y. Times, Oct. 21, 2010, <http://www.nytimes.com/2010/10/21/sports/football/21helmets.html?pagewanted=all>, available at <http://perma.cc/2LJV-K2RQ> (“The standard has not changed meaningfully since it was written in 1973”); Jason Navia, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 Admin. L. Rev. 265, 269 (2012) (“NOCSAE’s testing standards for football helmets have not changed since 1973”).
- 62 Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).
- 63 *Id.*
- 64 R. Graham et al., *Sports-Related Concussions in Youth: Improving the Science, Changing the Culture* (2013), available at <http://www.nationalacademies.org/hmd/Reports/2013/Sports-Related-Concussions-in-Youth-Improving-the-Science-Changing-the-Culture.aspx> (last visited Apr. 29, 2016).
- 65 See Navia *supra* n. 61 at 276–77.
- 66 Gary Mihoces, *New Helmet Standard To Address Concussion Prevention*, USA Today, June 20, 2014, <http://www.usatoday.com/story/sports/nfl/2014/06/20/helmets-safety-concussion-prevention-nocsa/11139183/>, archived at <http://perma.cc/M86U-EDUZ>.
- 67 *Id.*
- 68 See Graham, *supra* n. 64 at 250 (“Advances in helmet test standards that incorporate new methods and new injury criteria that evaluate protection in both linear and rotational loading modes are needed before real progress can be made on this issue. NOCSAE, to offer one example, has research under way to develop such test protocols, but the limiting factor may be having sufficiently robust, age-dependent concussion tolerance criteria with which to interpret the results of such tests.”)
- 69 *About CPSC*, U.S. Consumer Product Safety Comm., <http://www.cpsc.gov/en/About-CPSC/> (last visited Aug. 7, 2015), archived at <http://perma.cc/RWB9-RXD8>.
- 70 Brooke de Lench & Lindsey Barton Straus, *Standard-Setting by Non-Governmental Agencies in the Field of Sports Safety Equipment: Promoting the Interests of Consumers or Manufacturers?*, 10 J. Bus. & Tech. L. 47, 47 n.3 (2015).
- 71 *Football Helmets; Denial of Petition*, 45 Fed. Reg. 63326 (Sept. 24, 1980).
- 72 Jason Navia, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 Admin. L. Rev. 265, 270 (2012).
- 73 *H.R. 1127 (112th): Children’s Sports Athletic Equipment Safety Act*, GovTrack.us, <https://www.govtrack.us/congress/bills/112/hr1127> (last visited Aug. 7, 2015), archived at <https://perma.cc/R9SQ-BWUS>.
- 74 The Associated Press, *In Race to Develop Safer Football Helmets, Many Questions Remain*, N.Y. Times, Aug. 23, 2014, <http://www.nytimes.com/2014/08/24/sports/football/in-race-to-develop-safer-football-helmets-many-questions-remain.html>, archived at <https://perma.cc/2BYF-VJ5F>.
- 75 See *What is a Concussion?*, Riddell, <http://www.riddell.com/education#conclusion-tab> (last visited Aug. 7, 2015), archived at <http://perma.cc/BEX2-6YRP>.
- 76 Mary Pilon, *After 2 Helmets Are Decertified, Lacrosse Faces Safety Concerns*, N.Y. Times, Dec. 5, 2014, <http://www.nytimes.com/2014/12/06/sports/safety-organization-deems-popular-helmet-models-unsuitable-for-play.html>, archived at <https://perma.cc/5HDM-FYMK?type=pdf>.
- 77 Mary Pilon, *Maker Agrees to Modify a Lacrosse Helmet That Was Decertified*, N.Y. Times, Dec. 12, 2014, <http://www.nytimes.com/2014/12/13/sports/maker-agrees-to-modify-a-lacrosse-helmet-that-was-decertified.html>, archived at <https://perma.cc/S2U3-Y5ZY?type=pdf>.
- 78 Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).
- 79 See *Virginia Tech Helmet Ratings*, Virginia Tech, <http://www.beam.vt.edu/helmet/index.php> (last visited May 9, 2016), archived at <https://perma.cc/GJ9H-67UY>.
- 80 Bryan Gruley, *The Truth About the Safety Ratings That Sell Football Helmets*, Bloomberg (Jan. 28, 2015), <http://www.bloomberg.com/news/features/2015-01-28/the-controversial-safety-ratings-that-sell-football-helmets>, archived at <https://perma.cc/KM9B-PWXY>.
- 81 See *Virginia Tech Helmet Ratings*, Virginia Tech, <http://www.beam.vt.edu/helmet/index.php> (last visited May 9, 2016), archived at <https://perma.cc/GJ9H-67UY>.
- 82 Plaintiffs’ Amended Master Administrative Long-Form Complaint at p. 76, In re Nat’l Football League Players’ Concussion Injury Litigation, 2:12-md-2323 (E.D.Pa. July 17, 2012), ECF No. 2642.
- 83 *Id.* at ¶¶ 395–96.
- 84 See Brief in Support of Riddell Defendants’ Motion to Dismiss Based on LMRA § 301 Preemption, In re Nat’l Football League Players’ Concussion Injury Litigation, 2:12-md-2323 (E.D.Pa. Aug. 30, 2012), ECF No. 3592-1.
- 85 U.S.C. § 185.
- 86 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985).
- 87 See Brief in Support of Riddell Defendants’ Motion to Dismiss Based on LMRA § 301 Preemption at 2–3, In re Nat’l Football League Players’ Concussion Injury Litigation, 2:12-md-2323 (E.D.Pa. Aug. 30, 2012), ECF No. 3592-1, quoting *Wooddell v. Int’l Bd. of Elec. Workers*, 502 U.S. 93, 112 (1991).
- 88 *In re Nat’l Football League Players’ Concussion Injury Litigation*, 307 F.R.D. 351, 393 (E.D. Pa. 2015).
- 89 *In re Nat’l Football League Players’ Concussion Injury Litigation*, 821 F.3d 410 (3d Cir. Apr. 18, 2016).
- 90 See, e.g., *Thiel v. Riddell, Inc.*, 13-cv-7585 (D.N.J.); *DuRocher v. Nat’l Collegiate Athletic Ass’n*, 13-cv-1570 (S.D. Ind.); *Midwestern Midget Football Club Inc. v. Riddell, Inc.*, 15-cv-244 (S.D. W. Va.).
- 91 *DuRocher v. Nat’l Collegiate Athletic Ass’n*, 13-cv-1570 (S.D. Ind.).
- 92 *Complaint at Law*, *Mundy v. Kranos Corp. d/b/a Schutt Sports*, 2016-L-005166 (Ill. Cir. Ct. May 24, 2016).
- 93 *Id.*



Chapter 17

The Media^a



Today, the media takes on many forms, including traditional print journalists in newspapers and magazines, television and radio network broadcasters and reporters, and journalists who work for Internet-based news sources, *e.g.*, “blogs.” In discussing the media in this chapter, we intend for the term to include all of the aforementioned individuals who report news as a profession, *i.e.*, get paid, as well as their employers.^{1,b} The NFL and the media have an important and significant relationship that, as a result, makes the media a stakeholder in player health.

a The portions of this work related to media are the result of collaboration with John Affect, Knight Chair in Sports Journalism and Society, Penn State University.

b We recognize that the line between “media” and “social media” is increasingly blurred these days. Nevertheless, we think issues related to social media are properly addressed in Chapter 18: Fans.

In order to ensure that this chapter was as accurate and valuable as possible, we invited the Professional Football Writers Association (PFWA) and the National Sports Media Association (NSMA) to review a draft version of this chapter prior to publication. Both groups declined our invitation.

(A) Background

The NFL currently has television broadcasting agreements with ESPN, NBC, CBS, FOX, NFL Network, and DirecTV. The NFL also has a radio broadcasting agreement with Westwood One and, for at least the 2016 season, a streaming agreement with Twitter.² In total, the broadcasting agreements bring in approximately \$7 billion in annual revenue to the NFL³—58 percent of the NFL's approximate \$12 billion in total annual revenue.⁴

The television networks pay the broadcast fees in response to consumer demand. According to The Nielsen Company, during the 2015 season, 46 out of the top 50 rated television programs, including the top 25, were NFL games.⁵ In addition, more than 202 million Americans watched an NFL game in 2014—68 percent of the country.⁶

The networks also employ dozens of journalists, broadcasters, and other on-air talent to support their NFL coverage. All of the NFL's television broadcasting partners (except DirecTV) have pre-game shows consisting of various broadcasters, journalists, former players, coaches, and executives. Moreover, ESPN dedicates more than 23 hours of shows each week (not including SportsCenter) exclusively to the NFL during the season, and even created a 90,000 square foot studio exclusively for its NFL coverage.⁷

In addition to the television media, the PFWA consists of hundreds of writers who cover the NFL on a regular basis.⁸ These writers consist of traditional journalists as well as those who work for online news organizations.

To assist the media's coverage, the NFL has a robust Media Relations Policy requiring players and coaches to make themselves available to the media and for practices to generally be open to the media.⁹ Players diagnosed with concussions are excused from speaking with the media until they have cleared the Concussion Protocol (*see* Appendix A).¹⁰ Players nonetheless do not always cooperate with the Media Relations Policy. In 2014, Seattle Seahawks running back Marshawn Lynch was fined \$100,000 for refusing to speak to the media.¹¹ When he did speak, Lynch repeated the same non-responsive phrases over and over, such as “thanks for asking”¹² or “I'm just here so I won't get fined.”¹³

Below, we discuss the media and its historical treatment of player health matters before moving to a discussion of the NFL's Injury Reporting Policy.

1) THE MEDIA AND ITS HISTORICAL TREATMENT OF PLAYER HEALTH

Media have been reporting on injuries since the NFL's inception. At the same time, reporters have also been praising players who played through injuries for just as long. The *Chicago Daily Tribune's* coverage of the NFL champion 1940 Chicago Bears provides some descriptive examples. In the account of a key victory that season, the Bears' 14–7 win over the Green Bay Packers, writer George Strickler declared “the story of the game is written in the second half, when [the Bears' George] Swisher leaped from the bench incased (sic) in tape that protected his recently fractured ribs and brought the breath out of a record-breaking crowd of 45,434[.]”¹⁴ The article went on to praise Packers fullback Clark Hinkle, “who played a good share of the contest with a back injury that would have kept him out of any game except one with the Bears.”¹⁵ About a month later, Strickler's preview of the championship matchup between the Bears and the Washington football club devoted a paragraph to Swisher, who had an injured heel but was declared set to play, and to two injured Washington players.¹⁶

The converse of this praise is that members of the media have also been willing to criticize those players they believe lack toughness,¹⁷ not an uncommon occurrence.

The introduction of television created a powerful new way for fans, through the media, to experience NFL football. For example, in 1960, CBS created a documentary called *The Violent World of Sam Huff*, a New York Giants linebacker. Huff wore a microphone during a game for the documentary, which was narrated by Walter Cronkite.¹⁸

Perhaps one of the most important events in the media's coverage of the NFL occurred with the creation by Ed Sabol of a small film company that would later become NFL Films, an NFL-controlled corporation. NFL Films created widely acclaimed highlight films using dramatic music, slow motion, and live microphone recordings of players and coaches. In addition, NFL Films excelled at glorifying the violence of the game and toughness of the players.¹⁹ Former NFL Films President Steve Sabol once described NFL Films' work as “movie making perfectly matched to the grace and the beauty and the violence of pro football.”²⁰

Beginning in 2003,²¹ ESPN introduced a segment called “Jacked Up” which also glorified the violence of the game. The segment aired prior to Monday Night Football each week with former player and broadcaster Tom Jackson replaying the weekend’s biggest and most ferocious hits while all of the announcers yelled in unison that the player receiving the hit had “got JACKED UP!”²² The segment was discontinued after the 2008 season²³ after criticism from both the media²⁴ and fans.²⁵

2) THE NFL’S INJURY REPORTING POLICY

A key component of the media’s relationship to player health is the NFL’s “Personnel (Injury) Report Policy” (“Injury Reporting Policy”). The Injury Reporting Policy requires each club to report information on injured players to both the NFL and the media each game week (“Injury Report”).²⁶ The stated purpose of this reporting is “to provide a full and complete rendering of player availability” to all parties involved, including the opposing team, the media, and the general public. According to the NFL, the policy is of “paramount importance in maintaining the integrity of the NFL,”²⁷ *i.e.*, preventing gambling on inside information concerning player injuries.⁶

The Injury Report is a list of injured players, each injured player’s type or location of injury, and the injured player’s status for the upcoming game. Each injury must be described “with a reasonable degree of specificity,”²⁸ *e.g.*, ankle, ribs, hand or concussion. For a quarterback’s arm injury or a kicker’s or punter’s leg injury, the description must designate left or right. Historically, the player’s status for the upcoming game was classified into four categories: Out (definitely will not play); Doubtful (at least 75 percent chance will not play); Questionable (50-50 chance will not play); and, Probable (virtual certainty player will be available for normal duty).²⁹

In 2016, the NFL changed the classifications for player injuries by: (1) eliminating the probable designation; (2) changing the definition of “questionable” to “uncertain as to whether the player will play in the game”; (3) changing the definition of “doubtful” to “unlikely the player will participate”; and, (4) only using the “out” designation two days before a game.³⁰ The Injury Report also indicates whether a player had full, limited, or no participation in practice, whether due to injury or any other cause (*e.g.*, team discipline, family matter, etc.).³¹

Clubs must issue an Injury Report after practice each Wednesday, Thursday, and Friday of game week. If there are any additional injuries after the Friday deadline, the club must report these injuries to the NFL, the club’s opponent, the televising network, and the local media on Saturday and Sunday.³²

The Injury Reporting Policy dictates that all injury reports be “credible, accurate, and specific within the guidelines of this policy.” In “unusual situations,” clubs are requested to contact the League’s Public Relations Office, and when in doubt, clubs should include a player in the Injury Report. Clubs and coaches that violate the policy are subject to disciplinary action. If a player with a game status of “Doubtful” plays, the club must provide a written explanation to the NFL within 48 hours.³³

Despite the enforcement system and disciplinary action for abuse (typically fines of \$5,000 to \$25,000³⁴), many in the media along with coaches and players have questioned the Injury Report’s accuracy and value. A 2007 *USA Today* analysis of two-and-a-half seasons of Injury Reports found a high variance in the number of injuries reported by teams, with 527 reported by the Indianapolis Colts versus just 103 by the Dallas Cowboys; interviews with coaches suggested that the different philosophies of coaches to report even minor injuries versus only major injuries accounted for this variance.³⁵ In the same article, former Pittsburgh Steelers coach Bill Cowher was quoted as saying that he deliberately changed the location of injuries (*e.g.*, reporting hip instead of knee) to protect his players from having their injuries targeted by opponents.³⁶ Baltimore Ravens head coach Jim Harbaugh, after being fined for not listing an injured player in 2012, told the media that “[t]here’s no credence on the injury report now. . . . It doesn’t mean anything. It has no value.”³⁷ In March 2014, two former players on the New England Patriots stated that head coach Bill Belichick filed inaccurate and false injury reports.³⁸ Many in the media have referred to the Injury Report as a “game” or “joke.”³⁹ Finally, some believed that the 2016 changes to the injury reporting policy allowed for even more gamesmanship.⁴⁰ Possibly due to the potential for fines for misreporting injuries on the Injury Report, many clubs have policies prohibiting players from speaking to the media about injuries.⁴¹

c For more information on gambling and the NFL see Chapter 18: Fans.

(B) Current Legal Obligations^d

Traditionally, the media's main legal obligations toward the individuals it covers are explained in terms of defamation law. Defamation is "[t]he act of harming the reputation of another by making a false statement to a third person."⁴² Slander is the spoken form of defamation while libel is the written form.⁴³ A public figure, which would likely include any NFL player,⁴⁴ must prove that the reporter alleged to have committed defamation acted with "actual malice."⁴⁵ Actual malice is generally established where the reporter knew the statement was false or acted with reckless disregard of whether the statement was false or not.⁴⁶ Thus, media members generally have a legal obligation to work diligently to ensure the accuracy of their reports concerning public figures, including NFL players. Beyond these generalized obligations, there do not appear to be any specific relevant legal obligations that the media has as to NFL players.

(C) Current Ethical Codes

The principal source of media ethical obligations comes from the Society of Professional Journalists (SPJ), a voluntary organization of nearly 10,000 members.⁴⁷ The SPJ Code of Ethics includes 35 specific obligations, separated into the following categories: Seek Truth and Report It; Minimize Harm; Act Independently; and, Be Accountable and Transparent.⁴⁸ The principles most relevant to NFL players include:

Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.

* * *

Balance the public's need for information against potential harm or discomfort.

* * *

Weigh the consequences of publishing or broadcasting personal information.

The PFWA does not have a Code of Ethics but does include as one of its stated purposes "[t]o practice and advance the concepts of professional journalism while using verifiable facts, proper attribution and an objective, appropriate perspective in order to inform and enlighten the public in a credible manner."⁴⁹

(D) Current Practices

Media attention and interest concerning player health and safety has certainly increased in recent years. On the one hand, numerous news articles discussed and cited in this Report brought important attention to player health issues and increased scrutiny of current practices. At the same time, the media's interest in player injury information for reasons unrelated to player health has increased dramatically.

Perhaps the biggest contributing factor to increased media attention to player injuries is fantasy football. As is discussed in more detail in Chapter 18: Fans, tens of millions of NFL fans play fantasy football with billions of dollars at stake. An essential component of fantasy football success is the health of the players on the fan's fantasy football roster. Media companies have responded with a variety of items to assist fans. For example, ESPN has a website called "Injury Central" which tracks injuries to key fantasy players,⁵⁰ and CBS Sports partnered with a web application called "Sports Injury Predictor" which is supposed to help fans determine whether a player is likely to get injured.⁵¹ Additionally, every Sunday morning during the season, ESPN broadcasts a two-hour fantasy football show called "Fantasy Football Now." The program includes live updates from reporters on players' health statuses while also debating which players will "benefit" from the injury to another player.⁵² Another frequent topic of debate among fantasy football media is whether fans can "trust" a player and his health.⁵³ Finally, ESPN employs Stephania Bell, "a physical therapist who is a board-certified orthopedic clinical specialist" to provide analysis of player injuries, specifically as they relate to fantasy football.⁵⁴

As is discussed in more detail in Chapter 18: Fans, Section D: Current Practices, some have argued that fantasy football commoditizes and depersonalizes the players.⁵⁵ The reason is that media and fan focus is not on the health of players as human beings, but the health of the player as a replaceable unit in a gambling game. For example, when Carolina Panthers quarterback Cam Newton was in a major car crash during the 2014 season, fans quickly took to social media asking what the car crash meant for their fantasy football team.⁵⁶

Another important factor in the media's coverage of players and their health is the increasingly intense 24/7 news cycle. With the rapid demand for and consumption of news, journalists may not have sufficient time to verify the details of a

^d The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

story. If they do, they risk being scooped by competing news outlets. Moreover, news is no longer delivered by a predictable group of traditional news outlets. A large number of websites and Twitter users pass along rumors and other stories about players, many of which make it into the mainstream media as “news.” Additionally, several top sports media organizations have websites specifically devoted to “rumors,” including ESPN,⁵⁷ FOX Sports’ *Yardbarker*,⁵⁸ and NBC Sports’ *ProFootballTalk*.⁵⁹ National Football Post, another well-read NFL-specific website, includes a column called “The Training Room,” written by former San Diego Chargers Club doctor Dr. David Chao.⁶⁰ On a weekly basis, Chao speculates on the diagnosis, prognosis, and treatment of player injuries. Of note, Chao resigned as the Chargers Club doctor in 2013 after a series of negative incidents, including a complaint by the NFLPA (see Chapter 2: Club Doctors).

An example of the intense interest in player health information occurred during the 2015 offseason when Giants defensive end Jason Pierre-Paul suffered a hand injury that resulted in the amputation of one of his fingers. While Pierre-Paul was in the hospital and the status of his hand still uncertain, ESPN reporter Adam Schefter Tweeted a photo of a hospital surgical record showing that Pierre-Paul’s finger was to be amputated.⁶¹ Despite criticism for posting the picture of Pierre-Paul’s medical records, ESPN and Schefter defended the Tweet as part of the normal reporting of player injuries.⁶² In February 2016, Pierre-Paul sued ESPN and Schefter, alleging they had violated Florida medical confidentiality and privacy laws. In August 2016, the United States District Court for the Southern District of Florida denied ESPN and Schefter’s motion to dismiss, finding that Pierre-Paul had properly pled a claim for invasion of privacy.⁶³ The case is ongoing as of the date of this publication.

Prior to the 2014 season, Green Bay Packers star quarterback Aaron Rodgers lamented the intense interest in player injuries and its effect on players:

TMI. There’s too much information out there[.] There’s too much exposure and, at times, undue pressure on players and coaching staffs to play now, win now. Just too much access.^{64,e}

e Perhaps as further support for Rodgers’ complaint, in July 2014, the satirical news organization *The Onion* ran a story with the following headline: “Report: Majority of Football Fans Better Informed On Health of NFL Players Than Parents.” *Report: Majority of Football Fans Better Informed on Health of NFL Players Than Parents*, *The Onion* (July 29, 2014), <http://www.theonion.com/article/report-majority-of-football-fans-better-informed-o-36565>, archived at <http://perma.cc/GJY6-AX2F>.

Players we interviewed echoed these concerns:^f

- **Current Player 4:** “I think at times [the media’s coverage of player health issues] could be pretty hurtful Their job is to get as much information as possible and you, as a player, don’t necessarily want all your business being published in an article.”
- **Current Player 5:** “I think for the most part the media usually doesn’t know what they’re talking about. In sports reporting, I think there’s a very low bar for accuracy. So I think in general that they don’t do a very good job of drawing attention to player safety or reporting the facts.”
- **Former Player 2:** “I don’t know how accurate [the club is] giving proper information to the media . . . , so I wouldn’t say [the media is] that accurate I would say 60 percent confidence that anything the media reports on injuries is true.”^g

Clubs and the NFL have also placed considerable pressure on the way the media covers the NFL. The NFL and the clubs have websites that employ writers to cover the clubs. Not surprisingly, these writers receive greater access to the clubs, the League, coaches and players than unaffiliated writers, and often write stories favorable to the clubs or League. Additionally, NFL clubs often have public relations staff that monitors or shadows the media during interviews and news conferences. If a journalist writes articles unfavorable to the club, the club might reduce that journalist’s access to the club, its coaches, and players.⁶⁵ Similarly, when reporter Albert Breer left NFL Network in 2016, he explained that, while with NFL Network, he was prevented or discouraged from reporting on stories problematic for the NFL.⁶⁶

With the rapid demand for and consumption of news, journalists may not have sufficient time to verify the details of a story. If they do, they risk being scooped by competing news outlets.

f We reiterate that our interviews were intended to be informational but not representative of all players’ views and should be read with that limitation in mind.

g Former Player 2 also believed that “the media definitely does” put pressure on players concerning their health.

Despite the increased attention to player health issues, it is still common for journalists to question a player's toughness. For example, when Chicago Bears quarterback Jay Cutler was removed from a 2011 playoff game due to a knee injury, numerous news articles questioned the severity of Cutler's injury and his inability to return to the game.⁶⁷ Sometimes the criticism is more implicit. For example, during a 2015 playoff game against the Green Bay Packers, Dallas Cowboys linebacker Rolando McClain left the game after suffering a head injury.⁶⁸ McClain had been diagnosed with a concussion earlier in the week after suffering a head injury in the prior week's game against the Detroit Lions.⁶⁹ Nevertheless, when McClain was taken out of the Packers game, a Dallas-based ESPN reporter Tweeted: "Rolando McClain to Cowboys locker room. Nobody frustrates training staff more[.]"⁷⁰

Conversely, if the media glorifies players for playing with injuries,⁷¹ it creates pressure on other players to do the same.

The media's portrayal of players can have a powerful influence on the public. In a 2014 article in *Communication & Sport*,⁷² researchers reviewed 177 newspaper articles concerning two injury situations: Cutler's, as discussed above, and Washington quarterback Robert Griffin III's efforts to play with a knee injury during a 2013 playoff game against the Seattle Seahawks.⁷³ Of note, the researchers found that the leading theme from the articles discussing Griffin's injury shifted the blame to the Washington football club (40.67 percent of articles). Meanwhile, 49.24 percent of articles supported Cutler's decision to stop playing while 44.22 percent of articles blamed Cutler in some way, downplayed the severity of his injury or called him

a "sissy" in some way. The authors, citing other studies, reasoned that "[t]he notion that a player who needs to sit out or miss playing time due to an injury is a 'sissy' or less of a 'man' can have extremely unfortunate consequences."⁷⁴ Finally, the authors suggested that "[a]s sports journalists take more of an advocacy role and support athletes who make their health a priority, attitudes towards injuries and the players who sustain them may gradually begin to change."⁷⁵

The media's coverage of player health issues has been mixed. Beginning in January 2007, Alan Schwarz of *The New York Times* was one of the leading journalists to report on health problems among former NFL players and problems with the NFL's approach to player health issues, including its Mild Traumatic Brain Injury (MTBI) Committee.⁷⁶ Schwarz appropriately received numerous accolades for this work. Mark Fainaru-Wada and Steve Fainaru of ESPN and authors of *League of Denial* similarly exposed problems in the way player health is or has been addressed, and the resulting problems suffered by current and former players. Reporters from all over the country and world have taken the lead from this work and contributed their own stories of problems concerning player health. Without this work, many of the improvements concerning player health that have been made in the last 5 to 10 years may never have happened.^h

Despite the important work the media has done reporting on player health, there are also concerns. First, the media regularly reports on the perils and drawbacks of football,

^h Indeed, Current Player 9 believes the media has done a good job of covering player health "because they've done a good job of bringing awareness."

The media may not always have adequate space or time to convey the implications, and more importantly the limitations, of studies concerning player health.



whether children should be allowed to play,⁷⁷ and whether fans should continue to engage with the sport.⁷⁸ While these may be legitimate and important aspects to cover, some of this coverage shows a tendency to ignore important benefits to players (including those offered by the NFL and NFLPA) and others, and other positive aspects of the game.¹ In other words, balance in coverage in some instances appears to be lacking.

Another problem relates to accuracy. There have been many important scientific studies concerning the injuries, particularly concussions, suffered by football players. However, the media may not always have adequate space or time to convey the implications, and more importantly the limitations, of these studies.⁷⁹ The media may not always have adequate space or time to convey the implications, and more importantly the limitations, of studies concerning player health. Similarly, the media has not always accurately reported on player health litigation. For example, on September 12, 2014, the NFL filed an expert report in support of its position that the Concussion Litigation settlement would adequately compensate the plaintiffs.⁸⁰ The NFL's experts, using "conservative assumptions," assumed 28 percent of former players would be eligible for benefits under the settlement to demonstrate that the settlement was adequate.⁸¹ The same day, the *New York Times* published a story entitled "Brain Trauma to Affect One in Three Players, N.F.L. Agrees."⁸² The *Times*' headline ignored that the number was used by an actuarial firm as a conservative estimate meant to demonstrate the adequacy of the settlement—as opposed to medical data—and misstated 28 percent as "one in three," when it is actually closer to

one in four.^k The scientific and legal nuances are difficult to understand, which makes accurate reporting on them critically important.

(E) Enforcement of Legal and Ethical Obligations

A player's most likely available legal recourse against a member of the media is a civil lawsuit alleging defamation. As discussed above, lawsuits against journalists must overcome the high burden of proving that the journalist acted with actual malice, which should only arise in the rare event a journalist fails to abide by any of the sourcing or fact-checking requirements of the industry. Importantly, statements of opinion cannot be defamatory⁸³ and truth is an absolute defense to defamation claims.⁸⁴ While there are a few instances of sports figures suing journalists or publications for defamation,⁸⁵ there are no known cases of an NFL player suing a journalist.

In addition, as demonstrated by the Pierre-Paul case, it is possible more players will look to assert health privacy-related claims against media members.

The PFWA has a "Grievance Committee" that is charged with hearing any complaints about its members but its sanctioning authority as to the media is unclear. Similarly, while the SPJ has an Ethics Committee, it has no mechanism for investigating or enforcing violations of its Code of Ethics.⁸⁶ Instead, the SPJ believes the best enforcement of journalism ethics comes from the scrutiny of the public and other journalists.⁸⁷

i Former Player 3: "There's thousands, tens of thousands, of former players . . . doing great, physically, mentally, financially, spiritually doing great. So those stories are not told."

j For example, in January 2015, *The New York Times* reported on a study done at the Boston University School of Medicine which, based on tests given to 42 former NFL players, purported to find "that those who began playing tackle football when they were younger than 12 years old had a higher risk of developing memory and thinking problems later in life." Ken Belson, *Study of Retirees Links Youth Football to Brain Problems*, N.Y. Times, Jan. 28, 2015, <http://www.nytimes.com/2015/01/29/sports/football/study-points-to-cognitive-dangers-of-tackle-football-before-age-12.html>, archived at <https://perma.cc/G7MC-KGE8?type=pdf>. However, the *New York Times* article did not include any responses to the study, including criticism from highly respected neurologist Julian Bailes, which was included in ESPN's coverage of the study. See Tom Farrey, *Study Cites Youth Football for Issues*, ESPN (Jan. 29, 2015, 4:04 PM), http://espn.go.com/espn/otl/story/_/id/12243012/ex-nfl-players-played-tackle-football-youth-more-likely-thinking-memory-problems, archived at <http://perma.cc/V3Y5-EQJH> (Bailes told ESPN "that the sample is too small to draw any conclusions from, and that the results of NFL players cannot be compared to that of athletes who never made it to that level.").

k Similarly, in a lengthy article praising the attorney who filed the first concussion-related lawsuit against the NFL, the *New York Times* wrongly asserted that if the NFL had won its motion to dismiss prior to the settlement, the case would have proceeded in "mediation or arbitration." Michael Sokolove, *How One Lawyer's Crusade Could Change Football Forever*, N.Y. Times (Magazine), Nov. 6, 2014, <http://www.nytimes.com/2014/11/09/magazine/how-one-lawyers-crusade-could-change-football-forever.html>, archived at <https://perma.cc/4DJ6-XMQV?type=pdf>. In reality, dismissal likely would have been the end of the players' claims. See Michael McCann, *Retired Players Who Opt Out of NFL Concussion Settlement Taking Big Risk*, Sports Illustrated (Jan. 26, 2015), <http://www.si.com/nfl/2015/01/26/nfl-concussion-lawsuit-settlement-retired-players-opt-out>, archived at <http://perma.cc/ZD66-EJ67>. See also *In re Nat'l Hockey League Players' Concussion Injury Litigation*, 14-md-2551, 2016 WL 2901736, *22 (D. Minn. May 18, 2016) ("Plaintiffs, as retire[d] [hockey players], would likely be unable to access the arbitration forum and would not have another forum in which to seek relief").

(F) Recommendations Concerning the Media

The media has a powerful and unique voice to shape the way player health issues are perceived and addressed. Below we make recommendations to improve the relationship between the media and the players they cover.

Goal 1: To recognize the media's responsibility in encouraging a culture of health for NFL players.

Principles Advanced: Respect; Health Primacy; Collaboration and Engagement; and, Justice.

Recommendation 17:1-A: The media's reporting on players should take care not to dehumanize them.

The media can both help and hurt players. While many reporters are increasingly taking into consideration players' health, there are still many reporters who are willing to criticize and question the toughness of players who suffer injuries or who do not play with injuries. Such reports impossibly and improperly assume to understand the pain the player may be in or the medical consequences of the player's playing with the injury. Moreover, such reports fail to take into consideration the player's best interests, *e.g.*, the player's short- and long-term health.

Similarly, the fantasy football-related discussions, websites, and applications take on a disturbing tone in some instances. At their worst, they do not acknowledge the players as human beings with medical conditions that could, and in many cases will, affect the quality and length of their lives. Instead, in some instances there is a dehumanization of the player and only a concern for how the player's injury that will affect fantasy football rosters which, relative to player health, is meaningless.⁸⁸ While many in the media work hard to avoid dehumanizing players, those media members who participate in and perpetuate such discussions should reconsider the tone and context of their reports and debates. We recognize that this is an aspirational goal and not one that can be readily monitored or enforced, but it is important to acknowledge this behavior as a problem and the role it plays in player health.

Through taking care in its reporting of player injuries and treating players with dignity, the media has the power to draw greater public emphasis to player health and also reduce pressure on players to play while injured.

Recommendation 17:1-B: The media should engage appropriate experts, including doctors, scientists and lawyers, to ensure that its reporting on player health matters is accurate, balanced, and comprehensive.

The media's coverage of player health issues, while excellent at times, also has been occasionally misleading or not entirely accurate. Inaccurate news reports will only undermine the credibility of the serious issues facing NFL players. The medical, scientific and legal issues concerning player health are extremely complicated, which demands that the media take care to avoid making assertions that are not supported or that do not account for the intricacies and nuance of medicine, science, and the law. While we understand the pressures faced by members of the media trying to complete work on tight deadlines, we also emphasize the importance of engaging appropriate experts who can help the media understand these complex issues.

Endnotes

- 1 See also “Media”, Oxford Dictionaries, 2015, http://www.oxforddictionaries.com/us/definition/american_english/media (last visited Aug. 7, 2015), archived at <http://perma.cc/6FGD-CQP7> (defining “media” as “[t]he main means of mass communication (especially television, radio, newspapers, and the Internet) regarded collectively); “Journalist”, Oxford Dictionaries, 2015, http://www.oxforddictionaries.com/us/definition/american_english/journalist (last visited Aug. 7, 2015), archived at <http://perma.cc/37MC-9PZX> (defining “journalist” as “[a] person who writes for newspapers or magazines or prepares news to be broadcast”); “Press” Black’s Law Dictionary (9th ed. 2009) (defining “press” as “[t]he news media; print and broadcast news organizations collectively”).
- 2 National Football League and Twitter Announce Streaming Partnership for Thursday Night Football, NFL (Apr. 5, 2016), <https://nflcommunications.com/Documents/2016%20Releases/NFL%20TWTR%20TNF.pdf>, archived at <https://perma.cc/F5SN-AVRL>.
- 3 Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, Forbes (Feb. 14, 2011, 6:13PM), <http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/>, archived at <https://perma.cc/B64R-2GHV?type=pdf>.
- 4 See Daniel Kaplan, *NFL Projecting Revenue Increase of \$1B Over 2014*, Sports Bus. Daily (Mar. 9, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/09/Leagues-and-Governing-Bodies/NFL-revenue.aspx>, archived at <http://perma.cc/F8B5-233U> (discussing NFL’s \$11.2 billion in revenue for 2014, growing at a rate of approximately \$1 billion per year and expected to exceed \$12 billion in 2015).
- 5 Regular Season Tv Ratings Recap, Nat’l Football League, <https://nflcommunications.com/PublishingImages/Pages/2015-REGULAR-SEASON-RATINGS-RECAP-/2015%20Regular%20Season%20Ratings%20Recap.pdf> (last visited Apr. 7, 2016), archived at <https://perma.cc/Q43S-4HBE>.
- 6 B.J. Kisse, *2014 NFL TV Ratings Recap*, Kansas City Chiefs, (Jan. 11, 2015), <http://www.kcchiefs.com/news/article-2/2014-NFL-TV-Ratings-Recap/2638f637-5fae-4e89-afd9-8a0da6135588>, archived at <http://perma.cc/7ZME-GGZN>.
- 7 Bill Hofheimer, *ESPN’s Coverage of the 2014 NFL Season*, ESPN, (Sept. 3, 2014), <http://espnmediazone.com/us/press-releases/2014/09/espns-coverage-of-the-2014-nfl-season/>, archived at <http://perma.cc/U5CU-BQ5D>.
- 8 See Bob McGinn, *Packers: Scouts Should Determine NFL Awards*, Mil. J. Sentinel, Dec. 18, 2005, available at 2005 WLNR 20536517 (discussing “a few hundred PFWA members”); *Young Nabs Honor as NFL’s Best*, Buffalo News, Jan. 26, 1995, available at 1995 WLNR 1092627 (describing PFWA membership as “400-plus”).
- 9 *NFL Media Access Policy*, Pro Football Writers Am., <http://www.profootballwriters.org/nfl-media-access-policy/> (last visited Aug. 7, 2015), archived at <http://perma.cc/QGS4-HUMW>.
- 10 *Id.*
- 11 Jeffri Chadiha, *The Misunderstood Marshawn Lynch*, ESPN (Jan. 27, 2015), http://espn.go.com/nfl/playoffs/2014/story/_/id/12232435/the-misunderstood-marshawn-lynch-why-seattle-seahawks-running-back-trust-media, archived at <http://perma.cc/7CVQ-8XDK>.
- 12 Mike Florio, *Marshawn Has a Very Polite Media Availability*, ProFootballTalk (Dec. 22, 2014, 9:57 AM), <http://profootballtalk.nbcsports.com/2014/12/22/marshawn-has-a-very-polite-media-availability/>, archived at <http://perma.cc/2QS3-XCP2>.
- 13 Darin Gantt, *Marshawn Lynch Shows Up at Media Day to Avoid Fines*, ProFootballTalk (Jan. 27, 2015, 2:30 PM), <http://profootballtalk.nbcsports.com/2015/01/27/marshawn-lynch-shows-up-at-media-day-to-avoid-fines/>, archived at <http://perma.cc/K7GG-TCRX>.
- 14 George Strickler, *45,434 see Bears defeat Packers 14 to 7*, Chi. Trib., Nov. 4, 1940.
- 15 *Id.*
- 16 George Strickler, *Bears meet Redskins today for pro football title*, Chi. Trib., Dec. 8, 1940.
- 17 See, e.g., Dan Pompei, *Gault’s Confidence Built on Toughness*, Chi. Sun Times, Nov. 7, 1987, available at 1987 WLNR 2135505; Frank Cooney, *Everett’s Courage is Being Questioned Around the NFL*, S. F. Examiner, Sept. 12, 1993, available at 1993 WLNR 12375; Damon Amendora, *Washington Still Doesn’t Know if RGIII is Tough Enough*, CBS Sports Radio (Aug. 21, 2015, 11:40 AM), <http://da.radio.cbssports.com/2015/08/21/da-washington-still-doesnt-know-if-rgiii-is-tough-enough/>, archived at <http://perma.cc/YM7-ZVCS>.
- 18 *The Violent World of Sam Huff* (CBS October 30, 1960).
- 19 See Bob Raissman, *Concussion Concerns Will Go Over CBS’ Head*, N.Y. Daily News, Jan. 25, 2013, available at 2013 WLNR 1999106 (discussing role of NFL Films in Concussion Litigation and allegations of glorifying violence); Desmond Ryan, *A Player In The Field Of Film NFL Films Focuses On Gridiron Glory, But Has An Impact Beyond The End Zone*, Phil. Inquirer, May 8, 1995, http://articles.philly.com/1995-05-08/entertainment/25673540_1_nfl-films-cahiers-critics-and-editors (discussing the style of NFL Films); Bill Lyon, *NFL Films has seen – and filmed – it all*, Seattle Times, Dec. 16, 1990, available at 1990 WLNR 887902 (discussing NFL Films’ history and, among other things, glorification of violence in the NFL).
- 20 *NFL Films: Inside the Vault, Vol. 1* (Steve Sabol 2003).
- 21 Brent Jones, *Billick: Browns fans off base on Modell*, Balt. Sun, Dec. 23, 2003, available at 2003 WLNR 2034569 (earliest news article mentioning the “Jacked Up” segment).
- 22 See Aaron Gordon, *When ESPN Cheered Violence*, Salon (Sept. 15, 2013, 10:00 AM), http://www.salon.com/2013/09/15/keep_your_helmet_on_espns_jacked_up_in_retrospect_partner/, archived at <http://perma.cc/3RDU-4CTP>.
- 23 See Chad Finn, *ESPN’s Reaction Was Candid And Poignant*, Bos. Globe, Sept. 15, 2014, available at 2014 WLNR 25499549 (referencing “Jacked Up” segment ending after the 2008 season).
- 24 See Phil Mushnick, *ESPN Gets ‘Jacked Up!’*, N.Y. Post, Oct. 3, 2004, available at 2004 WLNR 19629651.
- 25 Will Leitch, *ESPN Listens Closely to Its Viewers*, Deadspin (Oct. 4, 2007, 4:10 PM), <http://deadspin.com/307063/espns-listens-closely-to-its-viewers>, archived at <http://perma.cc/D3G6-AFA9> (discussing internal ESPN memo citing 200+ complaints about the “Jacked Up” segment during the 2006 season). NFL Columnist Mike Freeman has criticized journalists (including himself) for “glorifying the violence of the sport while not detailing the toll that violence took on the body.” Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* 218 (2015).
- 26 Both quotes are from the *2008 Personnel (Injury) Report Policy*, Page E32.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* at E34.
- 30 Tom Pelissero, *Major change to NFL’s injury report will take some getting used to*, USA Today (Aug. 21, 2016, 4:33 PM), <http://www.usatoday.com/story/sports/nfl/2016/08/21/injury-report-probable-bill-belichick-patriots/89080582/>, archived at <https://perma.cc/QT4C-MAA6>.
- 31 *Personnel (Injury) Report Policy*, Page E33.
- 32 *Id.*
- 33 *Personnel (Injury) Report Policy*.

- 34 Scott Boeck & Skip Wood, *Analysis: Injury Report Is Game Within The Game*, USA Today, Nov. 22, 2007, available at http://usatoday30.usatoday.com/sports/football/nfl/2007-11-22-injury-report-cover_N.htm, archived at <http://perma.cc/4MK7-657Q>. Midway through the 2012 season, 4 NFL teams had been fined \$20,000 each for injury report violations. Mike Florio, *Rams Rack Up an Injury-Reporting Fine, Too*, ProFootballTalk (Nov. 2, 2012, 10:44 PM), <http://profootballtalk.nbcsports.com/2012/11/02/rams-rack-up-an-injury-reporting-fine-too/>, archived at <http://perma.cc/W8U5-XTN7>. In 2009, the Jets were fined a total \$125,000 for former quarterback Brett Favre's injury for the last 5 games of the season (\$75,000 for the team and \$25,000 each for General Manager Mike Tannenbaum and former Head Coach Eric Mangini), the highest injury-reporting violation fine publicly announced. See Greg Bishop, *Jets Still Paying Price for Favre and Mangini*, N.Y. Times, Sept. 16, 2009, <http://www.nytimes.com/2009/09/17/sports/football/17favre.html>, archived at <https://perma.cc/M9VT-BF96?type=pdf>.
- 35 Boeck *supra* note 34; see also Gregg Rosenthal, *Redskins Play the "Questionable" Game, Again*, ProFootballTalk (Sept. 25, 2010, 10:07 AM), <http://profootballtalk.nbcsports.com/2010/09/25/redskins-play-the-questionable-game-again/>, archived at <http://perma.cc/L4PQ-J8LV> (players reporting that coaches report the wrong injuries); Michael David Smith, *Spikes, Talib Say Patriots File False Injury Reports*, ProFootballTalk (Mar. 19, 2014, 7:01 AM), <http://profootballtalk.nbcsports.com/2014/03/19/spikes-talib-say-patriots-file-false-injury-reports/>, archived at <http://perma.cc/A4S9-MQ6Q>.
- 36 See Boeck *supra* note 34.
- 37 Jeff Zrebiec, *John Harbaugh: 'The Injury Report Has No Value'*, Balt. Sun, Nov. 2, 2012, <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-harbaugh-criticizes-nfl-over-injury-report-20121102-story.html>, archived at <http://perma.cc/FS8C-2PHX>.
- 38 Smith *supra* note 35.
- 39 See Rosenthal *supra* note 35; Boeck *supra* note 34. See also Carl Prine, *Bloody Sundays*, Pitt. Trib.-Rev., Jan. 9, 2005, http://triblive.com/x/pittsburghtrib/sports/steelers/s_291033.html#axzz30dCi5UC7, archived at <http://perma.cc/GSK3-W254> (finding that "the NFL's 1999 [Injury Reports] data was so suspect, the Trib didn't use it").
- 40 Mike Florio, *New Injury report creates plenty of questions, concerns*, ProFootballTalk (Aug. 21, 2016, 8:20 PM), <http://profootballtalk.nbcsports.com/2016/08/21/new-injury-report-creates-plenty-of-questions-concerns/>, archived at <https://perma.cc/ZMX9-XQT2>.
- 41 See Darin Gantt, *Julian Edelman Won't Say Whether He Had Concussion Tests*, ProFootballTalk (Feb. 1, 2015, 11:30 PM), <http://profootballtalk.nbcsports.com/2015/02/01/julian-edelman-wont-say-whether-he-had-concussion-tests/>, archived at <http://perma.cc/3WZQ-RU9K> (discussing Patriots' policy of prohibiting players from speaking about injuries). In an interview, a current player on a different club also stated that his club prohibited players from speaking to the media about injuries.
- 42 Black's Law Dictionary (9th ed. 2009).
- 43 See *id.* (defining "slander" as "[a] defamatory assertion expressed in a transitory form, esp. speech" and "libel" as "[a] defamatory statement expressed in a fixed medium, esp. writing but also a picture, sign, or electronic broadcast").
- 44 See *Vilma v. Goodell*, 917 F. Supp. 2d 591, 596 (E.D.La. 2013) (describing NFL player Jonathan Vilma as "a public figure" for purposes of defamation claim).
- 45 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
- 46 *Id.*
- 47 *About SPJ*, Soc'y Prof'l Journalists, <http://www.spj.org/aboutspj.asp> (last visited Aug. 7, 2015), archived at <http://perma.cc/6TSA-LVN3>.
- 48 *SPJ Code of Ethics*, Soc'y Prof'l Journalists, <http://www.spj.org/ethicscode.asp> (last visited Aug. 7, 2015), archived at <http://perma.cc/W49E-8MK2>.
- 49 PFWA Constitution and Bylaws (amend. Jan. 30, 2009) (on file with authors).
- 50 *Injury Central: Tracking Key Injuries*, ESPN (Dec. 26, 2014, 5:41 PM), http://espn.go.com/fantasy/football/story/_/id/11426633/all-latest-fantasy-football-injury-information-injury-central, archived at <http://perma.cc/WEE8-D764>.
- 51 *Sports Injury Predictor and ASL Extend Partnership*, Advanced Sports Logic (Feb. 20, 2014), <http://advancedsportslogic.com/about/asl-in-industry-news/asl-and-sports-injury-predictor-extend-partnership>, archived at <http://perma.cc/EM7E-2938>.
- 52 See also Matt Pallister, *Fantasy Football Players Can Benefit From Injuries If They Know Where To Look*, Wash. Times (DC), Aug. 28, 2014, available at 2014 WLNR 23671218.
- 53 Ladd Biro, *Starters and Benchwarmers: Fantasy Football*, S.F. Chron., Nov. 21, 2014, available at 2014 WLNR 32864699 ("it's hard to trust Rivers, who apparently is trying to play through a rib injury"); Cecil Lammey, *Fantasy Football Gates' Status Requires a Backup Plan*, Denver Post, Nov. 21, 2010, available at 2010 WLNR 23277384 ("Floyd is returning from a hamstring injury, but I can't trust him in the starting lineup this week.").
- 54 See *Stephania Bell Blog*, ESPN, <http://espn.go.com/blog/stephania-bell> (last visited Aug. 7, 2015), archived at <http://perma.cc/59PZ-NC4R>.
- 55 See Mónica Guzmán, *Internet Pumps Up Interest in Fantasy Football*, Seattle Times, Nov. 10, 2013, available at 2013 WLNR 28440805; Mackenzie Ryan, *An Analysis of National Football League Fandom and Its Promotion of Conservative Cultural Ideals about Race, Religion and Gender* 9 (Aug. 2012).
- 56 Josh Hill, *Scumbag NFL Fans Ask Fantasy Football Advice After Cam Newton Car Crash*, FanSided.com (Dec. 9, 2014), <http://fansided.com/2014/12/09/fantasy-football-advice-cam-newton-car-crash/>, archived at <http://perma.cc/4RPJ-U9DD>.
- 57 *Rumor Central: ESPN Insiders*, ESPN, <http://insider.espn.go.com/blog/insider/rumors/> (last visited Aug. 7, 2015), archived at <http://perma.cc/CJQ2-4P9W>.
- 58 *Yardbarker*, <http://www.yardbarker.com/> (last visited Aug. 7, 2015), archived at <http://perma.cc/YG7W-4KXX>.
- 59 ProFootballTalk, <http://profootballtalk.nbcsports.com/category/rumor-mill/> (last visited Aug. 7, 2015), archived at <http://perma.cc/4F8Z-VFA6>.
- 60 *The Training Room*—by Dr. David Chao, Nat'l Football Post, <http://www.nationalfootballpost.com/category/the-training-room/> (last visited Aug. 7, 2015), archived at <http://perma.cc/GL5E-MYNB>.
- 61 Mike Florio, *Scheffer says he "could and should have done more" before posting JPP medical records*, ProFootballTalk (July 12, 2015, 10:39 AM), <http://profootballtalk.nbcsports.com/2015/07/12/scheffer-says-he-could-and-should-have-done-more-before-posting-jpp-medical-records/>, archived at <http://perma.cc/ZY4D-9ZC5>.
- 62 *Id.*
- 63 Order on Defendant's Motion to Dismiss After Hearing, *Pierre-Paul v. ESPN, Inc.*, 16-cv-21156 (Aug. 29, 2016, S.D. Fla.), ECF No. 30.
- 64 Tom Pelissero, *Tony Romo's Injury Shows Pressure QBs Face to Play Hurt*, USA Today, Nov. 3, 2014, <http://www.usatoday.com/story/sports/nfl/2014/11/03/tony-romo-quarterback-injuries-aaron-roddgers-alex-smith/18439613/>, archived at <http://perma.cc/QLH9-U4LG>.
- 65 Interview with John Affleck, Knight Chair in Sports Journalism and Society, Penn State University.
- 66 Mike Florio, *Breer pulls back curtain on working for NFL Network*, ProFootballTalk (Apr. 23, 2016, 12:51 PM), <http://profootballtalk.nbcsports.com/2016/04/23/breer-pulls-back-curtain-on-working-for-nfl-network/>, archived at <https://perma.cc/KD7Y-BBBA>.
- 67 Nancy Gay, *Cutler Lacks Grit In Loss Against Packers*, FoxSports (Jun. 2, 2014, 1:49 PM), <https://web.archive.org/web/20110125180314/http://msn.foxsports.com/nfl/story/gay-jay-cutler-knee-injury-chicago-bears-nfc-championship-012311>, archived at <https://perma.cc/7MD9-U6C4>; *Will Cutler Ever Be Where Rodgers Is?*, Daily Herald (Arlington Heights, IL), Feb. 2, 2011, available at 2011 WLNR 2223051; Dave George, *Not Tough Enough?* Palm Beach Post (FL), Jan. 25, 2011, available at

- 2011 WLNR 1562822; Tom Rock, *Cutler's Exit Opens Debate*, Newsday, Jan. 24, 2011, available at 2011 WLNR 1423016.
- 68 Josh Alper, *Cowboys Tie Game, Lose Rolando McClain to Locker Room With Head Injury*, ProFootballTalk (Jan. 11, 2015, 1:36 PM), <http://profootballtalk.nbcsports.com/2015/01/11/cowboys-tie-game-lose-rolando-mcclain-to-locker-room-with-head-injury/>, archived at <http://perma.cc/KDS3-GGD8>.
- 69 *Id.*
- 70 Samer Kalaf, *Concussions Sure Are Frustrating*, Deadspin (Jan. 11, 2015, 2:05PM), <http://deadspin.com/concussions-sure-are-frustrating-1678834644>, archived at <http://perma.cc/8HUG-LKM4>; see also Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* 219 (2015) (criticizing journalist who “wrote glowingly about the violence of the sport, and condemned players we perceived as soft.”)
- 71 See Jeffri Chadiha, *J.J. Watt's nasty bruise evokes memories of great injury moments*, ESPN (May 22, 2015), http://espn.go.com/nfl/story/_/id/12928692/jj-watt-bruise-continues-storied-tradition-athletes-playing-injuries, archived at <http://perma.cc/W2RU-4VRU> (providing examples of “great injury moments” in which athletes played while injured).
- 72 According to its website, “*Communication and Sport (C&S)* is a cutting-edge, peer-reviewed quarterly journal that publishes research to foster international scholarly understanding of the nexus of communication and sport. *C&S* publishes research and critical analysis from diverse disciplinary and theoretical perspectives to advance understanding of communication phenomena in the varied contexts through which sport touches individuals, society, and culture.” *Communication & Sport*, SAGE Publications, <https://us.sagepub.com/en-us/nam/communication-sport/journal202136> (last visited Aug. 7, 2015), archived at <https://perma.cc/JA2M-AQ8N?type=pdf>.
- 73 Jimmy Sanderson et al., *A Hero or Sissy? Exploring Media Framing of NFL Quarterbacks Injury Decisions*, *Comm'n & Sport*, May 28, 2014.
- 74 *Id.* at 16.
- 75 *Id.* at 15.
- 76 See Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions and the Battle for Truth* 213, 215, 226, 227, 234, 260, 264, 276, 283–84 (2013).
- 77 See, e.g., John Guida, *Should Your Child Play Football?* N.Y. Times, Nov. 11, 2014, <http://op-talk.blogs.nytimes.com/2014/11/11/should-your-child-play-football/>, archived at <http://perma.cc/5VRC-H4PM>; Julie Suratt, *Would You Let This Boy Play Football?* *Bos. Mag.*, Jan. 2015, <http://www.bostonmagazine.com/news/article/2015/01/05/let-boy-play-football/>, archived at <http://perma.cc/ND6J-EF9Q>; *Opinion Northwest: Would You Let Your Son Play Football?* *Seattle Times*, Oct. 14, 2013, available at 2013 WLNR 25728781; *If You Had A High-School-Age Son, Would You Let Him Play Football?* *Ariz. Republic*, Sept. 22, 2012, available at 2012 WLNR 23906921; Lindsay Schnell, *Oregon Ducks Rundown Column*, *Oregonian* (Portland, Ore), Oct. 27, 2011, available at 2011 WLNR 22155996; *Sports Poll*, *San Diego Union-Tribune*, Jan. 13, 2013, available at 2013 WLNR 1063883.
- 78 See, e.g., Chuck Klosterman, *Is It Wrong to Watch Football?*, N.Y. Times, Sept. 5, 2014, <http://www.nytimes.com/2014/09/07/magazine/is-it-wrong-to-watch-football.html>, archived at <https://perma.cc/STD5-4GGS?type=pdf>; Will Leitch, *Is Football Wrong? Even to a Devoted Fan, It's Getting Harder to Watch the NFL*, N.Y. Magazine, Aug. 10, 2012, <http://nymag.com/news/sports/games/nfl-fans-2012-8/>, archived at <http://perma.cc/ZT5D-BBX2>; Steve Almond, *Why You Should Stop Watching Football*, *Bos. Globe*, Aug. 10, 2014, available at 2014 WLNR 21887974; Melissa Jeltsen, *The Moral Case Against Football*, *Huffington Post* (Sept. 4, 2014, 3:22 PM), http://www.huffingtonpost.com/2014/09/04/steve-almond-against-football_n_5718939.html, archived at <http://perma.cc/DK93-ZK6X>; Rick Maese & Scott Clement, *Despite Problems, NFL Remains Very Popular*, *Wash. Post*, Sept. 5, 2012, available at 2012 WLNR 18865647.
- 79 See *Last Week Tonight With John Oliver: Scientific Studies* (HBO) (May 8, 2016), YouTube, <https://www.youtube.com/watch?v=ORnq1NpHdmw>.
- 80 Report of the Segal Group to Special Master Perry Golkin, *In re: Nat'l Football League Players' Concussion Injury Litigation*, 2:12-md-2323 (Sep. 12, 2014), ECF No. 6168.
- 81 *Id.* at ¶¶ 18–23.
- 82 Ken Belson, *Brain Trauma to Affect One in Three Players, N.F.L. Agrees*, N.Y. Times, Sept. 12, 2014, <http://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html>, archived at <https://perma.cc/5HFR-N8TV?type=pdf>; see also Ken Belson, *Dementia Care, Tailored to N.F.L. Retirees*, N.Y. Times, Mar. 22, 2016, <http://www.nytimes.com/2016/03/23/sports/dementia-care-tailored-to-nfl-retirees.html>, archived at <https://perma.cc/P3E4-WXRV> (also inaccurately describing 28% figure).
- 83 *GreenBelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970).
- 84 *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967).
- 85 In 2013, St. Louis Cardinals (MLB) slugger Albert Pujols sued former player turned radio announcer Jack Clark for defamation after Clark asserted that Pujols used performance-enhancing drugs. Pujols agreed to drop the lawsuit after Clark retracted his statement and apologized. See *Media Views: The Real Meaning of Jack Clark's Apology*, *St. Louis Post-Dispatch*, Feb. 21, 2014, available at 2014 WLNR 4958206. In 2005, former Alabama football coach Mike Price settled a lawsuit against *Sports Illustrated* in which Price alleged *Sports Illustrated* slandered him about a night of drinking at a strip club. *Price, Time Reach Second Settlement Over Sports Illustrated Article*, *Seattle Times*, Nov. 15, 2005, http://seattletimes.com/html/sports/2002625534_webprice15.html, archived at <http://perma.cc/4288-A3LZ>.
- 86 *Frequently Asked Questions*, Soc'y Prof'l Journalists, <http://www.spj.org/ethicsfaq.asp> (last visited Aug. 7, 2015), archived at <http://perma.cc/P36J-633X>.
- 87 *Id.*
- 88 See William C. Rhoden, *Fantasy Sports' Real Crime: Dehumanizing the Athletes*, N.Y. Times, Nov. 25, 2015, http://www.nytimes.com/2015/11/26/sports/football/fantasy-sports-real-crime-dehumanizing-the-athletes.html?_r=1, archived at <https://perma.cc/WPG9-GL5A?type=image>.



Chapter 18

Fans^a



Fans are undoubtedly a central component to the NFL's success. Fans engage with NFL football and players in a variety of ways, including by watching on television, attending practices or games in-person, by gambling and playing fantasy sports, and through public events where fans might see or speak with players. These different fan experiences also shape the fan's interests and role in player health.

While in other chapters we provided the stakeholder an opportunity to review a draft of the relevant chapter(s) prior to publication, because there is no well-defined representative for fans, no one reviewed this chapter on behalf of fans prior to publication.

^a The portions of this work related to fans are the result of collaboration with Daniel Wann, Professor, Murray State University.

(A) Background

Below we discuss two components of fandom that have connections to player health: (1) the level at which fans engage with the NFL; and, (2) gambling, an activity that presents particular legal and ethical concerns.

1) FAN ENGAGEMENT

NFL football is the most popular sport in America by a variety of measures.¹ Thirty-five percent of Americans consider professional football (*i.e.*, the NFL) their favorite sport, a number that is increasing yearly.² Fifty-five percent of Americans identify themselves as fans of the NFL.³ According to ESPN, there are more than 85 million “avid” NFL fans—“more than a quarter of the nation.”⁴ A mean of more than 68,000 people attend every NFL game.⁵ NFL games are the most watched television programming: more than 20 million people watch the primetime broadcasts, triple the ratings of the major television networks.⁶ The Super Bowl is the most viewed broadcast in television history, with approximately 45-percent of all households (about 53 million) tuning in annually.⁷ And, not surprisingly, millions of fans also follow and engage with their favorite NFL clubs via social media.⁸

Indeed, NFL fans have strong psychological connections to their favorite clubs. Being a fan is a central component of their social identity,⁹ and fans often have a stronger connection to their favorite club than their religion or alma mater,¹⁰ or their favorite consumer brands such as clothing and food or beverage products.¹¹

2) FANS AND GAMBLING^b

A comprehensive analysis of issues in the NFL, including player health, is not complete without a discussion of gambling,^c including fantasy sports.^d The sports gambling

industry in the United States is vast and appears to have grown at an exponential rate since the 1970s.¹² The size of the legal college and professional football gambling market is limited to Nevada, Montana, and Delaware by virtue of the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal statute that exempted a small number of states from a federal prohibition on sports gambling.¹³

The legal sports gambling market in Nevada saw, in total, \$3.9 billion wagered on sports in 2014, \$1.74 billion of which was on football (about 45 percent of the total).¹⁴ In 2014, Nevada sportsbooks won \$113.73 million on college and professional football.¹⁵ Delaware recently reported revenue associated with state licensed football pools of \$25.4 million.¹⁶ The “Montana Sports Action,” a line of games related to fantasy football and racing, sold \$179,790 worth of tickets in 2013.¹⁷ Although no monetary amounts are available, the *Houston Chronicle* reported that “the Super Bowl is by far the most wagered on event—legally and illegally—in the country.”¹⁸

Despite the above-referenced figures, illegal gambling still dwarfs legal gambling. In the United States, illegal gambling on professional sports has been estimated at \$80-\$380 billion annually.¹⁹ If we assume the rate of illegal gambling on football matches Nevada’s 45-percent rate of legal gambling on football, one would estimate that there is as much as \$170 billion illegally gambled on football each year.²⁰ While likely off in its specifics, that estimate gives a rough sense of the magnitude of illegal NFL gambling that goes on.

The relationship between gambling and the NFL’s popularity is undeniable. As one current club owner recently said in reference to gambling, “our game is made for that.”²¹ In testimony surrounding the 1999 National Gambling Impact Study (created at Congress’ behest), broadcaster Bob Costas stated “there is also no denying that the presence and prevalence of sports gambling benefits those leagues and benefits their television ratings.”²² More recently, NFL commentator Mike Florio opined on the role of fantasy sports and NFL popularity:

*The unprecedented growth of pro football over the last 20 years has resulted in large part from the ascension of fantasy football. With free agency potentially undermining fan rooting interest in specific teams, the ability to cobble together a team of their own has expanded fan interest far beyond the teams they love and the teams they hate.*²³

^b The portions of this work related to gambling are the result of collaboration with Ryan Rodenberg, JD, PhD, Professor, Florida State University.

^c For purposes of this report, gambling is defined broadly to include traditional sports gambling (point spreads, money lines, totals, prop bets, in-game wagering, etc.), and fantasy sports (season-long and daily). We acknowledge the ongoing debate about whether fantasy sports constitute gambling but believe it is appropriate to include them in the definition for our purposes. See, e.g., Decision and Order, State of New York v. DraftKings, Inc., Index No. 543054/2015 (N.Y. Sup. Ct. Dec. 11, 2015) (enjoining daily fantasy sports operator from conducting business in New York).

^d Although specific forms of fantasy sports have been exempted under the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”), see 31 U.S.C. §§ 5361–5367, many suggest that in reality there is no distinction between gambling and fantasy sports, see, e.g., Robert Lipsyte, *Serving Sports Fans Through Journalism*, ESPN (Dec. 3, 2014), http://espn.go.com/blog/ombudsman/tag/_/name/robert-lipsyte, archived at <http://perma.cc/5G2C-EPTB> (“The rise of gambling and fantasy leagues — some would argue often the same thing — will have social consequences that need to be monitored”); Joshua Brustein, *Web Sites Blur Line between Fantasy Sports and Gambling*, N.Y. Times, Mar. 11, 2013, <http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html>, archived at <https://perma.cc/C6E5-5J3P?type=pdf>.

Gambling and player health have a long history. Following a 1960 incident in which a point spread²⁴ changed dramatically after publication of a photograph of Pittsburgh Steeler quarterback Bobby Layne's injured arm, the NFL instituted a policy requiring clubs to report player injury status during the week.^{25,e} Former NFL security director Jack Danahy explained the purpose of the injury reports during a 1976 deposition:

We have initiated a program in the [NFL] wherein we require each team to report injuries on Tuesdays, again on Thursdays, and then following Thursday, right up to the time of the game. We publicize these injuries. The purpose of making this information public—and it has been in existence probably as long as I have been in the league . . . is to foreclose the possibility of gamblers attempting to obtain or obtaining confidential information or obtaining information surreptitiously as to the condition of ballplayers. We want it out in the open so that no one can claim an unfair advantage.²⁶

For at least the last 50 years, the NFL has been concerned about the possibility of inside information about player injuries making its way into the hands of gamblers, who typically were involved in organized crime. In 1967, NFL assistant to the Commissioner in charge of gambling, William G. Hundley, wrote a letter to a federal probation officer on behalf of organized crime figure Gil Beckley as a result of Beckley's provision of NFL gambling-related information to Hundley.^f Former NFL commissioner Pete Rozelle admitted in a 1976 deposition that inside information concerning injuries "could be construed as for gambling purposes."²⁷ Also during a 1976 deposition, NFL security director Jack Danahy stated: "There can be times when maybe there is a key injury and we will have four and five representatives calling in at the same time with point spread changes."²⁸ In 1977, the NFL admitted that

it "investigates at least one allegedly crooked game a week during a typical season."²⁹ Additionally, there have been reports of gamblers seeking to obtain information from NFL club doctors.^g

In the United States, illegal gambling on professional sports has been estimated at \$80-\$380 billion annually.

(B) Current Legal Obligations^h

Generally speaking, fans have no legal obligations specific to their status as NFL fans. In other words, fans are generally obligated to treat (and avoid harming) players in the manner as they would any other individual.

Unfortunately, there have been several violent incidents between fans and athletes in a variety of sports over the years. Brawls occurred between Boston Bruins players and New York Rangers fans in 1980 (National Hockey League), and between Indiana Pacers players and Detroit Pistons fans in 2004 (National Basketball Association).³⁰ Fortunately (relatively speaking), in the NFL, fan and player violence has generally been limited to incidents of players and opposing fans trading snowballs.³¹ However, during a 2014 joint practice between the Oakland Raiders and Dallas Cowboys, after players began to fight near fans, a Raiders fan swung a helmet at a Cowboys player, narrowly missing.³²

While some of these incidents have resulted in criminal charges (typically assault or battery) for the fans and players,³³ there have been no criminal or civil proceedings that would demonstrate that fans have a legal obligation to players unique to the fan-player relationship.

e For more information on the NFL's Injury Reporting Policy, see Chapter 17: The Media.

f Letter from William G. Hundley to C.L. Williams, Probation Department, Miami, FL, April 20, 1967 ("[Beckley] offered, on a confidential basis, to furnish any information that came into his possession concerning the possibility of endeavors to corrupt professional football players, seek unauthorized information about players [sic] conditions, and supply any other information that might reflect adversely on the integrity of professional football."). A March 2, 1970 *Time Magazine* feature described Beckley as follows: "Handling as much as \$250,000 worth of bets daily, Beckley, 58, mastered all the tricks of his arcane trade: (i) wangling information from locker rooms; (ii) computing odds in his head; and (iii) occasionally bribing athletes." See also Adam Bernstein, *Lawyer William G. Hundley*, 80, Wash. Post, June 14, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/13/AR2006061301681.html>, archived at <http://perma.cc/7WZ6-5QHZ> (describing Hundley's role at the NFL).

g See Rob Huizenga, M.D., *You're Okay, It's Just a Bruise* 67–68 (1994) (former Los Angeles Raiders Club doctor explaining "'For the first time in my life I had information that people would pay money for. Big money.'")

h The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

(C) Current Ethical Codes

The only existing ethical codes for fans are stadium codes of conduct. In 2008, the NFL and its clubs began to implement codes of conducts for fans attending games.³⁴ The NFL's code requires fans to refrain from:

- Behavior that is unruly, disruptive, or illegal in nature.
- Intoxication or other signs of alcohol impairment that results in irresponsible behavior.
- Foul or abusive language or obscene gestures.
- Interference with the progress of the game (including throwing objects onto the field).
- Failing to follow instructions of stadium personnel.
- Verbal or physical harassment of opposing team fans.

Moreover, in 2012, the NFL began to require that any fan ejected from a stadium be required to take an online course on stadium conduct before being permitted back into an NFL stadium.³⁵ While these codes of conduct are not specific to the fan-player relationship, if followed, they would seemingly help to minimize the frequency of incidents between fans and players.

(D) Current Practices

1) FAN ENGAGEMENT

Increased attention on football-related injuries has had an effect on fans. A 2014 Bloomberg Politics poll reported that 50 percent of Americans say they will not let their son play football.³⁶ Major news publications such as the *New York Times* and *Boston Globe* have questioned whether it is ethical to continue to watch football³⁷ or to let your kids play football.³⁸ Not surprisingly, between 2010 and 2012, Pop Warner, the country's largest youth football program, saw a 9.5-percent decrease in participation.³⁹ Although officials at Pop Warner have suggested a number of potential causes for the declining rates (e.g., a poor economy), they admitted that parent concerns about injuries was likely a key contributor to the drop in participation.⁴⁰ While other organizations have reported similar declines in participation,⁴¹ the Sports & Fitness Industry Association (SFIA) actually found that participation in tackle football across all leagues and among individuals aged 6 and above increased from 2014 to 2015.^{42,i}

Despite all of the scrutiny, fans have generally not been dissuaded from consuming NFL football. Many fans enjoy NFL football (and other physical sports) specifically because of its violent nature.⁴³ Moreover, in a 2014 *Sports Illustrated* poll, while 26 percent of fans reported being less interested in NFL football as a result of news stories regarding the long-term health risks of playing football, only 8 percent said they actually viewed fewer NFL games than they did two years ago.⁴⁴ In contrast, 36 percent of fans said they were watching more NFL games than they previously did.⁴⁵ Additionally, after the NFL's mishandling of domestic violence incidents during the 2014 season, only 11 percent of fans said they were less likely to watch as a result.⁴⁶

Nevertheless, in the long term, decreased participation in youth football is likely to result in fewer future NFL fans. Research has frequently found that previous involvement in youth sport is one of the best predictors of interest in sport as a fan.⁴⁷ If fewer children participate in football because parents are hesitant to expose them to potential injury, a likely longitudinal consequence will be fewer adults interested in football as a fan years later (or at least less interested than they would have been had they played football).

The same dynamic is evident from older studies. A 1981 study found that fans rated football plays as more entertaining and enjoyable when the plays were violent in nature.⁴⁸ In a similar study, published in 1982, fans reported greater enjoyment of watching sport contests when the announcers focused on the hatred and violence between the two teams.⁴⁹ It has even been argued by some scholars that some fans are attracted to combative sports such as the NFL specifically for the opportunity to see players be injured.⁵⁰ Indeed, it is not uncommon for news articles to compare watching an NFL game to being in attendance at the Roman Colosseum.⁵¹

A fan's concern for an athlete's injury not surprisingly depends on his or her feelings toward that athlete. Following the 2001 fatal car crash by NASCAR driver Dale Earnhardt, Sr., researchers examined the reactions of NASCAR fans.⁵² Those who were not fans of Earnhardt were more likely to trivialize Earnhardt's death and be unsympathetic in their reactions to the crash. Conversely, fans with a strong attachment to Earnhardt were clearly disturbed and psychologically affected by the incident.

i For more discussion on youth football, see Part 7: Other Interested Parties: Youth Leagues.

There are many incidents of fans cheering players' injuries. In one of the more famous examples, in 1999, Philadelphia Eagles fans cheered as Dallas Cowboys star wide receiver Michael Irvin was being placed on a stretcher as a result of head and neck injuries.⁵³ In a more recent trend, fans have been cheering when their own players (typically poorly performing quarterbacks) are injured, such as Cleveland Browns fans and Derek Anderson in 2008,⁵⁴ Kansas City Chiefs fans and Matt Cassel in 2012,⁵⁵ and Houston Texans fans and Matt Schaub in 2013.⁵⁶

Fans' occasional disregard for the health of players is not surprising considering past research that has shown that college football fans are more attached to the game of football than they are to the individual players.⁵⁷ Some have suggested that as a result of the players' helmets, players become depersonalized,⁵⁸ and thus fans do not develop the same sentiment towards players and might not be uncomfortable cheering an injury.

There are, of course, positive relationships between fans and players as well. Research has shown that athletes are viewed positively by fans where the athletes are perceived as "good people off the field,"⁵⁹ and exhibit prosocial behavior.⁶⁰ Nevertheless, there is no doubt that players often feel pressure from fans to perform.⁶¹

2) FANS AND GAMBLING

As discussed in the background section of this chapter, the NFL has long been concerned about the commoditization of player health information. These concerns persist today. In a 2011 book discussing the gambling scandal involving

former NBA referee Tim Donaghy,^j professional gambler Jimmy Batista described winning a large amount after receiving a tip from the Philadelphia Eagles' locker room concerning the injury status of star running back Brian Westbrook (who played from 2002 to 2010) right before a game.⁶²

Today, the "Personnel (Injury) Report Policy" ("Injury Reporting Policy") makes clear that "it is NFL policy that information on all injured players be supplied by the clubs to the league office."⁶³ The NFL describes the Injury Reporting Policy as one "of paramount importance in maintaining the integrity of the NFL."⁶⁴ The potential abuses of the Injury Reporting Policy, including the possibility that players and coaches target injured players, are discussed in more detail in Chapter 17: The Media.

Perhaps the most visible way in which gambling affects players today is through fantasy sports. An estimated 33.5 million Americans play fantasy sports every year, spending more than \$3 billion on fantasy games and related services and products.⁶⁵ Moreover, there are many websites where fantasy players, for a fee, can win cash prizes, some exceeding \$1 million.⁶⁶ These games have been partially exempted under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA),⁶⁷ a legal status supported by the NFL, MLB, NBA, NHL, and NCAA.⁶⁸

j "Tim Donaghy, a former National Basketball Association (NBA) referee, was caught making picks on games he officiated during the 2006–07 season following an investigation conducted by the Federal Bureau of Investigation. Donaghy bet on dozens of games that he officiated in each of the three prior seasons and had disclosed information regarding player injuries and which referees were assigned to specific games to people betting on NBA games. He was eventually sentenced to a prison term of fifteen months for conspiracy to commit wire fraud and ordered to pay \$217,266 USD in restitution by denying his employer the intangible right to his honest services and conspiracy to transmit wagering information." Richard H. McLaren, *Is Sport Losing Its Integrity?* 21 Marq. Sports L. Rev. 551, 566 (2011).

Fans now routinely harass players via social media or in person concerning players' fantasy performance.



The high stakes of fantasy sports has nevertheless come with a dark side. Fans now routinely harass players via social media or in person concerning players' fantasy performance.⁶⁹ Star running backs Jamaal Charles of the Kansas City Chiefs and Arian Foster of the Houston Texans both recalled being pressured by fans to come back from injuries to help the fans' fantasy football performance.⁷⁰ Additionally, many of the interactions have come in the form of threats. For example, during the 2013 season, a fan sent the following Tweet to New York Giants running back Brandon Jacobs: "ON LIFE BRANDON IF YOU DON'T RUSH FOR 50 YARDS AND TWO TOUCHDOWNS TONIGHT ITS OVER FOR YOU AND YO FAMILY N---ER."^k Jacobs reported the incident to NFL security.⁷¹

Current Player 4 relayed a story in which an injured teammate had a fan tell the player "to get back in the game" because the fan had the player on his fantasy roster. "[The player] was pretty disgusted that somebody would even suggest something like that."^l Current Player 6 confirmed "[y]ou feel the pressure and you hear the chatter" and Current Player 7 said players "definitely" feel pressure from fans to play through injuries.^m

The NFL reportedly has growing concerns about high stakes fantasy sports,⁷² but to date has not reversed its position that fantasy sports is not gambling; this is unsurprising since the NFL administers free fantasy leagues (without cash prizes) through its own website,⁷³ and even recognizes a Fantasy Player of the Year at its annual awards ceremony.⁷⁴ Indeed, inside information concerning player injuries is now just as important for fantasy sports as it

always has been for more traditional gambling: ESPN offers a subscription service called "Insider Trading," which purportedly includes "a collection of fantasy advice pulled straight from the locker rooms and practice fields of every team."⁷⁵

The relationship between gambling and professional sports has caused some to reconsider its prohibition. In November 2014, NBA Commissioner Adam Silver, accepting that gambling has become widespread, called for the legalization of sports gambling, proposing that it instead be heavily regulated.⁷⁶ Indeed, both the NBA and MLB own equity interests in fantasy websites where fans pay entry fees and can win large financial prizes.⁷⁷ While the NFL does not have an equity interest in such websites, two NFL club owners do.⁷⁸ The NFL, nevertheless, as a collective entity, has been unmoved, stating that Silver's comment "doesn't change our stance that has been articulated for decades: no gambling on N.F.L. games."⁷⁹

(E) Enforcement of Legal and Ethical Obligations

As discussed above, there are no legal obligations unique to the fan-player relationship. To the extent fans assault, batter, threaten or otherwise harm NFL players, NFL players could pursue either criminal charges or a civil lawsuit against the fan.

If fans are acting unruly or in a threatening manner at a game, players can bring that to the attention of security and have the fan ejected.

k In the Tweet to Jacobs, the fan spelled out the entire slur. See *Fantasy Pressure*, ESPN (Dec. 8, 2014, 10:09 AM), <http://espn.go.com/video/clip?id=11994138>.

l Other players also expressed concern about the pressures created by fantasy football: Current Player 9: "Yes, definitely [players feel pressure from fans], especially with fantasy football." Former Player 2: "This fantasy football stuff right now has kind of gone crazy."

m Other players did not believe players felt meaningful pressure from fans. Current Player 2: "I don't think that [fans] play a huge role in putting pressure on guys as they're out on the field. I don't think there's any that have any impact on the guy whether a guy is going to go out there and play hurt or not." Current Player 10: "I don't think the fans or even the media plays that much into it." We reiterate that our interviews were intended to be informational but not representative of all players' views and should be read with that limitation in mind.

(F) Recommendations Concerning Fans

Fans, ultimately, are what drive the success of the NFL. Fans consume the sport in incredible numbers, driving record-breaking television audiences and contracts. Fans, thus, also have incredible power. Without fan interest, the money, power, and prestige disappear. Below we make recommendations that seek to recognize and harness the power of the fans for the betterment of NFL players.

Goal 1: To wield the power of NFL fans to improve the health of NFL players.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 18:1-A: Fans should recognize their ability to bring about change concerning player health.

As discussed above, fans are tremendously important when it comes to the NFL's success. Fans thus have the leverage to pressure the NFL and other stakeholders into making positive changes for player health. There is precedent for the exercise of such leverage. In 2009, the Sports Fan Coalition was formed by a former White House attorney for the purposes of protecting fans' interests.⁸⁰ In its brief history, two items on the Sports Fan Coalition agenda have changed for the better: (1) NCAA college football created a playoff system; and, (2) the Federal Communications Commission eliminated a rule that permitted NFL clubs to "blackout" television broadcasts where the game did not reach a certain attendance level. While the Sports Fan Coalition's importance in these changes is unclear, it seems likely that the Sports Fan Coalition's expression of a collective fan voice had an impact.

Fans could have a similar positive impact on NFL player health, including by putting pressure on the NFL, NFLPA, clubs, and other stakeholders to adopt recommendations like those we have made in this Report.ⁿ

Recommendation 18:1-B: Fans should recognize that the lives of NFL players are more than entertainment, and that NFL players are human beings who suffer injuries that may adversely affect their health.

While NFL players' profession entails playing a sport largely for the entertainment of fans, an NFL career has real and important short and long-term impacts on players and their families. The fan experience sometimes strips some fans of understanding or sympathy for players—viewing them as mere means rather than human beings. Such a view is incompatible with the principle of Respect we have outlined in this Report. Fortunately, fans have increasingly taken note of the ways in which the game can harm players and through their behavior can help foster a norm of respect. This is a positive trend and hopefully one that will continue.

Recommendation 18:1-C: Fans should not pressure players to play while injured.

ⁿ The long-time NFL columnist Mike Freeman stated, "[i]f there ever comes a time when fans see the players as people and not commodities or gladiators or faceless entities on our fantasy rosters, everything could change." Mike Freeman, *Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive)* xx (2015).

Recommendations Concerning Fans – continued

For the reasons discussed above, fans should respect players and their physical and mental conditions. It is obvious that all NFL players often play with varying degrees of injury and pain. No fan—except perhaps former NFL players—can realistically understand the physical limitations of a player’s particular injury and whether it can withstand the physical demands of playing in an NFL game. Moreover, fans should respect that the player has legitimate long-term interests in his health at stake. As part of the continuing theme, fans must treat players with dignity and respect, and not as combatants for the fans’ amusement.

On a related topic, fans should exercise discretion when communicating with players via social media. While the interaction between players and fans via social media is a great way to build a connection, fans should obviously refrain from crossing the line with racist attacks or other threats. To the extent players are recipients of such communications, they should take them seriously and report them to club and NFL security.

Recommendation 18:1-D: Fans should not advocate, cheer, encourage, or incite player injuries.

It seems obvious that one should not encourage or be happy about the bodily or mental injury of another human being. Nevertheless, fans sometimes express joy when a player, even their own team’s player, has been injured. That behavior is incompatible with showing respect for players and treating them as human beings.

Endnotes

- 1 Regina Corso, *As American As Mom, Apple Pie, and Football?* Harris Poll (Jan. 16, 2014), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/1365/Default.aspx>, archived at <http://perma.cc/9GF9-Y2WP> (listing America’s favorite sports as, among others, Pro Football (35%), Baseball (14%), College Football (11%), Auto Racing (7%), Men’s Pro Basketball (6%), Hockey (4%), Men’s College Basketball (3%). 35% is the highest percentage Pro Football has received in the history of the poll, dating back to 1985.).
- 2 *Id.*
- 3 Larry Shannon-Missal, *Denver Broncos Are America’s Favorite Football Team; Dallas Cowboys Drop to 4th After Six Years at the Top*, Harris Poll (Oct. 14, 2014), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/1506/ctl/ReadCustom%20Default/Default.aspx>, archived at <http://perma.cc/MB7G-FKX7>.
- 4 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 5 (2013).
- 5 *See NFL Attendance – 2015*, ESPN, <http://espn.go.com/nfl/attendance> (last visited Apr. 7, 2016), archived at <https://perma-archives.org/warc/3ST3-L4ZB/http://espn.go.com/nfl/attendance>.
- 6 Sara Bibel, *NFL 2013 TV Recap: 205 Million Fans Tuned In; 34 of 35 Most Watched Shows This Fall*, Zap2it (Jan. 8, 2014), <http://tvbythenumbers.zap2it.com/2014/01/08/nfl-2013-tv-recap-205-million-fans-tuned-in-34-of-35-most-watched-shows-this-fall/227726/>, archived at <http://perma.cc/NZ7C-WF3C>.
- 7 *Super Bowl XLVIII Draws 111.5 Million Viewers*, Nielsen (Feb. 3, 2014), <http://www.nielsen.com/us/en/insights/news/2014/super-bowl-xlvi-iii-draws-111-5-million-viewers-25-3-million-tweets.html>, archived at <http://perma.cc/X38F-ZX59>.
- 8 One.Cool.Customer, *NFL Social Media Rankings: Which Teams Have The Largest Social Media Reach?* SB Nation Blog (Jun 4, 2014, 8:00 PM), <http://www.bloggingtheboys.com/2014/6/4/5772834/nfl-social-media-rankings-which-teams-have-the-largest-social-media-reach>, archived at <http://perma.cc/8ZDY-RHDA>.
- 9 *See* K. A. Hunt, T. Bristol, & R. E. Bashaw, *A Conceptual Approach to Classifying Sports Fans*, *J. Serv. Mktg.* 13, 439–452 (1999); D. L. Wann, J. Royalty, & A. Roberts *The Self-Presentation of Sport Fans: Investigating the Importance of Team Identification and Self-Esteem*, *J. Sport Behavior* 23, 198–206 (2000).
- 10 S. E. Smith et al., *How Does Sport Team Identification Compare to Identification With Other Social Institutions?* 6 *J. Contemp. Athletics* 69–82 (2011).
- 11 R. J. Sebastian & D. N. Bristow, *Win or Lose, Take Me Out to the Ballgame! An Empirical Investigation of Loyalty Proneness Among College Students*, 9 *Sport Mktg. Quarterly* 211, 211–20 (2000).
- 12 A 1977 New York Times article estimated the illegal sports gambling market in the United States as being worth \$50 billion. Steve Cady, *The Need for a Super Security Agency to Police All Major Sports*, *N.Y. Times*, Feb. 22, 1977, <http://query.nytimes.com/gst/abstract.html?res=9C04E0DF143BE63BBC4A51DFB466838C669EDE>, archived at <https://perma.cc/593A-72WT?type=source>.
- 13 PASPA also exempted Oregon from the prohibition on sports gambling. However, in 2005 Oregon voted to abolish the sports wagering lottery at the end of the 2006–2007 NFL season. Carla Hanson, *Oregon Sports Action Laid to Rest*, *BlueOregon*, Feb. 9, 2007, http://www.blueoregon.com/2007/02/oregon_sports_al/, archived at <http://perma.cc/5RYJ-2CBY>.
- 14 David Purdum, *Wagers, Bettor Losses Set Record*, ESPN (Jan. 30, 2015), http://espn.go.com/chalk/story/_/id/12253876/nevada-sports-bettors-wagered-lost-more-ever-2014, archived at <http://perma.cc/RKR8-WPD7>.
- 15 *Id.*
- 16 *Delaware State Lottery 2013 Annual Report for the Fiscal Year Ending June 30, 2013*, Del. State Lottery, http://www.delottery.com/pdf/2013_DELott_Annual_Report.pdf (last visited Aug. 7, 2015), archived at <https://perma.cc/QWD5-CW6B?type=pdf>.

- 17 *Montana Lottery Annual Report 2013*, Mont. Lottery, http://montanalottery.com/forms/annual_report_2013.pdf (last visited Aug. 7, 2015), archived at <https://perma.cc/5JRT-9GDT?type=pdf>.
- 18 Jerome Solomon, *NFL's Dirty Little Secret: Gambling's Roots Run Deep*, *Houston Chron.*, Jan. 29, 2004, <http://www.chron.com/sports/article/NFL-s-dirty-little-secret-Gambling-s-roots-run-1562128.php>, archived at <http://perma.cc/6YEX-JU9R>.
- 19 *See The 1999 National Gambling Impact Study—Chapter 2: Gambling in the United States*, Nat'l Gambling Impact Study Comm'n (June 18, 1999), <http://govinfo.library.unt.edu/ngjisc/reports/2.pdf>, archived at <https://perma.cc/7VQU-EY39?type=pdf>, at Page 2–14. (“Estimates of the scope of illegal sports betting in the United States range anywhere from \$80 billion to \$380 billion annually, making sports betting the most widespread and popular form of gambling in America.”).
- 20 Unfortunately, the reported numbers make it impossible to bifurcate estimates for professional football and college football.
- 21 Robert Kraft, Owner, New England Patriots, Deans' Innovation in Sports Challenge Kickoff, Harvard innovation lab (Nov. 21, 2014).
- 22 Testimony of Bob Costas, N.G.I.S.C Las Vegas Meeting, November 10, 1998.
- 23 Mike Florio, *Goodell Says Fantasy Football Isn't About Wagering*, ProFootballTalk (January 17, 2014 11:32 AM), <http://profootballtalk.nbcsports.com/2014/01/17/goodell-says-fantasy-football-isnt-about-wagering/>, archived at <http://perma.cc/BU2B-YQUB>.
- 24 Generally speaking, the point spread is the number of points by which one team is expected to beat its opponent.
- 25 Dan Moldea, *Interference: How Organized Crime Influences Professional Football*, 101–02 (1989). The Steelers were initially pegged as a seven-point favorite over Washington, but the spread closed to one point before kickoff following the publication of a photograph featuring Layne and his injured arm.
- 26 Deposition of John J. Danahy, NFL v. Governor of Delaware, Oct. 28, 1976, p. 70–71. Danahy's affidavit in the same case elaborates on the motivation: “It is obvious that illegal gambling on NFL games occur and that constant efforts are made by these gamblers to seek information about teams or even influence games.” Affidavit of John J. Danahy, NFL v. Governor of Delaware, (August 23, 1976), p. 3.
- 27 Deposition of Pete Rozelle, NFL v. Governor of Delaware, Oct. 13, 1976, p. 99.
- 28 Deposition of John J. Danahy, NFL v. Governor of Delaware, Oct. 28, 1976, p. 24. Danahy also revealed: “We have had situations where rumors of injuries have been specifically created by gamblers for the purpose of creating or effecting a gambling coup” (p. 72).
- 29 Steve Cady, *The Need for a Super Security Agency to Police All Major Sports*, *N.Y. Times*, Feb. 22, 1977, <http://query.nytimes.com/gst/abstract.html?res=9C04E0DF143BE63B8C4A51DFB466838C669EDE>, archived at <https://perma.cc/593A-72WT?type=source>.
- 30 *See Glenn M. Wong, Essentials of Sports Law*, § 16.1.3 (4th ed. 2010) (discussing these and other cases of fan-athlete violence).
- 31 *See Rich Cimini, NFL Hits Ellis with 10G Fine for Snowball*, *N.Y. Daily News*, Dec. 24, 2008, available at 2008 WLNR 24668756 (discussing 2008 incident between Seattle Seahawks fans and New York Jets player Shaun Ellis); Hector Gutierrez, *Snow May Land Fans in Court*, *Denver Rocky Mountain News*, Nov. 24, 1999, available at 1999 WLNR 811239 (discussing 1999 incident between Denver Broncos fans and Oakland Raiders players); *Snowball Barrage Injures 15*, *Denver Rocky Mountain News*, Dec. 24, 1995, available at 1995 WLNR 657930 (discussing New York Giants fans pelting San Diego Chargers players and coaches with snowballs).
- 32 Mike Wilkening, *Fan Swings Helmet At Cowboys' Webb During Practice Fight; Webb Swings Back*, ProFootballTalk (Aug. 12, 2014, 10:59 PM), <http://profootballtalk.nbcsports.com/2014/08/12/fan-swings-helmet-at-cowboys-webb-during-practice-fight-webb-swings-back/>, archived at <http://perma.cc/RDR2-JFTL>.
- 33 *See Wong, supra* note 30.
- 34 *NFL Teams Implement Fan Code of Conduct*, *NFL* (Aug. 5, 2008, 04:43 PM, Updated Jul. 26, 2012, 08:20 PM), <http://www.nfl.com/news/story/09000d5d809c28f9/article/nfl-teams-implement-fan-code-of-conduct>, archived at <http://perma.cc/X4J4-T3X9>.
- 35 *See Darren Rovell, NFL Gets Serious About Fan Conduct*, *ESPN* (Aug. 17, 2012) http://espn.go.com/nfl/story/_/id/8278886/nfl-require-ejected-fans-take-online-fan-conduct-course, archived at <http://perma.cc/2N9E-ER4F>. The course is available at www.fanconductclass.com/NFL.
- 36 *Half of Americans Don't Want Their Sons Playing Football, Poll Shows*, *Bloomberg* (Dec. 10, 2014, 7:00 AM), <http://www.bloomberg.com/politics/articles/2014-12-10/bloomberg-politics-poll-half-of-americans-dont-want-their-sons-playing-football>, archived at <http://perma.cc/CQ5Q-D7KW>.
- 37 *See Chuck Klosterman, Is It Wrong to Watch Football?*, *N.Y. Times*, Sept. 5, 2014, <http://www.nytimes.com/2014/09/07/magazine/is-it-wrong-to-watch-football.html>, archived at <https://perma.cc/STD5-4GGS?type=pdf>; Steve Almond, *Why You Should Stop Watching Football*, *Bos. Globe*, Aug. 10, 2014, available at 2014 WLNR 21887974.
- 38 John Guida, *Should Your Child Play Football?*, *N.Y. Times*, Nov. 11, 2014, <http://op-talk.blogs.nytimes.com/2014/11/11/should-your-child-play-football/>, archived at <http://perma.cc/5VRC-H4PM>.
- 39 Steve Fainaru & Mark Fainaru-Wada, *Youth Football Participation Drops*, *ESPN* (Nov. 14, 2013), http://espn.go.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor, archived at <http://perma.cc/E3GZ-5D65>.
- 40 *Id.*
- 41 *See Ryan Wallerson, Youth Participation Weakens in Basketball, Football, Baseball, Soccer*, *Wall St. J.*, Jan. 31, 2014, <http://www.wsj.com/articles/SB10001424052702303519404579350892629229918>, archived at <http://perma.cc/D47A-QTPN> (5.4% decrease in youth football participation between 2008 and 2012 according to the Sports and Fitness Industry Association and Physical Activity Council); Emily Attwood, 2013 Editions of NSGA Sports Participation Reports Released, *Athletic Bus.* (June 2013), <http://www.athleticbusiness.com/industry-press-room/2013-editions-of-nsga-sports-participation-reports-released.html>, archived at <http://perma.cc/L5A2-7LZZ> (National Sporting Goods Association finding a “nearly 13% decline” in youth football participation between 2011 and 2013).
- 42 *Date Shows Team Sports Participation Increased in '15, Including Hoops, Football*, *Sports Business Daily* (Mar. 10, 2016), <http://www.sportsbusinessdaily.com/Daily/Issues/2016/03/10/Research-and-Ratings/SFIA.aspx>, archived at <https://perma.cc/PQ86-E29E>.
- 43 *See Jennings Bryant, Viewers Enjoyment of Televised Sports Violence, Media, Sports, and Soc'y*, 270–89 (1989); R. Todd Jewell, Afsheen Moati, & Dennis Coates, *A Brief History of Violence and Aggression in Spectator Sports, in Violence and Aggression in Sporting Contests: Economic, History and Policy* 11–26 (2011); Stephanie Lee Sargent, Dolf Zillmann & James B. Weaver III, *The Gender Gap in the Enjoyment of Televised Sports*, 22 *J. Sport Soc. Issues* 46 (1998); Daniel L. Wann et al., *Sport fans: The Psychology and Social Impact of Spectators* (2001).
- 44 Don Banks, *NFL Fan Poll: Should Roger Goodell Keep Job? More State of the Game*, *Sports Illustrated*, <http://www.si.com/nfl-fan-poll-2014> (last visited Aug. 7, 2015), archived at <http://perma.cc/PM8J-ZTNY>.
- 45 *Id.*
- 46 Michael David Smith, *Poll Finds NFL Still Has Strong Support Across America*, ProFootballTalk (Sept. 18, 2014, 6:59 PM), <http://profootballtalk.nbcsports.com/2014/09/18/poll-finds-nfl-still-has-strong-support-across-america/>, archived at <http://perma.cc/6D3R-PHE4>.
- 47 Daniel L. Wann et al., *Sport Fans: The Psychology and Social Impact of Spectators* (2001); Matthew D. Shank & Fred M. Beasley, *Fan or Fanatic: Refining a Measure of Sports Involvement*, 21 *J. Sport Behavior* 435 (1998); Stephen J. Grove et al., *Spectatorship Among a Collegiate Sample: An Exploratory Investigation*, in Michael J. Etzel & John F. Gaski, *Applying Marketing Technology to Spectator Sports*, 26–40 (1982).
- 48 Jennings Bryant, Paul W. Comisky & Dolf Zillmann, *The Appeal of Rough-And-Tumble Play in Televised Professional Football*, 29 *Comm'n Quarterly* 256 (1981).

- 49 Jennings Bryant et al., *Sports and Spectators: Commentary and Appreciation*, 32 J Commc'n 109 (1982).
- 50 Dolf Zillmann & Paul B. Paulus *Spectators: Reactions to sports events and effects on athletic performance*, in Robert N. Singer, Milledge Murphey & L. Keith Tennant, *Handbook of Res. on Sport Psychol.* 600–19 (1993).
- 51 See Michael Powell, *Outrage Over Violence Ends at the Stadium Gates*, N.Y. Times, Sept. 16, 2014, http://www.nytimes.com/2014/09/17/sports/football/reactions-to-adrian-peterson-case-ignore-brutality-on-nfl-fields.html?_r=0, archived at <https://perma.cc/P82D-CKY6?type=image>; Scott Ostler, *How will Martin fit in?*, S.F. Chron., Mar. 13, 2014, available at 2014 WLNR 6793584; Matthew Stanmyre, *NFL has tried to make football safer, but violence remains at its core*, Star-Ledger (N.J.), Feb. 1, 2014 available at 2014 WLNR 2909040; Cf. *Chiefs Players Angry as Fans Cheer Injury*, Pitt. Post-Gazette, Oct. 8, 2012, available at 2012 WLNR 21308873 (Kansas City Chiefs offensive lineman and future NFLPA President Eric Winston exclaiming “We are not gladiators and this is not the Roman Colosseum. This is a game” after Chiefs fans cheered the injury of quarterback Matt Cassel).
- 52 Daniel L., Wann & Paula J. Waddill, *Examining reactions to the Dale Earnhardt crash: The importance of identification with NASCAR drivers*, 30 J. Sport Behav. 94 (2007).
- 53 Jean-Jacques Taylor, *Crowd Callous About Irvin's Injury: Players Astonished By Fans' Reaction*, Dall. Morning News, Oct. 11, 1999, available at 1999 WLNR 7714249.
- 54 Mary Kay Cabot, *Browns QB Anderson Heard the Jeers After Injury*, Cleveland.com (Nov. 30, 2008, 8:38 PM), http://www.cleveland.com/browns/index.ssf/2008/11/browns_qb_anderson_heard_the_j.html, archived at <http://perma.cc/FM3C-HST7>.
- 55 Darin Gantt, *Eric Winston Rips Chiefs Fan For Cheering Cassel Injury*, ProFootballTalk (October 7, 2012, 5:48 PM), <http://profootballtalk.nbcsports.com/2012/10/07/eric-winston-rips-chiefs-fans-for-cheering-cassel-injury/>, archived at <http://perma.cc/A2KZ-VZVB>.
- 56 Mike Florio, *Texans Players Sound Off on Fans Cheering Matt Schaub Injury*, ProFootballTalk (Oct. 14, 2013, 10:11 AM), <http://profootballtalk.nbcsports.com/2013/10/14/texans-players-sound-off-on-fans-cheering-matt-schaub-injury/>, archived at <http://perma.cc/7QS5-ZDWM>.
- 57 Matthew J. Robinson & Galen T. Trail, *Relationships Among Spectator Gender, Motives, Points Of Attachment, And Sport Preference*, 19 J. Sport Mgmt. 58 (2005).
- 58 See Barbara Barker, *Broncos, Seahawks Defenders Bring Sack Dances To Big Stage*, Newsday, Jan. 29, 2014, <http://www.newsday.com/sports/football/super-bowl/super-bowl-2014-broncos-seahawks-defenders-bring-sack-dances-to-big-stage-1.6904808>, archived at <http://perma.cc/UZ25-FBGJ>; Sally Jenkins, *NFL Violence: It's a Matter Of Choice, Not Just the Rules*, Wash. Post, Dec. 1, 2002, available at 2002 WLNR 15895732.
- 59 Traci A. Giuliano et al., *Gender and the Selection of Public Athletic Role Models*, 30 J. Sport Behav. 161 (2007).
- 60 Julie A. Stevens, Anna H. Lathrop, & Cheri L. Bradish, “*Who Is Your Hero*”: *Implications for athlete endorsement strategies*, 12 Sport Mktg. Q. 103 (2003).
- 61 See Tom Pelissero, *Tony Romo's Injury Shows Pressure QBs Face To Play Hurt*, USA Today Sports, Nov. 3, 2014, <http://www.usatoday.com/story/sports/nfl/2014/11/03/tony-romo-quarterback-injuries-aaron-rogers-alex-smith/18439613/>, archived at <http://perma.cc/SUW3-9CVX> (Green Bay Packers quarterback Aaron Rodgers discussing pressure from fans to play through injuries as a result of publicly released medical information); Joseph White, *Redskins' Sellers: Temptation of steroids was hard to resist*, Virginian-Pilot, May 4, 2010, available at 2010 WLNR 9202873 (former Washington Redskins fullback Mike Sellers describing “pressure from fans, family . . .” as reasons players take performance enhancing drugs).
- 62 Sean Patrick Griffin, *Gaming the Game*, 68 (2011) (“He was questionable but we got a call out of the locker room before anyone else that he wasn't playing,” Battista says. “The Eagles were favored by ten points and the over/under was something like fifty-two. Well, Westbrook being out of the offense was a big deal. The total moved like six points. We bet the dog and buried the under. The under hit and the dog covered.”).
- 63 National Football League, *2008 Personnel (Injury) Report Policy*, Media and Public Relations – General Information, Volume IV, Page E32. The NFL's policy has numerous prongs: (i) “all players with significant or noteworthy injuries must be listed on the report;” (ii) “the intent of the policy is to provide a full and complete rendering of player availability;” (iii) “coaches violating [the] policy are subject to disciplinary action;” and (iv) “injuries must be identified with a reasonable degree of specificity in terms that are meaningful to coaches, other club officials, the media, and the public.” The degree of specificity in the reports creates a possible concern about gamblers, coaches, or players targeting injured bodily areas.
- 64 *Id.*
- 65 Erik Matuszewski, *Fantasy Sports Luring Wall Street in Its Fastest-Growing Sector*, Bloomberg (Jan. 5, 2014, 10:00 PM), <http://www.bloomberg.com/news/2014-01-06/fantasy-sports-luring-wall-street-in-its-fastest-growing-sector.html>, archived at <http://perma.cc/77RF-GAAR>.
- 66 *Id.*
- 67 See 31 U.S.C. §§ 5361–5367. For a detailed academic treatment of the UIGEA carve-out for certain kinds of fantasy sports see Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, J. Marshal L. Rev. 40, 1195–219 (2007).
- 68 See Letter from Jeffrey Pash, VP and General Counsel, NFL, Tom Oster-tag, Senior VP and General Counsel, MLB, Richard Buchanan, Senior VP and General Counsel, NBA, William Daly, Deputy Commissioner, NHL, and Elsa Kircher Cole, General Counsel, NCAA, to Members of Congress (Feb. 1, 2006) (urging members of Congress to pass the UIGEA).
- 69 See *Fantasy Pressure*, ESPN (Dec. 8, 2014, 10:09 AM), <http://espn.go.com/video/clip?id=11994138>.
- 70 *Id.*
- 71 *Id.*
- 72 Mike Florio, *NFL paying attention to influence of high-stakes fantasy football leagues*, ProFootballTalk (July 28, 2014, 3:08 PM), <http://profootballtalk.nbcsports.com/2014/07/28/nfl-paying-attention-to-influence-of-high-stakes-fantasy-football-leagues/>, archived at <http://perma.cc/LD2K-KW84>.
- 73 See *Fantasy Football*, NFL, <http://www.nfl.com/fantasyfootball> (last visited Aug. 7, 2015).
- 74 See *Fantasy Football Player of the Year Vote*, NFL, <http://fantasy.nfl.com/features/playeroftheyearvoteconfirm?votedPlayerId=100025&votingState=pre> (last visited Apr. 7, 2016), archived at <https://perma.cc/6WKf-TN3B>.
- 75 NFL Nation Reports, *Fantasy Advice for Every Team*, ESPN Insider (Sept. 5, 2014), http://insider.espn.go.com/fantasy/football/story/_/id/11467696/insider-trading-fantasy-advice-every-team-week-1-nfl, archived at <http://perma.cc/KQN7-WS9X> (“ESPN Insider has planted ‘spies’ in every NFL locker room – OK, so they’re our 32 NFL Nation team reporters – in order to provide fantasy owners with inside intel to help you win your league.”).
- 76 Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times, Nov. 13, 2014, <http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>, archived at <https://perma.cc/LUF8-EZM2?type=pdf>.
- 77 Craig Calcaterra, *MLB Owns a Stake in Daily Fantasy Sports*, HardBall-Talk.com (Mar. 30, 2015, 11:35 AM), <http://hardballtalk.nbcsports.com/2015/03/30/mlb-owns-a-stake-in-daily-fantasy-sports/>, archived at <http://perma.cc/QFH9-R8NT>.
- 78 Mike Florio, *NFL owners may have to dump investments in DFS companies*, ProFootballTalk (Nov. 13, 2015, 7:29 AM), <http://profootballtalk.nbcsports.com/2015/11/13/nfl-owners-may-have-to-dump-investments-in-dfs-companies/>, archived at <https://perma.cc/TH7P-W5QJ>.
- 79 Ken Belson, *Will Other Leagues Join N.B.A.? Don't Bet on It*, N.Y. Times, Nov. 14, 2014, <http://www.nytimes.com/2014/11/15/sports/not-all-leagues-ready-to-go-all-in-on-legalized-gambling.html>, archived at <https://perma.cc/P8TH-Z3P2?type=pdf>.
- 80 *Who We Are*, SportsFans.org, <http://www.sportsfans.org/about/> (last visited Aug. 7, 2015), archived at <http://perma.cc/QZ7V-GE8Z>.



Chapter 19

NFL Business Partners



In the 2015 season, the NFL had approximately 29 official corporate partners,^a which collectively paid the NFL more than one billion dollars annually.¹ While there are many other companies that might advertise on television during NFL games or around other NFL events, the business partners we are principally focused on here are the ones that have reached an agreement with the NFL to be considered an official partner or sponsor of the NFL. These business partners are an important component in professional football. Such a role includes the potential, and at times the obligation, to also play a role in player health.

^a These corporate partners are sponsors of the NFL as opposed to sponsors of particular clubs or players. In addition, none of them are Medical Service Providers, as discussed in Chapter 2: Club Doctors.

In order to ensure that this chapter was as accurate and valuable as possible, we invited nine NFL business partners to review a draft version before publication: Verizon, Anheuser-Busch, Pepsi, and McDonald's did not respond to multiple invitations to review the Report; Gatorade, FedEx, and Nationwide Insurance declined to review the draft; Microsoft reviewed the chapter but did not provide any comments; and, Nike provided a single comment affirming the importance of player health and safety to Nike.^b

b Nike's full comment: "As a sponsor of the NFL and the sponsor and footwear provider of many individual players, the safety and well-being of players is important to us. Through the years NIKE has worked closely with the both the NFLPA and the NFL in the NFL Foot and Ankle Committee (a subsection of the Player Safety Committee). Additionally, we have always worked directly with athletes, teams and equipment managers on testing, feedback and changes to our products to help athletes perform to their highest ability." E-mail from Nike counsel to author (May 18, 2016, 12:05 PM).

(A) Background

The largest NFL business partners at the time of publication include Verizon (\$250 million in sponsorship annually);² Anheuser-Busch (\$233 million);³ Nike (\$220 million);⁴ Pepsi (\$100 million);⁵ and, Microsoft (\$80 million).⁶ The relationship with the NFL generally provides the business partners, among other things, advertising during NFL games and through other NFL media, the right to include the NFL logo on their products and in their advertisements, the right to advertise themselves as the "official" brand of the NFL, exclusivity in their brand category, and/or the right to engage in promotional activities at NFL events, such as the Super Bowl. The business partners have clearly determined that the value of their association with the NFL and the related exposure exceeds the millions in sponsorship fees.



Table 19-A:
NFL Sponsors (2015)⁷

Sponsor	Category	Since
Gatorade	Isotonic beverage	1983
Visa USA	Payment systems service	1995
Campbell's Soup	Soup	1998
FedEx	Worldwide package delivery service	2000
Frito-Lay	Salted snack/popcorn/peanuts/dip	2000
Mars Snackfood	Chocolate and non-chocolate confectionery	2002
Pepsi	Soft drinks	2002
Bridgestone	Tire	2009
Procter & Gamble (Gillette, Head & Shoulders, Vicks, Old Spice)	Grooming products, fabric care/air care, household needs	2009
Verizon	Wireless telecommunication service	2010
Barclays	Affinity card/rewards program	2010
Papa John's	Pizza	2010
Castrol	Motor oil	2010
Anheuser-Busch	Beer	2011
USAA	Insurance/military appreciation	2011
Bose	Home theater system	2011
Marriott	Hotel	2011
Xbox (Microsoft)	Video game console, interactive video entertainment console	2011
Nike	Athletic apparel	2012
Quaker	Hot cereal	2012
Procter & Gamble (Tide, Duracell)	Household cleaning, battery power	2012
Lenovo	Computers (desktop, laptop, and computer workstations)	2012
McDonald's	Restaurant	2012
SAP	Cloud software solutions, business and business analytics	2012
Microsoft (Surface, Windows)	Sideline technology (tablet, PC operating system)	2013
Cover Girl	Beauty	2013
Nationwide	Insurance	2014
Extreme Networks	Wi-Fi Analytics Provider	2014
Hyundai	Automobile	2015

(B) Current Legal Obligations^c

Although NFL players and NFL business partners benefit from one another, there is generally no direct legal relationship between them. While some players might also enter into endorsement agreements with the business partners, these contracts concern marketing matters and would not create any legal obligations for the business partners concerning NFL player health.⁸ Similarly, the CBA does not create any obligations on NFL business partners, nor could it, since the CBA is a contract between the clubs and players. Thus, NFL business partners have no legal obligations to NFL players specific to their status as business partners.

(C) Current Ethical Codes

The NFL is supported by a range of business partners whose main focus often has nothing to do with football, but instead centers on reaching the NFL's massive audience for marketing purposes. Reaching consumers is a legitimate and important business goal, but not all advertising venues are fair game. One can imagine a wide variety of unsavory outlets a company would prefer (and ought) to avoid, even if they would be an effective way to reach potential customers. This is because companies are often concerned—either genuinely, or out of fear that negative responses from consumers will affect their bottom line—that they may contribute to some ethically problematic endeavor, thereby becoming complicit in or even exacerbating it. Notably, complicity comes in many forms, ranging from failure to intervene when one has the capacity to provide assistance to offering active support to an ethically problematic activity.

As increasing questions arise about the health of professional football players, NFL business partners (and their customers) may ask themselves, “what is our responsibility?” That is, what level and type of support should they be providing to the NFL, or from a different angle, to the players? At root, these questions are about unclean hands, and whether NFL business partners are profiting on the backs of players who may suffer dire consequences in the long term. While the precise risks and benefits of an NFL career remain subject to debate, the concerns suggest that these are precisely the questions that ethically responsible companies should ask. To avoid complicity, these companies should be concerned with what endeavors they allow their money to support, and in what ways they can and/or should wield their power to affect change.

The concept of corporate social responsibility seeks to address these questions. We find it a useful framework for understanding the ethical obligations NFL business partners might have towards players. The most influential articulation of corporate social responsibility principles is the United Nations Guiding Principles on Business and Human Rights, published in 2011 (“Guiding Principles”).⁹ Indeed, many NFL business partners have stated their intention to comply with the Guiding Principles.¹⁰

To be clear, we are not claiming that any of the problems we discuss in this Report or that NFL players face by playing football rise to the level of human rights violations; given the simple fact of consent to play and payment for services, the difficulties players face do not compare to the numerous and ongoing tragedies around the world that human rights law is thought to govern. Nonetheless, the Guiding Principles provide a framework for understanding business enterprises’ ethical obligations concerning others. This framework is useful to understanding the relationship between NFL business partners and players, even if we are not discussing human rights violations.

To put the point another way, in asking the question “what ethical obligations should business partners have as to the health of NFL players,” it is useful to begin by understanding what recognized ethical obligations they have in the human rights realm, simply as a starting point. The Guiding Principles include several principles that may be relevant to that inquiry:

- Business enterprises should “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”¹¹
- “[B]usiness enterprises should carry out human rights due diligence” including “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹²
- Business enterprises should engage in “meaningful consultation with potentially affected groups and other relevant stakeholders.”¹³
- Business enterprises should “exercise” leverage “to prevent or mitigate the adverse impact” when possible.¹⁴
- Business enterprises which lack the leverage to prevent or mitigate the adverse impact should consider “collaborating with other actors.”¹⁵

^c The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

In the corporate context, these responsibilities are considered as defining the ethical business conduct, but the Guiding Principles do not purport to be legally enforceable obligations. Nonetheless, using the Guiding Principles as persuasive authority, we highlight two of the above principles for further discussion.

Importantly, the Guiding Principles do not require that the business enterprises' conduct cause an adverse impact, only that they be "directly linked." NFL business partners' practices almost certainly do not cause player health problems, but for reasons discussed in this chapter, there is a direct link between business partners' practices and player health issues.

Second, the second-to-last bullet point recognizes business enterprises' obligations to exercise leverage where appropriate. Again, for reasons discussed in this chapter, business partners have the ability to wield influence with the NFL. With that influence comes the responsibility to act conscientiously and force others to do the same, including on matters concerning player health.

(D) Current Practices

NFL business partners' approach to NFL player health issues is best highlighted by examining their response to recent NFL controversies. When the NFL faced scrutiny for mishandled domestic violence incidents in the fall of 2014, many of its major sponsors issued generalized statements expressing disappointment in the situation and calling on the NFL to make changes.¹⁶ However, research has not

revealed any statements by any NFL corporate sponsor concerning the lawsuits over concussions or painkillers, or any other player health or safety issue.

Business partners should be concerned with what endeavors they allow their money to support, and in what ways they can and/or should wield their power to affect change.

Much of the relationship between business partners and the NFL occurs behind closed doors. All we can see are the public positions, statements, and actions undertaken by business partners. Taking inspiration from the Guiding Principles (and again emphasizing that there is no claim that we are talking about human rights violations), and evaluating only based on the public record (a limitation, to be sure), it does not appear that NFL business partners have undertaken any of these kinds of efforts to prevent harm to the health of NFL players, or even to influence a culture that recognizes the value and importance of player health. That is, there is no evidence that NFL business partners have: (1) sought to prevent or mitigate player health problems; (2) conducted due diligence concerning player health issues; (3) engaged in meaningful consultation

Research has not revealed any statements by any NFL corporate sponsor concerning the lawsuits over concussions or painkillers, or any other player health or safety issue.



with players concerning player health issues; (4) exercised leverage in an individual capacity to prevent or mitigate player health problems; or, (5) exercised leverage in a collaborative capacity to prevent or mitigate player health problems.^d

Commentators have opined that one way to push the NFL to make meaningful changes to its policies or course of conduct regarding player health is to threaten financial consequences, *i.e.*, if business partners threatened to stop doing business with the NFL.¹⁷ Thus, there seemingly exists the possibility that NFL business partners have the power to effect change—or to at least begin meaningful conversation about change—concerning player health issues.

Nevertheless, so long as the NFL remains a valuable property with which to be associated, it seems unlikely that individual business partners would risk damaging their relationships with the NFL by either taking adverse positions or putting pressure on the League. At the same time, this may be an era where the economic realities are changing.

Business enterprises that engage in sponsorship like that of the NFL's business partners are principally concerned with

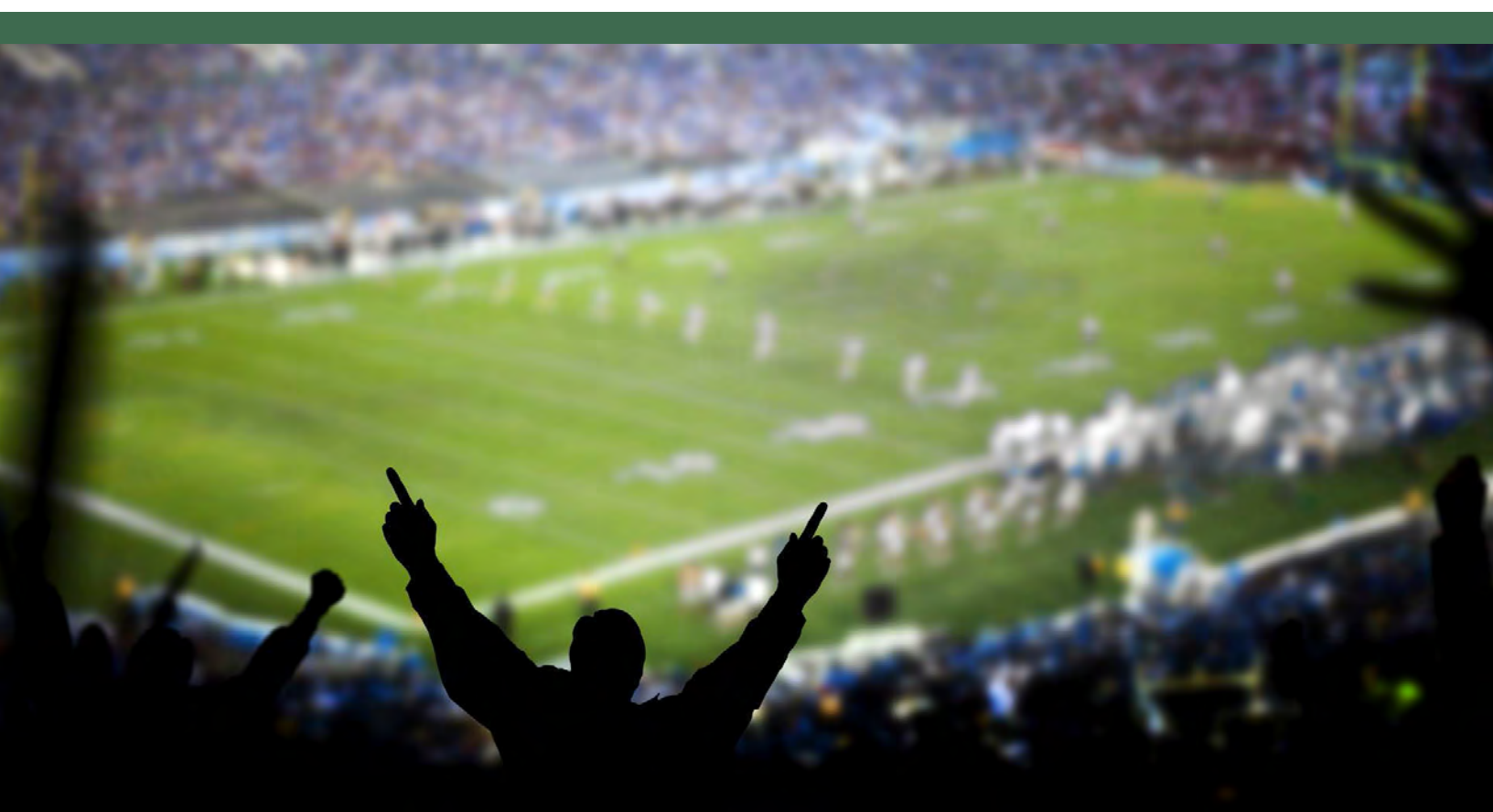
deriving economic value from the sponsorship through increased brand awareness and positive association with the sponsored entity, *e.g.*, the NFL. Negative publicity for the NFL or decreased attention to the NFL (*e.g.*, television ratings) lessens the economic value of the business partner's sponsorship. NFL player health issues have created negative attention for the NFL through lawsuits, news articles, and other means. This negative attention has the potential to spread to the NFL's business partners through a "guilt by association" mindset.^e Thus, this may be the moment where economic and ethical interests align, such that business partners can take on a more prominent role in pressing for protection of player health.

(E) Enforcement of Legal and Ethical Obligations

In the absence of any existing legal or ethical obligations for NFL business partners concerning NFL player health, there can be no enforcement of any such legal or ethical obligations.

^d The business partners' conduct must also be viewed in light of Guiding Principle No. 24, which states that "[w]here it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable." Thus, some business partners might believe there are issues of a human rights nature that deserve greater attention and immediacy than their involvement in NFL player health matters.

^e Such concerns are not hypothetical. In 2014, five sponsors (Sony, Emirates Airlines, Castrol, Continental and Johnson & Johnson) pulled their sponsorship of FIFA's World Cup due to extensive allegations of corruption within the international soccer organization. See Peter Sharkey, *Cup Joy's a World Apart From FIFA 'Toxic Brand'*, Birmingham Post (UK), Jan. 29, 2015, available at 2015 WLNR 2794660.



(F) Recommendations Concerning NFL Business Partners

NFL business partners, due to the power of their purses, have a unique ability to influence the NFL to make positive changes concerning player health. Below we make recommendations that can improve business partners' approaches to player health issues, to the benefit of both players and the business partners. In making these recommendations, we also stress that while we recommend and encourage business partners to act independently when necessary, that if business partners collaborated and worked collectively on these issues they would be more likely to achieve positive changes quickly and effectively.

Goal 1: To encourage NFL business partners to work towards advancing a culture of health for NFL players.

Principles Advanced: Respect; Health Primacy; Collaboration and Engagement; and, Justice.

Recommendation 19:1-A: NFL business partners should not remain silent on NFL player health-related policies.

During the 2014 season, the NFL's business partners condemned the NFL's failures to handle and address domestic violence issues. Several of the business partners' statements reflected on the NFL's place in our society and emphasized the need for ethical conduct and leadership.¹⁸ However, none of the business partners have ever made any statements concerning the risks players face in playing professional football and the tolls of such a career. Moreover, the business partners never made any statement concerning the allegations in the Concussion Litigation (*see* Chapter 7: The NFL and NFLPA) that for many years the NFL misrepresented the risks of playing professional football to players. Why this asymmetry? It is quite possible that business partners' comments on the domestic violence issue were in response to greater public pressure, and the more diffuse public pressure on player health has not yet reached the same crescendo.

Nevertheless, for the same reasons business partners commented on the NFL's domestic violence issues, they should also make their voices heard on player health-related issues. Business partners, like everyone in the professional football universe, need to understand and accept their responsibilities and role concerning player health.

A recent useful example is the energy bar company Clif Bar. Clif Bar sponsors adventure sports athletes, including mountain climbers. After determining that some of these athletes were taking risks that were excessive (such as not using safety ropes or BASE jumping), Clif Bar pulled their sponsorships of some of these athletes and issued a statement clarifying the types of risks Clif Bar felt comfortable supporting. Of particular relevance, Clif Bar indicated that it "no longer [felt] good about benefitting from the amount of risk certain athletes [we]re taking[.]"¹⁹

Recommendation 19:1-B: NFL business partners should consider applying pressure on the NFL to improve player health.

The NFL is a business and, like any business, does not want to suffer a drop in revenue. Individually, the business partners might not represent a significant portion of the NFL's revenue, but collectively the business partners' sponsorship fees comprise more than 10 percent of the NFL's revenue. Thus, collectively, the business partners have leverage, *i.e.*, the ability to force the NFL to make change at the threat of losing hundreds of millions of dollars. The business partners, consistent

Recommendations Concerning NFL Business Partners – continued

with the spirit of the Guiding Principles and other social responsibility initiatives and aspirations they have, should use their power of the purse to help the players from whom they derive considerable financial value.^f

To be fair, business partners might reasonably be concerned that any exercise of such leverage will only result in the NFL replacing them with a competitor. However, the NFL has reasons to maintain continuity with its business partners. Sponsor turnover is bad for brand loyalty and identification for both the sponsor and the NFL, thus decreasing the value of the replacement partner's sponsorship. For example, Pepsi is currently the official soft drink of the NFL. If Pepsi were to be replaced by Coca-Cola, many fans might still believe Pepsi is the official soft drink or be confused as to which brand is the official soft drink, decreasing the value of Coca-Cola's sponsorship and the amount it would be willing to pay to the NFL.²⁰

The recommendations made in this Report and other outlets that have discussed changes to player health provide guidance on the types of issues for which business partners should exercise leverage.

Recommendation 19:1-C: NFL business partners should consider supporting organizations conducting due diligence into player health issues.

The Guiding Principles, generally speaking, instruct business enterprises to conduct due diligence into how their actions and business relationships affect others. If business partners are going to make fully informed decisions about their relationships with the NFL, it would be advisable that they consider research and data on NFL players and the issues they face. While the business partners themselves likely lack the capabilities or expertise to conduct research into player health issues, they have the resources to support organizations conducting such research.

Recommendation 19:1-D: NFL business partners should engage players concerning player health issues.

As discussed above, NFL business partners receive tremendous economic value from their association with, and from the work of, NFL players. In such situations, the Guiding Principles direct that the business enterprise should engage the stakeholders involved to understand the impact of the business enterprise's conduct on the health of the stakeholder. Such conversations have the possibility to improve relations between the stakeholder and business enterprise, the business enterprise's own business operations, and the health of the stakeholder. In this context, NFL business partners could hold conversations with current or former players to better understand them and the issues that matter to them. Additionally, through these conversations, the business partners could learn how they might adopt more consistent messaging concerning professional football, apply pressure on the NFL where appropriate, and what types of causes or organizations concerning football the business partners should support. Such conversations would establish a better dynamic between players and business partners and enhance the business partners' reputation for social responsibility.

^f FIFA again provides a useful example. In 2015, major sponsors Coca-Cola, Visa, and McDonald's demanded FIFA take actions to address allegations of corruption and criminal activity and requested a meeting to voice their concerns. Brian Homewood, *FIFA to meet sponsors after reproaches from Coke, Visa, McDonald's*, Reuters, (Jul. 24, 2015, 8:48 AM), <http://www.reuters.com/article/2015/07/24/us-soccer-fifa-sponsors-idUSKCN0PY1IC20150724>, archived at <http://perma.cc/NF4G-JHJ4>.

Endnotes

- 1 *Spons-o-Meter: NFL Lines Up 26 Partners To Start '13 Season*, Sports Bus. Daily (Sept. 13, 2013), <http://www.sportsbusinessdaily.com/Daily/Issues/2013/09/06/NFL-Season-Preview/Sponsometer.aspx>, archived at <http://perma.cc/U4S2-TLUJ>. For several years, Sports Business Daily published an annual list of the NFL's official sponsors. However, for unknown reasons, Sports Business Daily did not publish any such list in 2014 or 2015.
- 2 Matthew Futterman and Spencer Ante, *Verizon Pads NFL Deal*, Wall St. J., Jun. 4, 2013, <http://online.wsj.com/news/articles/SB10001424127887324563004578525060861520512>, archived at <http://perma.cc/53SG-7U4H>.
- 3 Michael David Smith, *Bud Light sponsorship will pay the NFL \$1.4 billion over six years*, ProFootballTalk (Nov. 4, 2015, 10:28 AM), <http://profootballtalk.nbcsports.com/2015/11/04/bud-light-sponsorship-will-pay-the-nfl-1-4-billion-over-six-years/>, archived at <http://perma.cc/6YVT-FKJY>.
- 4 Kristi Dosh, *Steep Price Paid by Nike Likely to Pay Off*, ESPN (Apr. 3, 2012), http://espn.go.com/blog/playbook/dollars/post/_id/554/steep-price-paid-by-nike-likely-to-pay-off, archived at <http://perma.cc/2MRR-UBHJ>.
- 5 Matthew Futterman, *NFL Back On Field, And Deals Pile Up*, Wall St. J., Sept. 6, 2011, <http://online.wsj.com/news/articles/SB10001424053111904900904576552773485086198>, archived at <http://perma.cc/6QXS-GP4K>. Gatorade, Frito-Lay, and Quaker are all brands owned by PepsiCo and are included in Pepsi's deal with the NFL, which runs through the 2022 season.
- 6 *NFL Sponsorship Revenue Totals \$1.07 Billion In 2013 Season*, IEG Sponsorship Report, Jan. 27, 2014, [http://www.sponsorship.com/IEGSR/2014/01/27/NFL-Sponsorship-Revenue-Totals-\\$1-07-Billion-In-20.aspx](http://www.sponsorship.com/IEGSR/2014/01/27/NFL-Sponsorship-Revenue-Totals-$1-07-Billion-In-20.aspx), archived at <http://perma.cc/SD88-HK2L>.
- 7 *See Spons-o-Meter: NFL Lines Up 26 Partners To Start '13 Season*, Sports Bus. Daily (Sept. 13, 2013), <http://www.sportsbusinessdaily.com/Daily/Issues/2013/09/06/NFL-Season-Preview/Sponsometer.aspx>, archived at <http://perma.cc/U4S2-TLUJ> (providing the bulk of the list's data); *New Deal Establishes Nike As League's Official Uniform Provider*, NFL (Oct. 12, 2010, 1:25 PM), <http://www.nfl.com/news/story/09000d5d81b4559b/article/new-deal-establishes-nike-as-leagues-official-uniform-provider>, archived at <http://perma.cc/R7PZ-393X> (discussing sponsorship agreement between Nike and NFL); *Nationwide Insurance Teams Up With The National Football League As An Official Sponsor*, Nationwide Ins. (Aug. 4, 2014), <http://www.nationwide.com/about-us/080414-nfl-announcement.jsp>, archived at <http://perma.cc/K74G-4WZV> (discussing sponsorship agreement between Nationwide and NFL); *Extreme Networks Named Official Wi-Fi Analytics Provider of National Football League*, Extreme Networks (Jan. 15, 2014), <http://investor.extremenetworks.com/releasedetail.cfm?releaseid=819515>, archived at <http://perma.cc/9LFY-ZSBD> (discussing sponsorship agreement between Extreme Networks and NFL).
- 8 Additionally, players routinely enter into sponsorship agreements with competitors of the NFL's business partners. *See* Cindy Boren, *Colin Kaepernick Sticks with Beats by Dre — With a Little Tape Over the Logo*, Wash. Post, Oct. 14, 2014, available at 2014 WLNR 28601543.
- 9 United Nations Office of the High Commission, *Guiding Principles on Business and Human Rights*, A/HRC/17/31 (Jun. 16, 2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf?v=1392752313000/_jcr:system/jcr:versionstorage/12/52/13/125213a0-e4bc-4a15-bb96-9930bb8fb6a1/1.3/jcr:froznnode, archived at <https://perma.cc/U36F-S7YR?type=pdf> [hereinafter, "Guiding Principles"].
- 10 The NFL business partners that have stated their intention to comply with the Guiding Principles include, but are not limited to: Pepsi, *see PepsiCo Code of Conduct*, PepsiCo, <http://www.pepsico.com/Purpose/Talent-Sustainability/Human-Rights>, archived at <http://perma.cc/5YN4-WRPW?type=live> (last visited Aug. 7, 2015); *see Report of the Sustainability and Corporate Responsibility Committee of the Board of Directors of McDonald's Corporation*, McDonalds Corp., Jan. 9, 2014, <http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/Human%20Rights.pdf>, archived at <https://perma.cc/QN4Y-XMBR?type=pdf> (last visited Aug. 7, 2015); *Corporate Citizenship*, Microsoft, <http://www.microsoft.com/about/corporatecitizenship/en-us/working-responsibly/principled-business-practices/human-rights/>, archived at <http://perma.cc/EVJ3-H2KK> (last visited Aug. 7, 2015); and P&G Corporate Newsroom *A Renewed Commitment to Respect Human Rights*, Procter & Gamble, (Apr. 21, 2014, 2:33 PM) <http://news.pg.com/blog/social-responsibility/renewed-commitment-respect-human-rights>, archived at <http://perma.cc/MN33-JNEF>.
- 11 Guiding Principles, *supra* note 9 at 14.
- 12 *Id.* at 17.
- 13 *Id.* at 19.
- 14 *Id.* at 22.
- 15 *Id.*
- 16 Laurie Kulikowski, *Will These 10 NFL Sponsors Quit Funding Football Over Domestic Violence?*, Street (Sept. 24, 2014, 2:04 PM), <http://www.thestreet.com/story/12885981/1/10-nfl-sponsors-upset-over-the-handling-of-domestic-abuse-scandals.html>, archived at <http://perma.cc/5P8L-9KFN> (discussing statements by ten NFL sponsors expressing disappointment, including Anheuser-Busch, General Motors, Verizon, USAA, McDonald's, Pepsi, Bose, FedEx, Marriott and Campbell Soup).
- 17 *See* Michael David Smith, *Anheuser-Busch Disappointed, Concerned, Dissatisfied With NFL*, ProFootballTalk (Sept. 16, 2014, 3:47 PM), <http://profootballtalk.nbcsports.com/2014/09/16/anheuser-busch-disappointed-concerned-dissatisfied-with-nfl/>, archived at <http://perma.cc/4G5C-6FFN>; Juliet Macur, *Time for N.F.L. Sponsors to Demand Change*, N.Y. Times, Feb. 14, 2014, <http://www.nytimes.com/2014/02/15/sports/football/time-for-nfl-sponsors-to-demand-change.html>, archived at <https://perma.cc/PC9J-5PMF?type=pdf>.
- 18 *See* Kulikowski, *supra* note 16 (Anheuser-Busch stating that the players' actions "so clearly go against our own company culture and moral code."; USAA stating: "USAA's founding values of service, loyalty, honesty and integrity will always govern how we ultimately move forward, and we've made this clear to the NFL."; PepsiCo CEO Indra Nooyi stating: "Given PepsiCo's long-standing partnership with the NFL, I know Roger Goodell. We have worked together for many years. I know him to be a man of integrity, and I am confident that he will do the right thing for the league in light of the serious issues it is facing.").
- 19 *See* The Clif Bar Team, *A Letter to the Climbing Community*, Clif Bar, <http://www.clifbar.com/text/a-letter-to-the-climbing-community> (last visited Aug. 14, 2015), archived at <http://perma.cc/NA9L-QSKN>; John Branch, *A Sponsor Steps Away From the Edge*, N.Y. Times, Nov. 14, 2014, <http://www.nytimes.com/2014/11/16/sports/clif-bar-drops-sponsorship-of-5-climbers-citing-risks-they-take.html>, archived at <https://perma.cc/7TFM-UK3V?type=pdf>.
- 20 SportsBusiness Journal, in conjunction with Turnkey Sports & Entertainment, conducts an annual poll measuring fans' ability to correctly identify a league's official sponsor in various categories as opposed to a competing brand. *See* David Broughton, *Awareness up across the board for sponsors*, Sports Bus. Daily (June 16, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/06/16/Research-and-Ratings/NHL-Sponsor-Loyalty.aspx>, archived at <http://perma.cc/6VKS-DWX8>.





Part 7: **Other Interested Parties**



NCAA



Youth
Leagues



Government



Workers'
Comp.
Attys



Health-
related
Companies

As described in the Introduction to this Report, the stakeholders analyzed were: those that as individuals, groups, and organizations *directly impact* player health, for example, as employers or caregivers; those who *reap substantial financial benefits* from players' work; and/or those who have some *capacity to influence* player health. Additionally, as described in depth in the Introduction and throughout this Report, we are generally focused on current players.

Nevertheless, there are a variety of parties that do not fit well into the criteria outlined above but have some role in NFL player health. In particular, some have more direct roles in the health of future or former players. And while the roles of these parties are not as integral as the stakeholders already discussed, they still merit identification and discussion. These other parties that have at least some role in NFL player health are: (a) the National Collegiate Athletic Association (NCAA); (b) youth leagues; (c) governments; (d) workers' compensation attorneys; and, (e) health-related companies. Additionally, these parties should consider the recommendations in this Report and how they might be applied to their environment. For example, the NCAA should strongly consider our recommendations concerning improvements to the structure of player healthcare.

1) THE NCAA

The NCAA is a non-profit unincorporated association headquartered in Indianapolis through which the nation's colleges and universities govern their athletic programs. The NCAA consists of more than 1,200 member institutions, all of which participate in the creation of NCAA rules and voluntarily submit to its authority.¹ The NCAA's member institutions hire a President to oversee its affairs, currently Mark Emmert, formerly the President of the University of Washington.

The NCAA is divided into three Divisions (I, II, and III) depending on the size, resources, and number of sports teams of the schools, with Division I being the largest and Division III being the smallest. When it comes to football, Division I is further divided between the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). FBS schools are the largest schools with the greatest financial and physical resources. In 2015, there were 125 schools playing in the FBS and 127 schools playing in the FCS.²

Due to the NFL's requirement that a player be at least three years removed from his high school graduation before he is eligible for the NFL Draft,³ almost all NFL players played

college football at an NCAA Division I member institution.^a A handful of players come from Division II or III schools, international schools, or played for a college that is a member of the National Association of Intercollegiate Athletics, the NCAA's significantly smaller alternative.

Because the NCAA governs college football, it, its member institutions, and employees of member institutions have important legal and ethical obligations to current football student-athletes. In many respects, those obligations might track the obligations of the NFL, NFL clubs, and NFL club employees discussed herein.^b However, those responsibilities largely if not entirely disappear once a player leaves an NCAA member institution. Thus, the NCAA generally has no current legal or ethical obligations toward current NFL players.

Nevertheless, the NCAA is an important and powerful component of the football ecosystem. The NCAA's member institutions, for better or worse, serve as the training ground for many NFL players, coaches, doctors, athletic trainers, and others working in the NFL. It is at these member institutions where policies and practices are learned and become part of the football culture.

It is perhaps thus not surprising that the NCAA, like the NFL, has faced litigation concerning concussions. In 2013, multiple lawsuits brought by student-athletes alleging that the NCAA had failed to institute appropriate safeguards concerning concussions were consolidated in the United States District Court for the Northern District of Illinois.⁴ In October 2014, the parties reached a proposed settlement that included: (a) \$70 million in a medical monitoring fund whereby former student-athletes could obtain medical evaluations concerning possible medical problems related to concussions; (b) \$5 million for concussion-related research; and, (c) revised concussion protocols by the NCAA.⁵ The court rejected the initial settlement on several procedural grounds, including that the class was not sufficiently represented by former student-athletes and those that played non-contact sports.⁶ In April 2015, the parties submitted a revised proposed settlement agreement resolving the procedural issues but which did not change the financial

a FBS team rosters are limited to 105 student-athletes. NCAA Division I Manual § 17.10.2.1.2. FCS rosters are limited to 95 student-athletes. NCAA Division I Manual § 17.10.2.1.3. Thus, each year there are approximately 25,000 student-athletes playing Division I college football. According to the NCAA, only 1.6 percent of all Division I football student-athletes will ever play professionally. Jake New, *A Long Shot*, Inside Higher Ed, Jan. 27, 2015, <https://www.insidehighered.com/news/2015/01/27/college-athletes-greatly-overestimate-their-chances-playing-professionally>, archived at <https://perma.cc/MR9S-DZ7A>.

b A key distinction is that generally student-athletes are not considered employees of the institution. See Steven L. Wilborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. Miami L. Rev. 65 (2014).

components of the settlement.⁷ In January 2016, the Court approved the settlement.^{8,c}

The principal document governing intercollegiate athletics and setting forth relevant policies is the NCAA's Division I Manual, a complex set of thousands of rules. The Manual covers topics such as, but not limited to, ethical conduct, conduct and employment of athletics personnel, amateurism and athletics eligibility, recruiting, financial aid, scholarships, playing and practice seasons, championships, and enforcement.

The Division I Manual includes several provisions related to the health of student-athletes. In Section 2.2, entitled "The Principle of Student-Athlete Well-Being," the Division I Manual declares that "[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes."⁹ Section 2.2 goes on to list and describe several principles relevant to student-athlete health, including: overall educational experience; cultural diversity and gender equity; health and safety; student-athlete/coach relationship; fairness, openness and honesty; and, student-athlete involvement. Moreover, in 2010, the Division I Manual was amended to require each member institution to create a concussion management plan for its student-athletes.¹⁰

The NCAA has recently made additional important progress on player health issues. In January 2014, the NCAA hosted a Safety in College Football Summit.¹¹ The stated purpose of "the summit was to bring together a multi-faceted group of experts who share a common interest in improving the culture of safety in intercollegiate sports in general, and football in particular."¹² The summit working group consisted of 65 people, including doctors, athletic trainers, NCAA officials and consultants, school athletic department officials, athletic conference officials, military officials, attorneys, and others.¹³ The summit resulted in "consensus guidelines for three paramount safety issues in intercollegiate athletics: (1) Independent medical care in the collegiate setting; (2) Concussion diagnosis and management; and (3) Football practice contact." These guidelines substantially supplement the Division I Manual and are an important step forward for the health of college football players.

In addition, the NCAA has a Committee on Competitive Safeguards and Medical Aspects of Sports, which monitors

student-athlete health and safety issues, and promulgates a Sports Medicine Handbook, which establishes requirements and guidelines regarding student-athlete health and safety issues.¹⁴

While the NCAA does not have direct dealings with current NFL players, many NFL players' health issues may stem (at least in part) from their collegiate careers and earlier. The NCAA's policies and practices influence and guide those playing or working in college football who might later play or work in the NFL. Additionally, the NCAA is a powerful organization and has the authority to influence positive policy and culture changes around player health. And similarly, the NCAA is likely to be influenced and affected by changes made at the NFL level. For these reasons, the NCAA is an interested and important party concerning the health of football players, particularly future players, and should strongly consider the recommendations made in this Report. At the same time, because of their overlapping interests, it is advisable for the NFL, the NCAA and youth leagues (discussed next) to discuss and create a bottom-up approach to solving many of the health and safety issues that impact football players at all levels.

2) YOUTH LEAGUES

Youth football leagues present important opportunities for children to learn and play the game of football. Even though the number of children who play youth football and who ultimately play in the NFL is infinitesimal,^d youth football is still almost always the first step in a future NFL player's career.

There are approximately 2.8 million children between the ages of 6 and 14 who play football each year.¹⁵ According to numerous media reports, this number has declined over the last decade,¹⁶ though the Sports & Fitness Industry Association (SFIA) found that participation in tackle football among individuals aged 6 and above increased from 2014 to 2015.¹⁷ Moreover, according to SFIA, 40 percent of adolescent boys play football, tied with basketball as the sport most likely to be played by young boys.¹⁸

These children play in hundreds of different leagues, the largest being Pop Warner.¹⁹ Pop Warner has a participation level of approximately 225,000 annually, and, reportedly, 60 to 70 percent of current NFL players began playing football in a Pop Warner league.²⁰ Most youth football

c The settlement did not preclude additional lawsuits against individual schools (as opposed to schools collectively in the form of the NCAA). As a result, new lawsuits were brought against individual schools. See Ben Strauss, *Six Concussion Suits Are Filed Against Colleges and N.C.A.A.*, N.Y. Times, May 17, 2016, http://www.nytimes.com/2016/05/18/sports/ncaafotball/six-head-injury-suits-filed-in-new-front-against-colleges-and-ncaa.html?_r=0, archived at <https://perma.cc/5JY5-VEZT>.

d According to the NCAA, of 1,093,234 high school football players in 2013–2014, only 6.5 percent of those players will play college football. *Research—Football*, NCAA (Feb. 25, 2015), <http://www.ncaa.org/about/resources/research/football>, archived at <http://perma.cc/73HT-TTLW>. And, of those that play college football, only 1.6 percent will play in the NFL. By multiplying the figures together, it appears that only about 1 in every 1,000 high school football players will reach the NFL.

leagues, including Pop Warner, are members of USA Football, a non-profit organization based in Indianapolis that acts as the sport's national governing body for youth football.²¹ USA Football is supported by or affiliated with the NFL, NCAA, National Federation of State High School Associations (NFHS), the American Football Coaches Association, and the five most powerful conferences in college football (ACC, Big 12, Big Ten, Pac-12 and SEC).²² Additionally, NFL Commissioner Roger Goodell sits on USA Football's Board of Directors.²³

While Pop Warner leagues govern children between the ages of 5 and 14, NFHS generally creates the rules for high school football. NFHS is an organization consisting of each of the 50 states' high school athletic associations,²⁴ and makes rules of play that are generally adopted by each of its members.²⁵ For example, NFHS' rules for football require all equipment meet the standards set forth by the National Operating Committee on Standards for Athletic Enforcement (NOCSAE),²⁶ as discussed in Chapter 16: Equipment Manufacturers.

Like the NFL, both Pop Warner and NFHS have many rules concerning player safety, some of which were added in recent years. For example, in 2010, Pop Warner instituted rules that required a player who may have a concussion to receive clearance from a doctor before he can return to play.²⁷ Then, in 2012, Pop Warner prohibited certain drills that cause helmet-to-helmet collisions and limited the amount of contact during practice to one-third of the practice time.²⁸ Similarly, in 2010, NFHS instituted rules requiring clearance by a doctor before a player suspected of having suffered a concussion can return to play.²⁹ Then, in 2016, Pop Warner banned kickoffs, believed to be the most dangerous play in the game.³⁰ Additionally, all youth leagues must comply with the Lystedt Laws, which are discussed below in the Government section.

Youth sports leagues can be held liable for the negligent actions of its employees when those employees are engaged in work on behalf of the league.³¹ However, youth sports leagues are sometimes protected by statutes that provide immunity to non-profit or volunteer organizations³² as well as the assumption of risk doctrine.³³ Similarly, while some state courts have found "that state high school athletic associations owe a duty of care to their participating athletes and that duty of care includes the responsibility to establish and enforce rules to protect the health and safety of participating athletes,"³⁴ high school athletic associations, which are often largely intertwined with the state government, may be protected, at least in part, by sovereign immunity laws.³⁵

The possibility of litigation and heightened scrutiny concerning player health has caused concerns for youth leagues. Pop Warner has faced multiple lawsuits from former players alleging they had suffered serious injuries as a result of playing Pop Warner football,³⁶ settling some for undisclosed sums.³⁷ Moreover, dwindling participation and cautious exclusion of potentially injured athletes has forced schools to forfeit games or give up the sport.³⁸ Finally, increased liability exposure has increased leagues' insurance premiums,³⁹ potentially threatening the financial viability of the leagues.⁴⁰

Despite decreasing participation, millions of children still play football. Consequently, youth football leagues remain important to both the game of football and those who play it.^e The youth leagues teach players how to play the game and how to play it safely and thus also promote lifelong interest in the game. For these reasons, many of the issues and recommendations discussed in this Report are relevant to youth leagues. And again, as recommended above, because of their overlapping interests, it is advisable for the NFL, the NCAA, and youth leagues to work together in addressing these issues.

3) GOVERNMENTS

The federal government has occasionally involved itself in professional sports. In 1961, Congress passed the Sports Broadcasting Act (at the NFL's prompting), which, among other things, immunizes the NFL, NBA, NHL, and MLB from the antitrust laws when the leagues want to collectively sell their television rights;⁴¹ in 1992, Congress passed the Professional and Amateur Sports Protection Act (again, at the NFL's prompting), a federal statute that generally forbids state-sponsored sports gambling;⁴² and, in the mid-2000s, Congress held a series of hearings concerning performance-enhancing drugs in sports.⁴³ Of most relevance, in 2007 Congress held hearings concerning retirement and disability benefits for former NFL players,⁴⁴ in 2009 held a hearing concerning concussions in the NFL,⁴⁵ and in 2016 held a hearing concerning concussions generally.⁴⁶

While Congress has never passed legislation specifically concerned with NFL player health, the possibility exists. Moreover, although governments' interest in sports is sporadic, the power that governments wield makes them a potentially powerful change agent. For example, shortly after the 2009 hearing, the NFL overhauled the Mild

e "The mission of Pop Warner . . . is to enable young people to benefit from participation in team sports and activities in a safe and structured environment." *The Pop Warner Mission*, Pop Warner Little Scholars, http://www.popwarner.com/About_Us/mission.htm (last visited Aug. 7, 2015), archived at <http://perma.cc/3UMX-YGGF>.

Traumatic Brain Injury (MTBI) Committee^f by removing its controversial leaders, renaming it the Head, Neck and Spine Committee, and appointing respected, independent neurosurgeons to lead the Committee and the NFL's research into concussions.⁴⁷

State governments have taken more action concerning football player health, focusing on youth football. Since youth football players have no sophisticated union to represent their interests, government actions to protect their health have been particularly important. The most important of these initiatives are known as “Lystedt Laws,” after Zackery Lystedt, who, as a 13-year old in October 2006, suffered brain hemorrhaging after he returned to a youth football game 15 minutes after having suffered a concussion.⁴⁸ Lystedt's experience left him in a coma for nine months, on a feeding tube for two years, and with severe physical disabilities.⁴⁹

In 2009, as a result of Lystedt's experience, Washington, Lystedt's home state, passed a law in his name that: (1) requires youth athletes suspected of having sustained a concussion or head injury in a practice or game to be removed from competition at that time; and, (2) prevents the youth athlete from returning to play “until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider.”⁵⁰ Soon, other states began passing similar legislation.

In 2010, NFL Commissioner Roger Goodell sent a letter to the Governors of 44 states that had not yet passed a version of the Lystedt Law, urging them to do so.^{51,52} In 2014, with the passage of the Mississippi Youth Concussion Act, all 50 states and the District of Columbia had passed a version of the Lystedt Law.⁵²

Nearly all states' Lystedt Laws also require concussion-related information to be provided to youth athletes.⁵³ Nevertheless, there is substantial variation in the laws concerning the content of the information and whether the athletes must acknowledge receipt of the information.⁵⁴ The content can vary concerning the nature of a concussion, the risks of a concussion, the risk of continued play after a suspected concussion, actions to be taken in response to a concussion, return to play guidelines, and the short- and long-term consequences of concussions.⁵⁵ Thirty-five states require that both the athlete and his or her parents acknowledge receipt of the information while an

additional eight states require only that the parent acknowledge receipt.⁵⁶

The application of the Lystedt Laws in the event of non-compliance is unclear. None of the state statutes provide for criminal or civil penalties.⁵⁷ In the only case to date concerning Washington's law, the court seemingly used the law as a guideline for determining whether the defendants were negligent. After briefly discussing the law's requirements, the court found that “[t]he Administrators and Coaches responsible for the football program . . . were not negligent in administering the eligibility requirements or monitoring the safety and health of the players on the team.”⁵⁸

Governments are appropriately aware of situations posing threats to the health of the public, including practices in particular industries. While any problems concerning NFL player health are generally best left to the collective bargaining process, it might be appropriate for the government to involve itself if the situation is particularly concerning. More importantly, governments can play a more robust role in changing the culture around football safety by protecting youth football players, some of whom are future NFL players.

4) WORKERS' COMPENSATION ATTORNEYS

As discussed in Chapter 8: NFL Clubs, NFL clubs' obligations to pay for workers' compensation benefits to players has been a contentious issue. Although the benefits a player might receive are quite small compared to the amounts he earned while playing, the player will have medical care stemming from a football-related injury covered for life. Workers' compensation attorneys are a crucial part of players receiving benefits to which they are entitled.

To assist NFL players with workers' compensation claims, the NFLPA makes available to players and their contract advisors a document describing the benefits claim process, benefits amount, and statutes of limitations. Additionally, the NFLPA has recommended workers' compensation attorneys in each city in which an NFL club plays (collectively, the “Panel”). The Panel consists of approximately 60 attorneys. Because players play in many states, they are often eligible for workers' compensation benefits in many states. The advantage of the Panel is coordination and communication (with the NFLPA's assistance) that permits a player to determine which state will provide the player with the best benefits. Finally, contract advisors are prohibited from referring a player to a workers' compensation attorney who is not a member of the Panel.⁵⁹

^f For more on the MTBI Committee, see Chapter 7: The NFL and NFLPA.

^g Dr. Richard Ellenbogen, Lystedt's treating physician and the co-chairman of the NFL Head, Neck and Spine Committee was also involved in the efforts to have the laws passed.

The Panel provides NFL players with easy access to attorneys experienced in workers' compensation and sensitive to the specific issues that might arise concerning NFL players. In addition, the Panel attorneys are generally the first to know of changes in the workers' compensation laws, whether by judicial decision or legislative action, and can alert the NFLPA accordingly.

Workers' compensation attorneys are also in a relatively unique position to judge a player's post-career health. Workers' compensation claims generally must be filed within 1 to 3 years from the date of injury. Professional football players are most likely to file claims for career-ending or threatening injuries when the likelihood of future compensation becomes less certain. Workers' compensation attorneys are thus likely working with players whose careers are about to end or have recently ended. Moreover, as part of the workers' compensation claim, the attorney will undoubtedly become familiar with the player's medical history and issues and the likely effect of those issues on the player's quality of life moving forward.

Many of the issues discussed in this Report potentially contribute and are relevant to workers' compensation claims. Consequently, workers' compensation attorneys' are well-versed in many of these issues. For these reasons, we believe it would help players and their health if workers' compensation attorneys reviewed this Report and considered the ways in which they can help improve player health.

5) HEALTH-RELATED COMPANIES

Many technology companies are creating biological and other health-related products principally geared towards a sports application. Some of these companies are working on biological technologies while others are working on genetic ones. Additional detail on these technologies and tests, and their legal and ethical implications as they relate to NFL players, are discussed at length in our forthcoming law review article, *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*.⁶⁰

Several companies are putting cutting-edge technology into devices that can generate a variety of biological data. For example, there are technologies that can be used to track player movement (Catapult Sports, Zebra Technologies), or measure the force exerted by players (Catapult Sports, PUSH, EliteForm), a player's readiness for practice or competition (Omegawave, BioForce HRV), a player's heart rate (Polar, Proteus Digital Health, BioForce HRV), the quality of a player's sleep (Fatigue Science), a player's body temperature (Proteus Digital Health, HQInc.), a player's hydration level (Atago), and head impacts (X2 Biosystems,

Riddell). Many of these products are already being utilized by NFL clubs.

As these technologies get smaller and smaller, and thus easier to incorporate into equipment, the trend will be toward more robust data generation and collection over time. In all of these situations, the companies are responding to market demands, including for technologies that can help athletes (professional and amateur) improve their performance and also those that can help athletes be healthier and safer. Recognizing that these demands are principal concerns of the NFL and many other powerful sports leagues provides strong economic incentives for the continued creation and expansion of biotechnologies.

Turning to products focused on genetics, a 2011 study in the *Journal of Personalized Medicine* found 13 companies providing sports-specific DNA tests or analyses to American consumers.⁶¹ The tests were given names such as "Sports DNA Test," "Sports X Factor Standard Panel," "Athletic Gene Test," "Sports Gene Test," and "Athletics Profile Test" and ranged in price from \$99 to about \$1,000.⁶² However, in August 2013, the Food and Drug Administration (FDA) ordered one of the leading companies offering sports-specific DNA tests, 23andMe, to stop advertising its genetic tests without authorization from the FDA.⁶³ At that time, the FDA had not developed any rules for direct-to-consumer (DTC) genetic testing. Thus, the FDA was concerned about whether the test was clinically validated and how consumers might interpret genetic test results provided to them.⁶⁴ Shortly thereafter, 23andMe and its American competitors ceased offering the DTC genetic tests.⁶⁵

The reliability of these genetic tests is suspect. A 2013 article summed up the state of research: "A favorable genetic profile, when combined with an optimal training environment, is important for elite athletic performance; however, few genes are consistently associated with elite athletic performance, and none are linked strongly enough to warrant their use in predicting athletic success."⁶⁶ This opinion is not uniformly held, and indeed a 2013 *Journal of Sports Medicine* article took an even dimmer view of the current science, arguing that: "Current genetic testing has zero predictive power on talent identification and should not be used by athletes, coaches or parents."⁶⁷

Nevertheless, interest in genetic testing in sports remains extremely high. Researchers and companies have claimed there are more than 200 genes associated with physical performance and that at least 20 of them might be tied to elite athletic performance.⁶⁸ In February 2015, 23andMe received FDA approval to begin marketing a genetic test designed to determine whether prospective parents carry

mutations that could cause a rare disorder known as Bloom syndrome in their children.⁶⁹ Thus, it seems likely that 23andMe and other American companies will seek or already are seeking FDA approval for sports-specific genetic tests.

Many of the issues discussed in this Report are decades old—ingrained in the culture and nature of the NFL. The health-related technology companies are an interesting component of the future of the NFL. Nevertheless, these technologies have the potential to be bad for players—by contributing to many of the problems discussed in this Report—or good for players—by using their technologies in ways that are principally designed to protect and promote player health. Health-related technologies can both contribute to many of the problems discussed in this Report and be used in ways that are principally designed to protect

and promote player health. Health-related technology companies should review the issues discussed in this Report and carefully consider what their role in player health will be moving forward.

Health-related technologies can both contribute to many of the problems discussed in this Report and be used in ways that are principally designed to protect and promote player health.



Endnotes

- 1 See *Who We Are*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/about/who-we-are> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/2S7M-GL89>; *Membership*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/about/who-we-are/membership> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/5J5P-RQ2V> (describing membership as more than 1,200 schools).
- 2 See *NCAA Members by Division*, <http://web1.ncaa.org/onlineDir/exec2/divisionListing> (last visited Aug. 7, 2015), *archived at* <https://perma.cc/EJP3-S2V4?type=pdf>.
- 3 See 2011 CBA, Art. 6 § 2(b).
- 4 See *In re: Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litigation*, 13-cv-9116, 2014 WL 7237208, *1-3 (N.D. Ill. Dec. 17, 2014) (discussing procedural history of case).
- 5 See *id.* at *3-4 (discussing terms of proposed settlement).
- 6 See *In re: Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litigation*, *supra* note 4, *6-10.
- 7 See Ben Strauss, *Former Player Opposes Settlement in N.C.A.A. Concussion Suit*, N.Y. Times, June 9, 2015, <http://www.nytimes.com/2015/06/10/sports/football/former-player-opposes-settlement-in-ncaa-concussion-suit.html>, *archived at* <https://perma.cc/WE4D-7JJR?type=source>.
- 8 *In re: Nat'l Collegiate Ath. Ass'n Student-Athlete Concussion Injury Litigation*, 13-cv-9116, 2016 WL 305380 (N.D. Ill. Jan. 26, 2016).
- 9 NCAA Division I Manual at § 2.2.
- 10 See *id.*
- 11 *Health and Safety—Appendix*, Nat'l Collegiate Athletic Ass'n, <http://www.ncaa.org/health-and-safety/appendix> (last visited Apr. 30, 2015), *archived at* <http://perma.cc/9XSN-6RZ6>.
- 12 *Id.*
- 13 *Id.*
- 14 *Committee on Competitive Safeguards and Medical Aspects of Sports*, NCAA, <http://www.ncaa.org/governance/committees/committee-competitive-safeguards-and-medical-aspects-sports> (last visited Dec. 11, 2015), *archived at* <https://perma.cc/785B-5WDV?type=source>.
- 15 Steve Fainaru & Mark Fainaru-Wada, *Youth Football Participation Drops*, ESPN (Nov. 14, 2013), http://espn.go.com/espn/otl/story/_/page/pop-warner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor, *archived at* <http://perma.cc/FHB7-ZU5C>.
- 16 See *id.* (discussing Pop Warner's reported 6.7-percent decline in participation from 2010 to 2011 and 4.0-percent decline from 2011 to 2012); Neil Paine, *Fewer Kids Are Playing Football, But Mark Cuban Might Be Wrong About Why*, FiveThirtyEight (Mar. 25, 2014, 4:37 PM), <http://fivethirtyeight.com/datalab/fewer-kids-are-playing-football-but-mark-cuban-might-be-wrong-about-why/>, *archived at* <http://perma.cc/22EQ-XB8X> (discussing a Wall Street Journal study that found a 5.4% decline in youth football between 2008 and 2014); Bob Cook, *Why Is Football Participation Declining? The Answer Isn't Concussions*, Forbes, Nov. 26, 2013, <http://www.forbes.com/sites/bobcook/2013/11/26/why-is-football-participation-declining-the-answer-isnt-concussions/>, *archived at* <https://perma.cc/Y9C9-X579?type=image> (discussing a National Sporting Goods Association report finding a 13% decline from 2011 to 2012).
- 17 *Date Shows Team Sports Participation Increased in '15, Including Hoops, Football*, Sports Business Daily (Mar. 10, 2016), <http://www.sportsbusinessdaily.com/Daily/Issues/2016/03/10/Research-and-Ratings/SFIA.aspx>, *archived at* <https://perma.cc/PQ86-E29E>.
- 18 Bruce Kelley & Carl Carchia, *Hey, Data Data—Swing!* ESPN (Jul. 16, 2013), http://espn.go.com/espn/story/_/id/9469252/hidden-demographics-youth-sports-espn-magazine, *archived at* <http://perma.cc/TQ4P-TUQG>.
- 19 Fainaru & Fainaru-Wada, *supra* note 15.
- 20 See *id.*
- 21 *USA Football*, USA Football, <http://usafootball.com/about-us> (last visited Aug. 7, 2015), *archived at* <http://perma.cc/V48Q-37P6>.
- 22 *Id.*
- 23 *Directory*, USA Football, http://usafootball.com/contact_us (last visited Aug. 7, 2015), *archived at* <http://perma.cc/R4W8-K3D7>.
- 24 *About Us*, Nat'l Fed'n State High Sch. Ass'ns, <http://www.nfhs.org/who-we-are/aboutus> (last visited Apr. 30, 2015), *archived at* <http://perma.cc/2FWC-LURF>.
- 25 *Id.*
- 26 See *Football Rules Book*, Nat'l Fed'n State High Sch. Ass'ns (2012), <http://goodofficials.files.wordpress.com/2012/08/2012-football-rules2.pdf>, *archived at* <https://perma.cc/93Y8-A4LQ?type=pdf> (containing multiple provisions requiring equipment meet NOCSAE standards).
- 27 Bill Brink, *Pop Warner Football Issues Strict Rules on Concussions*, Pittsburgh Post-Gazette, Nov. 19, 2010, available at 2010 WLNR 23068024.
- 28 *Limited Contact in Practice Rule*, Pop Warner Little Scholars, http://www.popwarner.com/safety/practice_contact.htm (last visited Aug. 7, 2015), *archived at* <http://perma.cc/8XUX-PW7A>.
- 29 *—11 NFHS Rule Book Changes on Concussion*, Nat'l Fed'n State High Sch. Ass'ns, http://www.fhsaa.org/sites/default/files/orig_uploads/health/pdf/concussion.pdf (last visited Aug. 7, 2015), *archived at* <https://perma.cc/LRZ8-3SEL?type=pdf>.
- 30 Ken Belson, *Pop Warner Bans Kickoffs in Hopes of Protecting Its Youngest Players*, N.Y. Times, May 12, 2016, <http://www.nytimes.com/2016/05/13/sports/football/pop-warner-bans-kickoffs-concussions-nfl.html>, *archived at* <https://perma.cc/U52D-GBRK>.
- 31 Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussion in Youth Athletes and the Related Legal Issues*, 21 Marq. Sports L. Rev. 241, 260–68 (2010) (discussing liability of youth sports leagues).
- 32 Thomas A. Baker, Daniel P. Connaughton, & James J. Zhang *An Examination of Immunity Statutes Regarding the Liability of Recreational Youth Sport Organizations for the Pedophilic Actions of Coaches, Administrators, and Officials*, 5 J. Int'l Council for Health, Physical Educ., Recreation, Sport & Dance 54 (2010).
- 33 Wilson, *supra* note 31 at 260–68.
- 34 *Id.* at 263.
- 35 See *Isler v. New Mexico Activities Ass'n*, 893 F. Supp. 2d. 1145 (D.N.M. 2012) (state high school athletic association entitled to immunity); *University Interscholastic League v. Southwest Officials Ass'n, Inc.*, 319 S.W.3d 952 (Tex. App. 2010) (same); *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) (same); *Coughlon v. Iowa High School Athletic Ass'n*, 150 N.W.2d 660 (Iowa 1967) (same). *But see* *Wissel v. Ohio High School Athletic Association*, 605 N.E.2d 458 (Ohio Ct. App. 1992) (state high school athletic association not entitled to sovereign immunity).
- 36 See *Complaint*, *Pyka v. Pop Warner Little Scholars, Inc.*, 15-cv-57 (Feb. 5, 2015), ECF No. 1; Ken Belson, *Family Sues Pop Warner Over Suicide of Player Who Had Brain Disease*, N.Y. Times, Feb. 5, 2015, <http://www.nytimes.com/2015/02/06/sports/family-of-player-with-cte-who-killed-himself-sues-pop-warner.html>, *archived at* <https://perma.cc/YF26-F4ER>; Trial Order, *Dixon v. Pop Warner Little Scholars, Inc.*, No. BC526842, 2015 WL 9583749 (Sup. Ct. Dec. 22, 2015) (tentative ruling denying Pop Warner's motion for summary judgment in case brought by former player).
- 37 See Michael Martinez, *Pop Warner settles concussion suit filed by former player who committed suicide*, CNN (Mar. 9, 2016, 3:54 PM), <http://www.cnn.com/2016/03/09/us/pop-warner-concussion-lawsuit-settlement-player-suicide/>, *archived at* <https://perma.cc/9GBA-VAKK>;

- Stipulation of Dismissal With Prejudice, *Pyka v. Pop Warner Little Scholars, Inc.*, 15-cv-57 (Mar. 10, 2016), ECF No. 54.
- 38 John Branch & Billy Witz, *Injury Lists Grow Longer, and High School Seasons Are Cut Short*, Oct. 29, 2014, <http://www.nytimes.com/2014/10/30/sports/football/football-injuries-lead-to-steady-stream-of-high-school-forefeitures.html>, archived at <https://perma.cc/82JC-NU7R?type=pdf>.
- 39 Ken Belson, *Concussion Liability Costs May Rise, and Not Just for N.F.L.*, N.Y. Times, Dec. 10, 2012, <http://www.nytimes.com/2012/12/11/sports/football/insurance-liability-in-nfl-concussion-suits-may-have-costly-consequences.html>, archived at <https://perma.cc/739V-3QGN?type=pdf>.
- 40 See Kevin Brandwein, *Goals and Obstacles in Legislating Concussion Management in Youth Sports*, 10 Willamette Sports L.J. 28, 38 (2013) (collecting and discussing news articles arguing that increased insurance premiums threaten football leagues).
- 41 U.S.C. §§1291-1295 (1961).
- 42 U.S.C. § 3702. See also Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 Cardozo Arts & Ent. L.J. 569 (2013) (discussing, among other things, PASPA's history and the NFL's involvement).
- 43 NFL Commissioner Paul Tagliabue and NFLPA Executive Director Gene Upshaw were forced to appear in front of the House Government Reform Committee in April 2005. Jarrett Bell, *NFL Touts Tweaks to Drug Policy*, USA Today, Apr. 28, 2005, available at 2005 WLNR 6652843, and the House Energy and Commerce Committee in May 2005, concerning performance-enhancing drugs; Leonard Shapiro, *Leagues Draw Praise, Rebuke; Congress Says NFL Is 'Excellent' on Drug Policy, but NBA Is 'Weak'*, Wash. Post, May 20, 2005, available at 2005 WLNR 27746472.
- 44 See Paul Daugherty, *NFL No Match For Aging Ex-Players*, Cincinnati Enquirer, June 28, 2007, available at 2007 WLNR 27417382 (describing June 26, 2007 hearing before the House Judiciary Committee); Greg Johnson, *NFL Admits to Flaws in Pension System*, L.A. Times, Sept. 19, 2007, available at 2007 WLNR 18319286 (describing September 19, 2007 hearing before the Senate Commerce Committee).
- 45 See Wayne Coffey, *Goodell, NFL Grilled Over Concussions*, N.Y. Daily News, Oct. 29, 2009, available at 2009 WLNR 21575530 (describing October 29, 2009 hearing before the House Judiciary Committee).
- 46 Broad Review of Concussions: Initial Roundtable Before the House Committee on Energy, Commerce, Oversight and Investigations, 114th Congress (2016).
- 47 See Mark Fainaru & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 279–88 (2013).
- 48 Chantal Anderson, *State Lawmakers Approve Concussion Bills for Young Athletes*, Seattle Times, Mar. 11, 2009, available at 2009 WLNR 4637806.
- 49 Sheila Mickool, *The Story Behind the Zackery Lystedt Law*, Seattle Mag., Fall/Winter 2012, <http://www.seattlemag.com/article/story-behind-zackery-lystedt-law>, archived at <http://perma.cc/3KLL-KWYY>.
- 50 Wash. Rev. Code § 28A.600.190.
- 51 *NFL's Goodell Urges States to Adopt Concussion Law*, Ottawa Citizen (Canada), May 24, 2010, available at 2010 WLNR 26175330.
- 52 Nat'l Football League, 2014 Player Health & Safety Report 11 (2014), <http://www.nflevolution.com/healthandsafetyreport/>, archived at <http://perma.cc/TPR2-5DE9>.
- 53 Christine M. Baugh et al., *Requiring Athletes to Acknowledge Receipt of Concussion-Related Information and Responsibility to Report Symptoms: A Study of the Prevalence, Variation, and Possible Improvements*, 42 J. L., Med., & Ethics 297, 299 (2014) (explaining that Colorado, Connecticut, Mississippi, and New Hampshire are the only states that do not require the dissemination of such information).
- 54 *Id.*
- 55 *Id.*
- 56 *Id.*
- 57 Phoebe Anne Amberg, *Protecting Kids' Melons: Potential Liability and Enforcement Issues with Youth Concussion Laws*, 23 Marq. Sports L. Rev. 171, 183 (2012).
- 58 *Ingram v. U.S.*, 12-cv-5892, 2014 WL 934363 (W.D.Wash. Mar. 10, 2014).
- 59 NFLPA Regulations, § 3(B)(28).
- 60 Jessica L. Roberts, et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, U. Penn. L. Rev. (forthcoming 2017).
- 61 Jennifer K. Wagner & Charmaine D. Royal, *Field of Genes: An Investigation of Sports-Related Genetic Testing*, 12 J. Pers. Med. 119 (2012) (the companies identified were: 23andMe, Inc.; Advanced Health Care Inc.; American International Biotechnology Services; Asper Bio Tech; Athleticcode, Inc.; Atlas Sports Genetics, LLC; Cosmetics DNA; CyGene Direct; DNA4U; Family Tree DNA; Genetic Technologies Limited; My Gene; and, Warrior Roots).
- 62 *Id.*
- 63 George J. Annas & Sherman Elias, *23andMe and the FDA*, 370 N. Engl. J. Med. 985 (2014).
- 64 *Id.*
- 65 *Id.* It was determined that 23andMe's American competitors ceased offering DTC genetic tests by attempting to visit their websites. Specifically, Warrior Gene, Athleticcode, Inc. and Cygene Direct no longer offer their sports-specific genetic tests.
- 66 Lisa M. Guth & Stephen M. Roth, *Genetic Influence on Athletic Performance*, 25 Curr. Opin. Pediatr. 653 (2013).
- 67 Yannis Pitsiladis et al., *Genomics of Elite Sporting Performance: What Little We Know and Necessary Advances*, 47 Br. J. Sports Med. 550 (2013).
- 68 *Id.*
- 69 Andrew Pollack, *F.D.A. Reverses Course on 23andMe DNA Test in Move to Ease Restrictions*, N.Y. Times, Feb. 19, 2015, http://www.nytimes.com/2015/02/20/business/fda-eases-access-to-dna-tests-of-rare-disorders.html?_r=0, archived at <https://perma.cc/9ER6-UQTW?type=pdf>.

Conclusion

We began this Report by explaining the pressing need for research into the overall health of NFL players; the need to address player health from all angles, both clinical and structural; and, the challenges presented in conducting such research and analysis. The issues and parties involved are numerous, complex, and interconnected. To address these issues—and ultimately, to protect and improve the health of NFL players—requires a diligent and comprehensive approach to create well-informed and meaningful recommendations for change. This has been precisely the focus of this Report.

We examined the wide variety of stakeholders in NFL player health and addressed the pertinent legal and ethical issues. Beginning with interviews of various stakeholders, we also took care to subject the Report to review by expert peer reviewers, our own Law & Ethics Advisory Panel, and the stakeholders themselves. Only by undertaking such a thorough approach is it possible to abide by our commitment to make realistic ethical and policy recommendations that can advance player health.

Nevertheless, our recommendations are only as useful as their implementation. For this reason, we make the following final recommendations.

Final Recommendation 1: The NFL, NFLPA and other stakeholders should actively engage with and publicly respond to this Report.^a

We recognize that analyzing and implementing (or not) the recommendations contained in this Report will be complicated and challenging. Nevertheless, it is important that the stakeholders (particularly the NFL and NFLPA) take proactive steps to fulfill their respective and shared responsibilities for player health. We think a useful first step in that process is to review and publicly respond to this Report in such a way that demonstrates the steps they will take to fulfill their obligations as described herein.

As discussed in the Section: Ensuring Independence and Disclosure of Conflicts, we invited both the NFLPA and NFL to write a response to this Report, which we offered to publish on The Football Players Health Study website alongside the Report. The NFL took us up on this offer while the NFLPA did not.^b While the NFL may disagree with us on certain issues, we nonetheless appreciate the time it took in reviewing our Report and providing a response. We remain hopeful that the NFL will engage with this Report and other stakeholders to implement our recommendations for improving player health. Similarly, although the NFLPA declined to write a response, we remain hopeful that the NFLPA will engage with this Report and other stakeholders to implement our recommendations for improving player health.

^a We recognize that certain stakeholders might not have a clearly defined representative to respond to this Report, such as second opinion doctors, family members, and fans. Nevertheless, we urge individuals within these stakeholder groups to engage with the Report and welcome their responses.

^b In declining the opportunity to write a response, the NFLPA stated as follows: “[O]ur primary objective in funding Harvard is to advance independent research on the many complex issues facing our members. Harvard’s publications further that objective without formal comment by the PA.”

Final Recommendation 2: The stakeholders identified in this Report, media, academics, and others should actively advocate, encourage, and monitor the promotion of player health.

Following this Report, we do not intend to be a passive voice in the process of improving player health. It is our hope to be able to periodically review the progress of the stakeholders in improving player health, and provide additional reports. However, in addition to any progress reports from the authors of this Report or The Football Players Health Study at Harvard University, we urge and trust that others, in particular the stakeholders themselves, will heed the messages in this Report and hold other stakeholders accountable.

The stakeholders' efforts to protect and promote player health would almost certainly be aided by communication and collaboration. Thus, when possible, the stakeholders should engage with one another to consider the issues discussed in this Report and consider actions to be taken.

Final Recommendation 3: As recommended throughout the Report, various stakeholders (e.g., club doctors, athletic trainers, coaches, contract advisors, and financial advisors) should adopt, improve and enforce Codes of Ethics.

Many of the stakeholders discussed in this Report have some form of an existing Code of Ethics that potentially regulates their interactions with players, including club doctors, athletic trainers, second opinion doctors, neutral doctors, personal doctors, coaches, equipment managers, contract advisors, financial advisors, and the media. These Codes of Ethics seem to have varying degrees of strength and record of enforcement, and thus have varying degrees of usefulness to players. There are important changes that need to be made to some of these Codes of Ethics. We have recommended that both the NFL Physicians Society (Recommendation 2:1-B) and NFL Coaches Association (9:1-A) adopt Codes of Ethics responsive to the unique circumstances of their employment in the NFL. We have also recommended that the Professional Football Athletic Trainers Society substantially amend its Code of Ethics to better reflect athletic trainers' obligations to players (3:1-B). In addition, we have recommended that substantial changes be made to the NFLPA's regulations governing contract advisors (12:2-A, 12:2-D, 12:2-E) and the NFLPA's regulations governing financial advisors (13:1-B). These changes are important steps these stakeholders can take in protecting and promoting player health.

In addition, enforcement is essential. Violations of a professional code of ethics should include meaningful punishments, ranging from warnings and censures to fines and suspensions. In order to be effective, the enforcement and disciplinary schemes for some of these stakeholders might need to be included in the CBA.

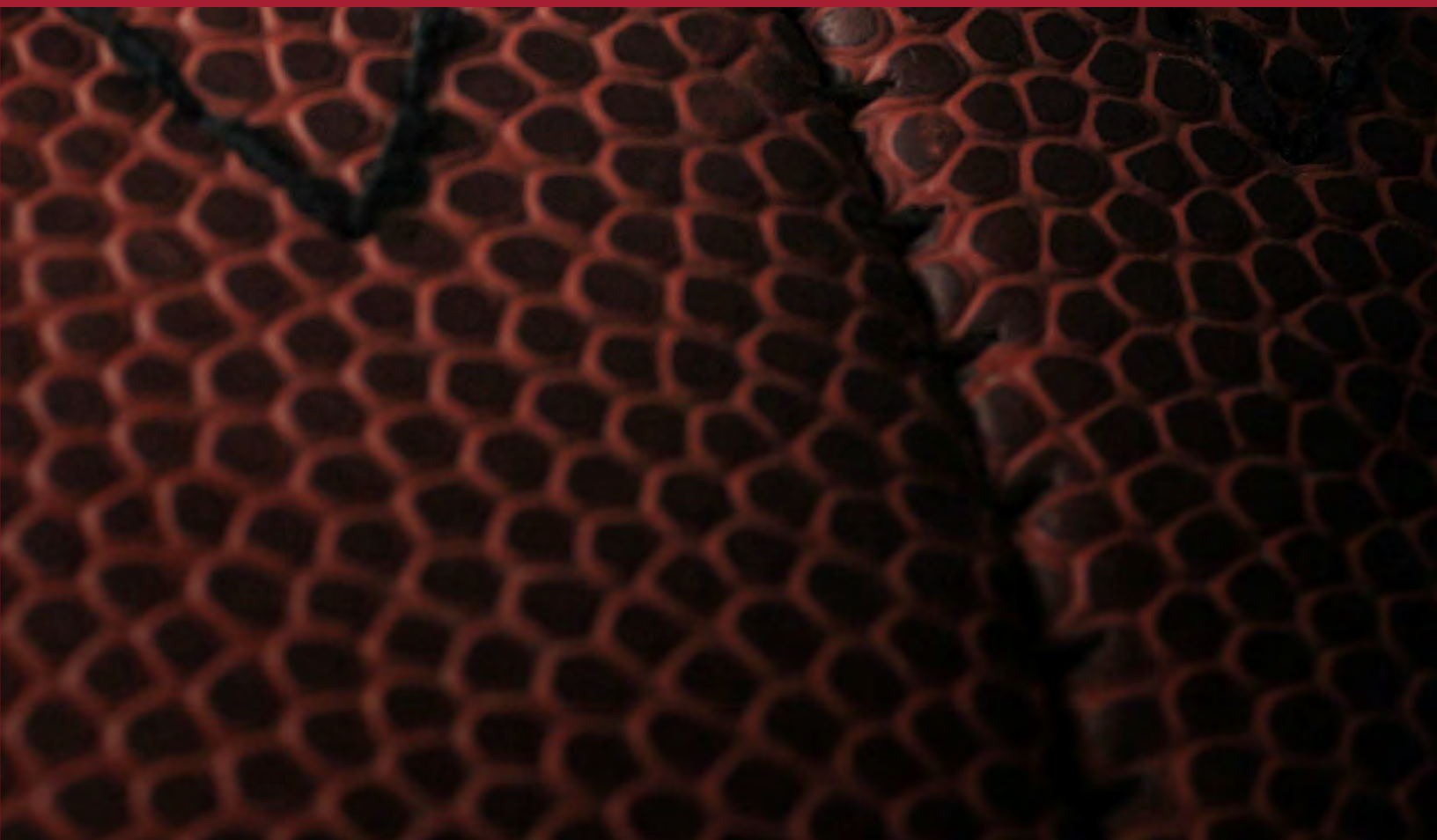
* * *

NFL football has a storied history and holds an important place in this country. The men who play it deserve to be protected and have their health needs met and it is our fervent hope that the health needs of these men will be met. We hope this Report succeeds in furthering that cause.





Appendices



APPENDIX A \ Concussion Protocol



NFL Head, Neck and Spine Committee's Protocols Regarding Diagnosis and Management of Concussion

Introduction

Concussion is an important injury for the professional football player, and the diagnosis, prevention, and management of concussion is important to the National Football League, its players and member Clubs, and the National Football League Players Association. The NFL's Head, Neck and Spine Committee has developed a comprehensive set of protocols with regard to the diagnosis and management of concussions in NFL players.

The diagnosis and management of concussion is complicated by the difficulty in identifying the injury as well as the complex and individual nature of managing this injury. Ongoing education of players, NFL team physicians and athletic trainers regarding concussion is important, recognizing the evolving advances in concussion assessment and management. The objective of these protocols is to provide medical staffs responsible for the health care of NFL players with a process for diagnosing and managing concussion.

Concussion Defined: For purposes of these protocols, the term *concussion* is defined as (reference McCrory et al BJSM '13): A complex pathophysiological process affecting the brain induced by biomechanical forces. Several common features that incorporate clinical, pathologic and biomechanical injury constructs that may be utilized in defining the nature of a concussive head injury include:

1. Concussion may be caused either by a direct blow to the head, face, neck or elsewhere on the body with an "impulsive" force transmitted to the head.
2. Concussion typically results in the rapid onset of transient impairment of neurologic function that resolves spontaneously. However, in some cases, symptoms and signs may evolve over a number of minutes to hours.
3. Concussion may result in neuropathological changes, but the acute clinical symptoms largely reflect a functional disturbance rather than a structural injury and, as such, no abnormality is seen on standard structural neuroimaging studies.
4. Concussion results in a graded set of clinical symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive symptoms typically follows a sequential course; however, it is important to note that, in some percentage of cases, post-concussive symptoms may be prolonged.

Potential Concussion Signs (Observable)

- Any loss of consciousness;
- Slow to get up following a hit to the head (“hit to the head” may include secondary contact with the playing surface);
- Motor coordination/balance problems (stumbles, trips/falls, slow/labored movement);
- Blank or vacant look;
- Disorientation (e.g., unsure of where he is on the field or location of bench);
- Clutching of head after contact;
- Visible facial injury in combination with any of the above.

Potential Concussion Symptoms (Player reported, following direct or indirect contact)

- Headache;
- Dizziness;
- Balance or coordination difficulties;
- Nausea;
- Amnesia for the circumstances surrounding the injury (i.e., retrograde/antegrade amnesia);
- Cognitive slowness;
- Light/sound sensitivity;
- Disorientation;
- Visual disturbance;
- Tinnitus.

NFL Sideline Concussion Assessment:

The NFL Sideline Concussion Assessment is the standardized acute evaluation that has been developed by the NFL’s Head Neck and Spine Committee to be used by team’s medical staffs to evaluate potential concussions during practices and on game day. This evaluation is based on the Standardized Concussion Assessment Tool (SCAT2) published by the Concussion in Sport Group (McCrory ‘09), modified for use in the NFL in 2011, and consistent with the SCAT3 published in 2013 by the same international Concussion in Sport Group (McCrory ‘13) (Attachment A). The NFL Sideline Concussion Assessment can be used to aide in the diagnosis of concussion even if there is a delayed onset of symptoms. The NFL Sideline Concussion Assessment is also designed for serial testing, which allows it to be used across multiple occasions to track player recovery. Clubs shall maintain all NFL Sideline Concussion Assessment exams and a copy of the same shall be given to both the player and the team medical staff.

Being able to compare the results from the Sideline Concussion Assessment to the baseline information obtained in the preseason improves the value of this instrument. In all circumstances, the Team Physician or other physician designated by the Team Physician (e.g. neurosurgeon or Neurotrauma Consultant) shall assess the player in person. The Team Physician shall be responsible for determining whether the player is diagnosed as having a concussion

APPENDIX B \ Summary Of Health-Related Changes To The Collective Bargaining Agreements

Note: The below summaries represent our efforts to identify and describe those changes to the collective bargaining agreements (CBAs) that we believe affected player health as defined in this Report, but the summaries are not necessarily exhaustive.

CBA NUMBER: ONE

Date of Execution: November 20, 1968

Effective Begin Date: July 15, 1968

Effective End Date: February 1, 1970

Changes to Player Health Provisions:

1. Creation of "Bert Bell NFL Player Retirement Plan and Trust Agreement" ("Retirement Plan").
2. Creation of Group Medical Insurance policy.
3. Creation of Injury Grievance mechanism.
4. Creation of provision requiring clubs to provide worker's compensation benefits.
5. Creation of Injury Protection benefit.

CBA NUMBER: TWO

Date of Execution: March 29, 1971

Effective Begin Date: February 1, 1970

Effective End Date: January 31, 1974

Changes to Player Health Provisions:

1. Injury Grievances: Added impartial arbitration process; clarified filing and hearing process.
2. Creation of Disability Benefits plan.
3. Creation of Life Insurance policy.
4. Creation of Dental Benefits program for players and their families.
5. Off-Season Workouts: Parties "agree that no veteran player shall be required to perform any activities relating to professional football during the off-season except on a voluntary basis."

CBA NUMBER: THREE

Date of Execution: March 1, 1977

Effective Begin Date: February 1, 1974

Effective End Date: July 15, 1982

Changes to Player Health Provisions:

1. Retirement/Pension Plan: Vesting requirement reduced from five to four Credited Seasons for players who achieve fourth Credited Season in 1974 or later.
2. Group Medical Insurance: Major medical coverage increased to \$250,000. Eighty percent of the first \$3,000 and 100 percent of the excess eligible medical expenses will be reimbursed.
3. Disability Benefits: Benefits increased to \$1,000/month for football injuries and \$500/month for non-football injuries + \$50/month for each dependent child.
4. Life Insurance: Coverage increased to \$30,000 for rookies and an additional \$5,000 per year for each Credited Season up to \$50,000.
5. Dental Benefits: Coverage increased to \$1,000 per year and orthodontics coverage added.
6. Off Season Workouts: Each club can hold one mandatory off-season training camp for veteran players which cannot exceed three days in length and will not include contact work. Teams with new coaches can hold two off-season camps and there is no limit on off-season camps for rookies. Players injured during off-season camps are protected "in the same manner as if injured during the club's pre-season training camp."
7. Pre-Season Training Camps: No player required to report to training camp more than 15 days before first preseason game or July 15, whichever is later.
8. Joint Committee on Player Safety and Welfare established "for the purpose of discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, drug abuse prevention programs and any other relevant subjects." Committee has no power to bind either NFL or NFLPA on any issue.
9. Days Off: Players are entitled to at least four off days a month, though players can be required to receive medical treatment and quarterbacks can be required to attend meetings.
10. PUP List: Any player placed on the Physically Unable to Perform List will be paid at the rate of his full contract salary while on the List.

CBA NUMBER: FOUR**Date of Execution:** December 11, 1982**Effective Begin Date:** July 16, 1982**Effective End Date:** August 31, 1987**Changes to Player Health Provisions:**

1. Group Medical Insurance: Major medical coverage increased to \$1 million.
2. Workers' Compensation: Addition of arbitration mechanism if amount of benefits is disputed.
3. Injury Protection: Maximum benefit increased to \$65,000.
4. Disability Benefits: Benefits increased to \$4,000/month for football injuries and \$750/month for non-football injuries.
5. Life Insurance: Coverage increased to \$50,000 for rookies and an additional \$10,000 per year for each Credited Season up to \$100,000.
6. Dental Benefits: Coverage increased to \$2,000 per year.
7. Season Length: NFL must give 90 days' notice before increasing season to 16 games and must negotiate with NFLPA with regard to additional compensation, subject to arbitration if no agreement reached. Regular season cannot be extended beyond 18 games.
8. Severance Pay: Any player with at least two Credited Seasons who leaves the NFL is entitled to severance payment ranging from \$5,000 to \$140,000 depending on length of service.
9. Club Doctors: "Each club will have a board certified orthopedic surgeon as one of its club physicians. The cost of medical services rendered by club physicians will be the responsibility of the respective clubs. If a club physician advises a coach or other club representative of a player's physical condition which could adversely affect the player's performance or health, the physician will also advise the player."
10. Club Athletic Trainers: All full-time athletic trainers must be certified by the National Athletic Trainers Association.
11. Second Medical Opinion: Players entitled to second medical opinion paid for by club provided player first consults with club doctor and club doctor is provided with report from second opinion doctor.
12. Players' Right to a Surgeon of His Choice: Player entitled to choose his own surgeon at the club's cost provided player first consults with club doctor.
13. Pre-Season Physical: Each player will undergo a standardized minimum pre-season physical examination conducted by the club doctor.
14. Chemical Dependency: Clubs to pay for education and treatment related to chemical dependence.
15. Drug Testing: "The club physician may, upon reasonable cause, direct a player to [a treatment facility] for testing for chemical abuse or dependency problems. There will not be any spot checking for chemical abuse or dependency by the club or club physician."
16. Access to Medical Records: Player entitled to review his medical records twice per season. Players' doctor may obtain copies for use in rendering a medical opinion, but such copies cannot be released to the player or any other person.

CBA NUMBER: FIVE**Date of Execution:** May 6, 1993**Effective Begin Date:** March 29, 1993**Effective End Date:** March 1, 2000**Changes to Player Health Provisions:**

1. Retirement Plan: Future contributions to be made by NFL clubs as necessary to fund the Plan pursuant to certain actuarial assumptions and methods. Vesting requirement reduced to three Credited Seasons for players with at least one Credited Season during 1993. Early Retirement Option eliminated for players beginning career in 1993 or later. Amendment of Plan to include benefits for players who played prior to 1959.
2. Group Medical Insurance: Lifetime benefits increased up to a maximum of \$1 million.
3. Injury Grievances: Addition of "presumption of fitness" if player passes preseason physical.
4. Worker's Compensation: Addition of joint study on workers' compensation laws and moratorium on lobbying on workers' compensation laws.
5. Injury Protection: Maximum benefits increased to \$150,000–200,000 depending on year.
6. Disability Benefits: Benefits divided into five categories: (1) Active Football: \$4,000/month; (2) Active Nonfootball: \$4,000/month; (3) Football Degenerative: \$4,000/month; (4) Inactive Nonfootball: \$1,500/month; and, (5) Dependent Child: \$100/month. Also, included retroactive increases for payments due under prior CBAs.
7. Life Insurance: Coverage increased to \$100,000 for rookies and an additional \$20,000 per year for each Credited Season up to \$200,000.
8. Off-Season Workouts: Creation of minicamps instead. Clubs can conduct offseason workout programs for no more than sixteen weeks with four workouts per week. No more than 14 team practices. Contact work prohibited.
9. PUP List: Player's contract tolled if in last year and unable to perform after sixth regular season game.
10. Severance Pay: Players with at least two Credited Seasons to receive \$5,000 for each Credited Season between 1989 and 1992 and \$10,000 for each Credited Season between 1993 and 1999.
11. Club Doctors: If a player's "condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity."

12. Pre-Season Physical: Substantially the same, plus inclusion of permission to “conduct random testing for steroids” with limits to be negotiated between Commissioner and NFLPA.
13. Access to Medical Records: Addition of player’s permission to obtain records during the off-season upon request.
14. Creation of Steroid Testing: Clubs permitted to “conduct random testing for steroids” with limits to be negotiated between Commissioner and NFLPA.
15. Creation of Second Career Savings Plan: Each NFL club to contribute a total of \$215,000 to plan per year. Participants in plan can receive various payout structures after age 45 if no longer employed by NFL club.
16. Creation of Supplemental Disability Insurance: Creation of a Voluntary Employees’ Beneficiary Association (VEBA).^a Increases benefit amounts due under the Retirement Plan.
17. Creation of Benefit Arbitrator to arbitrate any disputes concerning player benefits.

CBA NUMBER: SIX

Date of Execution: June 6, 1996

Effective Begin Date: March 29, 1993

Effective End Date: March 1, 2003

Changes to Player Health Provisions:

1. Injury Protection: Maximum benefits increased to \$225,000 for 2000–2002.
2. Life Insurance: Coverage increased to \$150,000 for rookies and an additional \$30,000 per year for each Credited Season up to \$300,000.
3. Off-Season Workouts: Healthy, veteran players prohibited from participating in club activities within 10 days prior to training camp; coaches can be fined if club does not comply with rules.

CBA NUMBER: SEVEN

Date of Execution: February 25, 1998

Effective Begin Date: March 29, 1993

Effective End Date: March 1, 2005

Changes to Player Health Provisions:

1. Retirement Plan: Increase in benefits for Credited Seasons prior to 1997; retroactive decrease in vesting requirement from five to four years for players prior to 1975.
2. Group Medical Insurance: Lifetime benefits increased up to a maximum of \$2 million.
3. Worker’s Compensation: Lobbying moratorium to end June 1, 1999.

4. Injury Protection: Maximum benefits increased to \$250,000 for 2003–2004; players allowed to argue they should not have passed post-season physical.
5. Disability Benefits: Change in definitions: “A disability will be deemed ‘permanent’ if it has persisted or is expected to persist for at least 12 months from the date of its occurrence and if the Player is not an Active Player.” Players can obtain disability benefits for psychological disorders caused by NFL activities.
6. Creation of Player Annuity Program: Establishment of program with NFL contribution \$33 million in 1998 up to \$73 million in 2001; player annuity amounts dependent on experience (four Credited Seasons minimum).

CBA NUMBER: EIGHT

Date of Execution: January 8, 2002

Effective Begin Date: March 29, 1993

Effective End Date: March 1, 2008

Changes to Player Health Provisions:

1. Group Medical Insurance: Lifetime benefits increased up to a maximum of \$2.5 million.
2. Worker’s Compensation: No moratorium on lobbying.
3. Injury Protection: Maximum benefits increased to \$275,000 for 2006–2007.
4. Disability Benefits: Disability definition changed to that of the American Medical Association’s “Guides to the Evaluation of Permanent Impairment.”
5. Off-Season Workouts: Off-season workout programs reduced from 16 to 14 weeks; players cannot be at facility for more than four hours per day and not on the field for more than 90 minutes per day; NFLPA given authority to commence investigations; potential discipline against violators increased up to a 4th round draft pick for repeat offenders.
6. Joint Committee on Safety and Welfare: NFLPA has right to commence an investigation before the Joint Committee if it believes “that the medical care of a team is not adequately taking care of player safety.” Neutral doctor will investigate and issue a report concerning the complaint.
7. Supplemental Disability Benefits: Payments to be made automatically to qualifying players unless they have waived the right to receive such benefits.
8. Creation of Tuition Assistance Plan: Establishment of plan whereby clubs will reimburse players for tuition up to \$15,000/year.

^a A VEBA is a tax-free account created for the purpose of providing benefits to employees, such as insurance benefits, severance pay, sick leave, vacation benefits, etc.

CBA NUMBER: NINE**Date of Execution:** March 8, 2006**Effective Begin Date:** March 8, 2006**Effective End Date:** March 1, 2013**Changes to Player Health Provisions:**

1. Worker's Compensation: Clarifies method for calculating a club's right to offset a player's salary with any workers' compensation award.
2. Injury Protection: Maximum benefits increased to \$350,000 for 2012.
3. Life Insurance: Coverage increased to \$300,000 for rookies and an additional \$100,000 per year for each Credited Season up to \$800,000.
4. Severance Pay: Payments increased to \$12,500 for each season between 2000 and 2008 and \$15,000 for each season between 2009 and 2011.
5. Player Annuity Program: Clubs to contribute \$65,000 per player with at least four Credited Seasons.
6. Tuition Assistance Plan: Program extended to players retired within last three years.
7. Creation of Health Reimbursement Account: NFL clubs to contribute based on actuarial assumptions and methods. Account credits up to \$300,000 depending on number of Credited Seasons.
8. Creation of 88 Benefit: Establishment of plan to provide players with dementia up to \$88,000 per year, paid for by NFL.
7. Life Insurance: Coverage increased to \$600,000 for rookies and an additional \$200,000 per year for each Credited Season up to \$1.6 million.
8. Off-Season Workouts: Offseason program reduced to nine weeks in three phases of varying intensity; establishment of uniform workout agreement.
9. Pre-Season Training Camps: Limitations imposed on two-a-day practices. Maximum of three hours of padded practice. All practices to be filmed.
10. Days Off: Generally, one off-day every seven days in preseason and four per month during regular and postseason.
11. Season Length: NFL can increase the number of regular season games only with NFLPA approval which may be withheld at the NFLPA's sole discretion.
12. Severance Pay: \$17,500 for each season between 2012 and 2013 up to \$22,500 for each season between 2017 and 2020.
13. Club Physicians: Clubs required to have orthopedic surgeon and internal, family medicine or emergency medicine physician. Club doctors must have Certificate of Added Qualification in Sports Medicine. Club required to have the following consultants: neurological; cardiovascular; nutrition; and, a neuropsychologist. New provision declaring that "each Club physician's primary duty in providing player medical care shall not be to the Club but instead to the player-patient."
14. Pre-Season Physical: Each player will undergo a standardized minimum pre-season physical examination conducted by the club physician. Clubs prohibited from conducting their own tests for PEDs or drugs or alcohol.

CBA NUMBER: TEN**Date of Execution:** August 4, 2011**Effective Begin Date:** August 4, 2011**Effective End Date:** March 1, 2021**Changes to Player Health Provisions:**

1. Retirement Plan: Benefit amounts increased for past seasons.
2. Group Medical Plan: Elimination of maximum coverage.
3. Injury Grievances: Establishment of Grievance Settlement Committee.
4. Worker's Compensation: Joint committee established to address workers' compensation in California.
5. Injury Protection: Maximum benefits increased to \$1 million in 2011–2012 up to \$1.2 million in 2019–2020. Players can now get "Extended Injury Protection" in second season after injury for \$500,000 in 2012–2014 up to \$575,000 in 2019–2020.
6. Disability Benefits: New plan created, providing for benefits up to \$30,000 per year. "A disability will be deemed 'permanent' if it has persisted or is expected to persist for at least twelve months from the date of its occurrence." Categories of disability include: Active Football; Active Nonfootball; Inactive A; and, Inactive B.
15. Access to Medical Records: Prohibition against showing records to any other person removed. NFL to develop and implement online, electronic medical record system.
16. Minicamps: Greater restrictions on types of activities, pursuant to off-season workout rules. Clubs can hold voluntary veteran minicamp. All minicamps must be videotaped.
17. Supplemental Disability Plan: Incorporated into new NFL Player Disability.
18. Player Annuity Program: Club contributions increase to \$95,000 in 2018–2020.
19. Tuition Assistance Plan: Reimbursement amount increased to \$20,000 in 2015–2020. Program available to players retired within the last four years if they have five Credited Seasons.
20. Health Reimbursement Account: Account credits cannot exceed \$350,000.
21. 88 Benefit: Benefits increased to \$100,000 per year, \$130,000 beginning in 2016.
22. Regular Season and Post-Season Practices: Clubs limited to fourteen padded practices during the season and one per week in the postseason. On-field activities limited to three hours. Four days off during bye weeks. All practices to be filmed.

23. Role of NFLPA Medical Director: NFLPA Medical Director to be a voting member on all NFL healthy and safety committees and will have same access to data as NFL Medical Advisor.
24. Home Game Neutral Physician: "All home teams shall retain at least one [Rapid Sequence Intubation] RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies."
25. Creation of Accountability and Care Committee: Committee established "which will provide advice and guidance regarding the provision of preventive, medical, surgical and rehabilitative care for players by all clubs." Committee has several identified tasks, including conducting a confidential survey every two years to solicit players' input regarding adequacy of medical care.
26. Creation of Legacy Benefit: Establishment of benefit for players who played prior to 1993. NFL to contribute \$620 million.
27. Long Term Care Insurance Plan: Continues plan already in existence —players are able to obtain a long-term care insurance policy providing maximum benefits of \$150/day for four years.
28. Creation of Former Player Life Improvement Plan: Plan formerly known as NFL Player Care Plan. Plan permits qualifying retired players not otherwise covered by health insurance to receive up to \$250,000 in medical costs for "joint replacements, prescription drugs, assisted living, Medicare supplemental insurance, spinal treatment, and neurological treatment."
29. Neuro-Cognitive Disability Benefit: Permits qualifying retired players to receive no less than \$3,000 per month for a maximum of 180 months. The medical standards for qualifying for this benefit were to be agreed upon by a Special Committee created by the parties made up of three healthcare professionals with expertise in neuro-cognitive disorders.
30. Support for Former Players: \$22 million annually allocated to healthcare, benefits, funds and programs for former players as determined by the NFLPA.
31. Medical Research: \$11 million annually allocated for medical research.

APPENDIX C \ Summary of Collectively Bargained Health-Related Programs and Benefits

Preliminary Note: The descriptions below are of various collectively bargained health-related programs and benefits. These programs are mentioned in the collective bargaining agreement (CBA) but the actual plan and benefit documents are separate from the CBA. The descriptions below are merely summaries as the actual plan and benefit documents are substantially longer and contain much greater detail and nuance. These descriptions should be not be taken as a complete statement of the benefits, rights, and obligations under the various plans.

Additionally, as a preliminary matter, player eligibility for many of the collectively bargained benefits discussed below depends on the number of “Credited Seasons” a player has earned. Generally, a player earns a Credited Season when he is entitled to be paid for at least three regular season games.¹

RETIREMENT PLAN

First Created: 1968

Last Amended: 2011

2011 CBA Provision: Art. 53

Administrator: The Retirement Board, which consists of three members selected by the NFL Management Council (NFLMC)^a and three members selected by the NFLPA. The current NFLMC members are: Dick Cass, President, Baltimore Ravens; Katie Blackburn, Executive Vice President, Cincinnati Bengals; and, Ted Phillips, President, Chicago Bears. The National Football League Players Association (NFLPA) members are former players Jeff Van Note, Robert Smith, and Sam McCullum. NFL Commissioner Roger Goodell is a nonvoting member and Chairman.

The members of the Retirement Board also serve as the members of the Disability Board, Savings Board, 88 Board, Annuity Board, and HRA Board, the plans of which are discussed in further detail below.

Description: Provides eligible players with retirement benefits, and offers survivor benefits for players’ wives and family.

Eligibility: Generally, only “Vested Players” are eligible for retirement benefits. A Vested Player is a player who fits one of the following criteria: (1) has three or more Credited Seasons, including at least one Credited Season after 1992; (2) has four or more Credited Seasons, including at least one Credited Season after 1973; or, (3) has five or more Credited Seasons. In addition, regardless of the number of Credited Seasons a player has, if the player qualifies for permanent and total disability benefits under the Disability & Neurocognitive Disability Benefit Plan (discussed below) while an active player, the player can receive benefits under the Retirement Plan.

When Eligible: Vested Players can receive monthly retirement benefits for life beginning at age 55. Players with a Credited Season before 1993 can receive reduced monthly benefits as early as age 45. A player can elect to receive retirement benefits until his death or defer some of the benefits to his family upon death.

Payor: Contributions are made into a trust fund by NFL clubs each year according to certain actuarial assumptions.

Payment Type: Monthly.

Enrollment Type: Player must file for retirement benefits upon reaching age 55, but will automatically begin receiving the benefits at age 65 if nothing is filed.

^a NFL Management Council is the official name of the organization that collectively bargains on behalf of the NFL clubs.

Benefit Amount:**Table C-A:****Retirement Benefits (If taken after age 55)**

Credited Season	Monthly Benefit Credit per Credited Season
Before 1982	\$250
1982 through 1992	\$255
1993 through 1994	\$265
1995 through 1996	\$315
1997	\$365
1998 through 2011	\$470
2012 through 2014	\$560
2015 through 2017	\$660
2018 through 2020	\$760

In addition, the Retirement Plan includes \$620 million in Legacy Benefits created as part of the 2011 CBA for players that played before 1993. The Legacy Benefits listed below are in addition to the Retirement Benefits listed above.

Table C-B:**Legacy Benefits**

Credited Season	Monthly Benefit Credit per Credited Season
Before 1975	\$124
1975 through 1992	\$108

Additional Notes: According to the NFL, as of 2015, 3,641 former players receive an average monthly retirement benefit of \$1,656,² for a total of approximately \$72,353,952 annually. In addition, about 90 percent of those former players also received Legacy Benefit payments, with an average monthly payment of \$723.85,³ for a total of approximately \$28,464,677 in Legacy Benefit payments. Thus, in 2015, the NFL Retirement Plan paid a little more than \$100 million to former NFL players.

The Retirement Plan—which until 2011 also covered disability benefits—has historically been viewed negatively by former players. The filing process has been considered complex and lengthy,⁴ resulting in many former players suing the Retirement Plan concerning their benefits.⁵ During a 2007 hearing before the United States Senate Committee on Commerce, Science, and Transportation, it was revealed that only 317 former players were receiving disability benefits, out of the thousands that were eligible.⁶

Of additional concern, in recent years the NFLPA has been warning players that the Retirement Plan is underfunded.⁷ Currently, the Plan only takes in enough money to cover about 54.5 percent of what it pays out,⁸ jeopardizing its ability to pay retirement benefits in the future.

DISABILITY & NEUROCOGNITIVE BENEFIT PLAN

First Created: Disability benefits were first offered in 1970 and were historically available as part of the Retirement Plan. The Neurocognitive Disability Benefit was created as part of the 2011 CBA. The 2011 CBA also agreed to combine the disability components of the Retirement Plan, the Supplemental Disability Plan and the Neurocognitive Disability Benefit into this plan.

Last Amended: 2014

2011 CBA Provisions: Arts. 61, 65

Administrator: The Disability Board, which consists of the same members as the Retirement Board.

Description: Provides eligible players with disability benefits, including benefits based on neurocognitive disability.

Eligibility: A player is eligible for “Total and Permanent Disability Benefits” if the Initial Claims Committee^b or Disability Board determines “(1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit . . . , and (2) that such condition is permanent.”

Each player is awarded benefits pursuant to one of four categories: (1) Active Football: the player is an active player and the disability “results from League football activities”;^c (2) Active Nonfootball: the player is an active player but the disability does not result from League football activities; (3) Inactive A: the player is a former player who filed for disability benefits within 15 years of his last Credited Season; or (4) Inactive B: the player is a former player who filed for disability benefits more than 15 years of his last Credited Season. Inactive A and Inactive B disability benefits are not dependent on the disability resulting from League football activities.

b The Initial Claims Committee consists of three members: one appointed by the NFL, one appointed by the NFLPA, and a medical professional jointly chosen by the parties.

c League football activities include any NFL “pre-season, regular-season, or post-season game, or any combination thereof, our out of League football activity supervised by a[] [Club], including all required or directed activities.”

A player is eligible for “Line-of-Duty Disability Benefits” if the Initial Claims Committee or Retirement Board determines that the player “incurred a substantial disablement . . . arising out of [NFL] football activities.” Line-of-Duty Disability Benefits address those injuries or disabilities that are not considered permanent.

A player is eligible for Neurocognitive Disability Benefits if: (1) the player is vested under the Retirement Plan; (2) the player is under age 55; (3) the player had at least one Credited Season after 1994; (4) the player does not receive Retirement Benefits; (5) the player does not receive Total and Permanent Disability Benefits; (6) the player executes a release releasing the NFL and clubs from any liability for head or brain injuries;^d and, (7) the player is determined to have mild or moderate neurocognitive impairment.

A player has “mild neurocognitive impairment if he has problems with one or more domains of cognitive functioning which reflect acquired brain dysfunction but are not severe enough to cause marked interference in day-to-day activities.”

A player has “moderate neurocognitive impairment if he has problems with one or more domains of cognitive functioning which reflect acquired brain dysfunction resulting in marked interference with everyday life activities, but not severe enough to prevent the Player from working.”

A player must submit to a medical examination by a doctor of the Disability Board’s choosing to determine if the player has neurocognitive impairment.

When Eligible: A player can receive Total and Permanent Disability Benefits as soon as the disability is established, retroactive to the time of application. Total and Permanent Disability Benefits continue so long as the player remains disabled and submits to medical examinations.

A player can receive Line-of-Duty Disability Benefits as soon as the disability is established, retroactive to the time of application, for a maximum of 90 months.

A player can receive Neurocognitive Disability Benefits as soon as the disability is established, retroactive to the time of application, for a maximum of 180 months. Also, the Neurocognitive Disability Benefits terminate

upon the player’s 55th birthday regardless of when the benefits began.

Generally, a player cannot receive both retirement and disability benefits at the same time.

Payor: Contributions are made into a trust fund by NFL clubs each year.

Payment Type: Monthly.

Enrollment Type: Player must file for disability benefits.

Benefit Amount:

Table C-C:
Total and Permanent Disability Benefits

Type of Disability	Monthly Benefit
Active Football	\$22,084
Active Nonfootball	\$13,750
Inactive A	\$11,250
Inactive B	\$5,000

- **Line-of-Duty Disability Benefits:** \$3,000/month.
- **Mild Neurocognitive Disability Benefits:** \$2,250/month.
- **Moderate Neurocognitive Disability Benefits:** \$4,000/month.

Additional Notes: As of July 31, 2015, 1,881 players are receiving disability benefits for an average of \$5,178.33 a month,⁹ for a total of approximately \$116,885,264.

According to a 2010 analysis of the NFLPA’s disability claims database, disability benefit applications had never exceeded 200 applications in a year until 2008 and 2009, when there were more than 400 claims in both years.¹⁰ As of 2010, NFL disability benefit claims were approved approximately 38 percent of the time.¹¹ Importantly, the benefits criteria changed after the 2011 CBA, so current data would not be comparable. Moreover, according to the same analysis, of the players who filed for disability benefits, the mean age at which they retired from the NFL was 30.2 years.¹² Additionally, the mean age at which the player filed for disability benefits was 38.1 years.¹³

Finally, through the year 2009, there had been a total of 2,670 disability benefit claims, with 2,423 (90.7 percent) for orthopedic conditions, 52 (1.9 percent) for neurological conditions, 18 (0.7 percent) for psychological conditions, 18 (0.7 percent) for cardiovascular conditions, and 159 for other unspecified conditions (6.0 percent).¹⁴

^d The requirement of this release might prevent many otherwise qualified players from receiving Neurocognitive Disability Benefits to which they would otherwise be entitled. When asked, the NFL stated it was unable to provide the number of former players currently receiving neurocognitive disability benefits “without the consent of the NFL Players Association.” The NFLPA declined to provide this consent or the number of former players who have filed for or are receiving these benefits, citing “player privacy and confidentiality concerns.” We are not sure if we agree with these concerns. This information is de-identified aggregate data that is unlikely to reveal the personal medical information of any player.

SEVERANCE PAY**First Created:** 1982**Last Amended:** 2011**2011 CBA Provision:** Art. 60**Administrator:** NFLMC**Description:** Player is eligible to receive severance pay for each Credited Season.**Eligibility:** A player with at least two Credited Seasons, at least one of which was in 1993 or after.**When Eligible:** 12 months after your last contract expired or was terminated. Payments generally begin within the quarter after claim accepted.**Payor:** The club with whom the player last earned a Credited Season.**Payment Type:** Single lump sum.**Enrollment Type:** Player must file a claim with NFLMC.**Benefit Amount:****Table C-D:****Severance Pay Benefits^e**

Seasons	Amount for Each Credited Season
1989–92	\$5,000
1993–99	\$10,000
2000–08	\$12,500
2009	\$15,000
2010	0
2011	\$15,000
2012–13	\$17,500
2014–16	\$20,000
2017–20	\$22,500

^e Pursuant to the terms of the 2006 CBA, the NFL was not required to fund several benefit plans, including the Severance Pay Plan in 2010 if the 2010 season was not played with a Salary Cap — a situation which would only exist if the NFL and NFLPA were unable to agree to an extension of the CBA, which is what actually transpired. See 2006 CBA, Art. L; Art. LVI.

PLAYER INSURANCE PLAN**First Created:** 1968**Last Amended:** 2011**2011 CBA Provision:** Art. 59**Administrator:** Aon Hewitt; Cigna**Description:** Provides players and their family with life insurance, accidental death and dismemberment insurance, medical coverage, dental coverage, and wellness benefits. The wellness benefits include access to clinicians for mental health, alcoholism, and substance abuse, child and parenting support services, elder care support services, pet care services, legal services, and identity theft services.**Eligibility:** Any player in the NFL, including practice squad players. Players who are vested under the Retirement Plan continue to receive coverage for five years after their career ends. Players who are not vested are only covered through the end of the plan year.After their career has ended, players have the option of continuing coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA)^f for a period of 18, 29 or 36 months. Players are required to pay the full cost of coverage plus 2 percent for administrative costs.**When Eligible:** Generally, players are eligible on the first day of training camp.**Payor:** Generally speaking, the clubs pay for the costs of the insurance programs, which, under the terms of the CBA, reduces the amount of money that can be paid to players in salary.

The club pays the entire cost of life insurance and accidental death and dismemberment insurance.

The players are responsible for copayments and deductibles of varying amounts depending on the types of medical and dental treatment being provided.

Payment Type: Insurance coverage and reimbursement as appropriate.**Enrollment Type:** Player must complete enrollment paperwork.

^f COBRA, 29 U.S.C. §§ 1161–69, requires continuation coverage to be offered to covered employees, their spouses, former spouses, and dependent children when group health coverage would otherwise be lost due to certain specific events, including, as would be relevant in the NFL, “the termination (other than by reason of such employee’s gross misconduct), or reduction of hours, of the covered employee’s employment.” 29 U.S.C. § 1163(2).

Benefit Amount:**Table C-E:****Life Insurance Benefits**

Number of Credited Seasons	Benefit Amount
6 or more	\$1,600,000
5	\$1,400,000
4	\$1,200,000
3	\$1,000,000
2	\$800,000
1 or 0	\$600,000

- **Accidental Death and Dismemberment Insurance:** Up to \$50,000 depending on the injured body part.
- **Medical Coverage:** So long as the player is a member of the insurance plan, there is no limit to the amount of benefits the player can obtain.
- **Dental Coverage:** Limited to \$2,000 per person per year.

SECOND CAREER SAVINGS PLAN**First Created:** 1993**Last Amended:** 2011**2011 CBA Provision:** Art. 54**Administrator:** The Savings Board, which consists of the same members as the Retirement Board.**Description:** A 401(k) plan that helps players save for retirement in a tax-favored manner.**Eligibility:** All NFL players, regardless of the number of Credited Seasons.**When Eligible:** Players can receive their benefits after the player is 45 provided the player is not employed by a club, or after the player is 59½.**Payor:** Players and their clubs.**Payment Type:** The player can receive the benefits in a variety of forms: (1) a single lump sum payment; (2) installments over ten years; (3) an annuity for the player's life; and, (4) an annuity for the player's life and surviving spouse's life.**Enrollment Type:** Players are automatically enrolled in the plan, with 10 percent of their pre-tax salary going towards the plan. Players can change the amount of their contributions or opt out of the plan at any time.**Benefit Amount:** Players can contribute up to the maximum permitted by the IRS (\$18,000 in 2016). The player's club is required to contribute a minimum of: \$1,000 if the player has exactly one Credited Season; \$7,200 if the player has exactly two Credited Seasons; and, \$3,600 if the player has three or more Credited Seasons.

In addition, the club will contribute \$2 for every \$1 contributed by a player during a year in which the player earned a Credited Season, provided the player has at least one Credited Season, up to a maximum of \$26,000 between 2015–18, and \$28,000 between 2019–20.

Notes: According to the NFLPA, 99 percent of NFL players are enrolled in the Second Career Savings Plan.¹⁵**TUITION ASSISTANCE PLAN****First Created:** 2002**Last Amended:** 2011**2011 CBA Provision:** Art. 56**Administrator:** NFLMC**Description:** Players receive reimbursement for tuition, fees, and books from attending an eligible education institution.**Eligibility:** All current NFL players with at least one Credited Season. Former players with at least five Credited Seasons are also eligible provided that the costs are incurred within four years of the player's last season.**When Eligible:** Players must have received a "C" or better in the course and submit their claim for reimbursement within six months of when the final grade is issued.**Payor:** The player's club pays the benefits. NFLMC pays administrative costs and expenses.**Payment Type:** Lump-sum payment within 75 days after player's application is received.**Enrollment Type:** Player must complete application and include copies of all receipts.**Benefit Amount:** The maximum reimbursement is \$20,000 per year. A former player with at least five Credited Seasons is eligible for up to \$60,000 in reimbursements.**Note:** For context, according to the College Board, the average tuition at a public four-year university for an in-state student is \$9,410; the average tuition at a public four-year university for an out-of-state student is \$23,893; and, the average tuition at a private four-year university is \$32,405.¹⁶

THE 88 PLAN

First Created: 2006

Last Amended: 2012

2011 CBA Provision: Art. 58

Administrator: The 88 Board, which consists of the same members as the Retirement Board.

Description: Provides former players suffering from dementia, amyotrophic lateral sclerosis (ALS) or Parkinson’s disease with benefits. The 88 Plan is named for John Mackey, a Hall of Fame tight end for the Baltimore Colts and San Diego Chargers from 1963 to 1972, who wore number 88 during his career. Mackey suffered from dementia later in life and died in 2011 at the age of 69.

Eligibility: Vested Players under the Retirement Plan and players who have received Total and Permanent Disability Benefits under the Disability & Neurocognitive Benefit Plan who have been diagnosed with dementia, ALS, or Parkinson’s disease. The 88 Committee, consisting of an NFLMC designee and an NFLPA designee, determine whether the player qualifies for the benefit.

When Eligible: A player is eligible upon diagnosis.

Payor: Contributions are made into a trust fund by NFL clubs each year.

Payment Type: The 88 Plan will reimburse or pay the following costs for medical care that are related to a player’s dementia, ALS, or Parkinson’s disease: institutional care; home custodial care provided by an unrelated third party; physician services; durable medical equipment; and, prescription medication.

The player must file claims for reimbursement within 12 months of the later of the date medical care was rendered or the date the bill for covered expenses was received.

Enrollment Type: Player must apply for the benefits.

Benefit Amount: A maximum of \$130,000 per year.

Notes: As of 2014, 214 former players were receiving funds from The 88 Plan.¹⁷

FORMER PLAYER LIFE IMPROVEMENT PLAN

First Created: 2007

Last Amended: 2011

2011 CBA Provision: Art. 64

Administrator: Aon Hewitt

Description: Plan permits qualifying former players (and in some cases their dependents) not otherwise covered by health insurance to receive reimbursement for medical costs for “joint replacements, prescription drugs, assisted living, Medicare supplemental insurance, spinal treatment, and neurological treatment.”

Eligibility: Former NFL players who are vested under the Retirement Plan. However, there are many benefits under this plan, some of which have additional eligibility requirements, so not every player is eligible for every benefit.

When Eligible: Generally, upon the end of the player’s career.

Payor: Contributions to the plan are made by the clubs on a per-capita basis to a trust in amounts sufficient to pay estimated benefits and expenses.

Payment Type: Reimbursement and grants to assist eligible players in need.

Enrollment Type: Player must file.

Benefit Amount:

- **Joint Replacement Benefits:** A maximum of \$5,250, or \$10,500 in the case of a bilateral procedure.
- **Discount Prescription Drug Benefits:** Unspecified discounts for prescription drugs.
- **Life Insurance Benefits:** Term life insurance in an amount equal to \$20,000, plus \$2,000 for each Credited Season in excess of the number of Credited Seasons the player was required to have to vest under the Retirement Plan, up to a maximum of \$50,000.
- **Assisted Living Benefits:** Special discounts and preferred access at Brookdale Senior Living and Silverado Senior Living facilities.
- **Medicare Benefit:** A range of Medicare Supplemental Insurance plans to former players are available.
- **Spine Treatment Benefit:** Access to top tier medical centers that have particular expertise in treating spinal conditions. However, the plan generally does not cover the costs of any treatment or provide for any discounts.

- **Neurological Benefit:** Access to top tier medical centers that have particular expertise in treating neurological conditions. However, the plan generally does not cover the costs of any treatment or provide for any discounts.
- **Wellness Benefit:** Includes access to clinicians for mental health, alcoholism, and substance abuse, child and parenting support services, elder care support services, pet care services, legal services, and identity theft services.

PLAYER ANNUITY PLAN

First Created: 1998

Last Amended: 2011

2011 CBA Provision: Art. 55

Administrator: The Annuity Board, which consists of the same members as the Retirement Board.

Description: Provides deferred compensation to players. The Annuity Plan invests the players' collective deferred compensation. The Annuity Plan is divided between a Qualified Account and a Nonqualified Account. The Qualified Account includes the maximum amount of compensation that can be deferred on a pre-tax basis pursuant to IRS rules. The maximum amount that could be deferred on a pre-tax basis in 2016 was \$53,000.¹⁸ The amount contributed to the Annuity Plan above this amount is the Nonqualified Account portion and must be taxed before being invested as part of the Annuity Plan.

Eligibility: A current or former player with at least one Credited Season. A player does not vest in his Qualified Account until he has earned at least three Credited Seasons. In contrast, a player is always vested in his Nonqualified Account.

When Eligible: A player can elect to receive a distribution at any time after he is done playing, provided the player is at least 45, or is at least 35 and five years have elapsed since the player last earned a Credited Season. Distributions must begin no later than the first day of the month after the player turns 65.

Payor: Paid from player's own deferred compensation.

Table C-F:
Annuity Plan Benefits

Credited Seasons	Total Amount Allocated to Annuity Plan for That Season
1	\$0
2	\$5,000
3	\$5,000
4	\$70,000
5 or more	\$80,000

The reason for the large increase in allocation from the third to fourth Credited Season is likely due to the vesting requirements. As stated earlier, a player is not vested in his Qualified Account—which represents the bulk of the Annuity Plan contribution—until after his third Credited Season. If he does not vest in the Qualified Account, it is forfeited. Thus, by minimizing the amounts allocated before players vest in the Annuity Plan, the Annuity Plan minimizes the amount of deferred compensation that might be forfeited.

Payment Type: Players may elect different distributions forms for each of their accounts and different dates for payments to begin. Payment forms include: (1) annual installments until the player reaches 45; (2) an annuity for life; (3) a reduced annuity for your life, with a survivor annuity beginning after the player's death; (4) a lump sum, if the former player is at least 45 when the lump sum is to be paid; and, (5) a partial lump sum, if the player is at least 45 when the partial lump sum is paid, with the remainder paid in one of the other payment forms.

Enrollment Type: Automatic.

Benefit Amount: The benefit the player receives depends on: the value of the player's account; the player's age; the player's marital status; and, the type of payment plan selected by the player.

HEALTH REIMBURSEMENT ACCOUNT PLAN

First Created: 2006

Last Amended: 2011

2011 CBA Provision: Art. 63

Administrator: The HRA Board, which consists of the same members as the Retirement Board.

Description: Helps to pay out-of-pocket healthcare expenses after players are no longer employed by an NFL Club and after the period of extended medical coverage under the Player Insurance Plan that is paid by the NFL has ended.

Eligibility: (1) Players with at least eight Credited Seasons and whose last Credited Season was in 2004 or 2005; or (2) Players with at least three Credited Seasons and whose last Credited Season was in 2006 or later.

When Eligible: Player is eligible to withdraw amounts from Health Account for medical expenses incurred provided he files for reimbursement within 24 months of receiving the medical bill to be reimbursed.

Payor: Clubs contribute the amounts to the Health Account. Players do not contribute their own money to their Health Account.

Payment Type: Lump sum.

Enrollment Type: Automatic.

Benefit Amount:

Table C-G:

Health Reimbursement Account Benefits^g

Credited Seasons	Health Account Contribution per Credited Season
2009 and prior	\$25,000
2010	\$0
2011 through 2015	\$25,000
2016 through 2020	\$30,000

LONG TERM CARE INSURANCE PLAN

First Created: 2011

Last Amended: 2011

2011 CBA Provision: Art. 62

Administrator: NFL

Description: Provides medical insurance to cover the costs of long-term care.

Eligibility: Vested players under the Retirement Plan who are between the ages of 50 and 76, who have been certified by a licensed healthcare provider as requiring critical supervision, or requiring the presence of another person within arm's reach due to inability to perform a required number of defined activities of daily living.

When Eligible: Player is eligible for the insurance as soon as he meets the eligibility requirements.

Payor: It is uncertain what the NFL and players' obligations are with respect to the Long Term Care Insurance Plan, as we were unable to obtain Plan documents.

Payment Type: Uncertain.

Enrollment Type: Player must enroll.

Benefit Amount: \$150 a day for a maximum of four years.

^g Pursuant to the terms of the 2006 CBA, the NFL was not required to fund several benefit plans, including the Health Reimbursement Account in 2010 if the 2010 season was not played with a Salary Cap — a situation which would only exist if the NFL and NFLPA were unable to agree to an extension of the CBA, which is what actually transpired. See 2006 CBA, Art. L; Art. LVI.

Endnotes

- 1 See Bert Bell/Pete Rozelle NFL Player Retirement Plan (Apr. 1, 2012) § 1.11 (defining “Credited Season”); 2011 CBA, Art. 26, § 2 (same).
- 2 Aaron Gordon, *Battle for Benefits, Part 3: “Don’t Make Proud Men Beg”*, Vice Sports (Sept. 18, 2015), https://sports.vice.com/en_us/article/battle-for-benefits-part-3-dont-make-proud-men-beg, archived at <https://perma.cc/YP4J-8AGY>.
- 3 *Id.*
- 4 See Mark Fainaru & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 86–87 (2013).
- 5 Pursuant to the Employee Retirement Income Security Act (“ERISA”), individuals claiming entitlement to benefits under a retirement plan are entitled to bring a civil action to enforce or clarify their rights under the plan. 29 U.S.C. § 1132(a). Former players routinely sue the Retirement Plan alleging they were wrongfully denied benefits, with mixed success. See, e.g., *Atkins v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 694 F.3d 557 (5th Cir. 2012) (plan administrator’s determination that player was not entitled to additional benefits was not an abuse of discretion); *Giles v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 925 F. Supp. 2d 700 (D.Md. 2012) (Retirement Board’s classification of participant’s disability as “Inactive” rather than “Football Degenerative” was not reasonable decision supported by substantial evidence in the record); *Moore v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 282 Fed.Appx. 599 (9th Cir. 2008) (Retirement Board’s decision to terminate player’s benefits was not based on reasonable interpretation of plan’s terms); *Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082 (8th Cir. 2006) (plan administrator did not abuse its discretion in setting date of disability as time of disability determination by physician to whom plan had referred former player); *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173 (9th Cir. 2005) (administrator did not abuse its discretion in rejecting retiree’s claim, given ambiguity as to cause of neurologic disability at issue); *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp. 2d 424 (W.D.Pa. 1999) *aff’d* 214 F.3d 136 (3d Cir. 2000) (plan administrator’s determination that former player was not disabled was not arbitrary or capricious); *Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433 (8th Cir. 1993) (trustees’ interpretation of ERISA plan to allow higher level of disability benefits only in cases involving single, identifiable football injury, and excluding cases of disability resulting from football career’s overall impact on body was unreasonable in light of plan’s goals).
- 6 *Oversight of the National Football League (NFL) Retirement System: Hearing Before the Comm. On Commerce, Sci. & Transp.*, 110th Cong. 1177 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg76327/html/CHRG-110shrg76327.htm>, archived at <https://perma.cc/RK38-GBYQ?type=pdf>.
- 7 Aaron Gordon, *Battle for Benefits, Part 3: “Don’t Make Proud Men Beg”*, Vice Sports (Sept. 18, 2015), https://sports.vice.com/en_us/article/battle-for-benefits-part-3-dont-make-proud-men-beg, archived at <https://perma.cc/YP4J-8AGY>.
- 8 *Id.*
- 9 Aaron Gordon, *Battle for Benefits, Part 1: “Why Do I Have to Fight You Now?”*, Vice Sports (Sept. 16, 2015), https://sports.vice.com/en_us/article/battle-for-benefits-part-1-why-do-i-have-to-fight-you-now, archived at <https://perma.cc/FK7X-G3BN>.
- 10 Edgeworth Economics, *DRAFT Dangers of the Game: Injuries in the NFL — Analysis for the NFLPA* (Sept. 6, 2010), http://esq.h-cdn.co/assets/cm/15/07/54dae83730ce3_-_Dangers-of-the-Game-Draft-Esquire.pdf, archived at <https://perma.cc/X976-GYPU?type=pdf>.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Quotes from NFLPA Press Conference*, NFLPA (Feb. 4, 2016), <https://www.nflpa.com/news/all-news/quotes-from-nflpa-sb50-press-conference>, archived at <https://perma.cc/2GZH-FQ37>.
- 16 See *Average Published Undergraduate Charges by Sector, 2015–16*, CollegeBoard, <http://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16> (last visited Mar. 17, 2016), archived at <https://perma.cc/HNW6-FBKG>.
- 17 Ken Belson, *Dementia Care, Tailored to N.F.L. Retirees*, N.Y. Times, Mar. 22, 2016, <http://www.nytimes.com/2016/03/23/sports/dementia-care-tailored-to-nfl-retirees.html>, archived at <https://perma.cc/P3E4-WXRV>.
- 18 See *IRS Announces 2016 Pension Plan Limitations; 401(k) Contribution Limit Remains Unchanged at \$18,000 for 2016*, Internal Revenue Service, Oct. 21, 2015, [https://www.irs.gov/uac/Newsroom/IRS-Announces-2016-Pension-Plan-Limitations%3B-401\(k\)-Contribution-Limit-Remains-Unchanged-at-\\$18,000-for-2016](https://www.irs.gov/uac/Newsroom/IRS-Announces-2016-Pension-Plan-Limitations%3B-401(k)-Contribution-Limit-Remains-Unchanged-at-$18,000-for-2016), archived at <https://perma.cc/G28S-9K6R>.

APPENDIX D \ Summary Of Programs Offered by NFL's Player Engagement Department^a

To Whom Available	Program	Program Description (According to NFL)
High School Student-Athletes	NFL PREP 100	Program includes: Classroom sessions on player health and safety; On-field instructions highlighting technical drills and techniques; Insight on the academic and athletic experiences of a professional athlete from current and former NFL players; Leadership Development training by the National Guard; and, classroom sessions led by NCAA representatives to explain the most up-to-date information regarding eligibility, recruiting, and compliance information for parents and student-athletes.
High School Student-Athletes	NFL Prep Sports Career Expo	The NFL Prep Sports Career Expo, produced in conjunction with Why Not Sports, Inc., enlists professionals from all aspects of the sports industry to inform, educate, and enlighten student-athletes on career opportunities within the professional sports arena. Students are educated about the academic requirements needed to successfully transition from high school to college and are enlightened about a broad spectrum of career opportunities within the sports industry outside of being a professional athlete.
Rising Senior High School Student-Athletes	Prep Leadership Program	Program includes: Basics of Leadership – assessments, styles, motivating others; Professional Development – life skills, social media; Career Development – preparing for the future (resume, mock-interview, public speaking, networking); Financial Education – introduction to financial terms, tools, and the role of financial advisors; and, Basics of Management.
High School Student-Athletes in Baltimore	1st & Goal Program	<p>The 1st & Goal program focuses on supporting student athletes with meeting and exceeding academic standards including improving grades, attendance, and graduation rates. The program supports the social-emotional growth of each athlete through a curriculum that focuses on financial literacy, character development, conflict resolution, mentoring, communications and health, safety and wellness.</p> <p>NFL Player Engagement has partnered with the Family League of Baltimore and selected The Academies at Frederick Douglass High School as the target athletic program. The Family League of Baltimore is a non-profit organization that convenes, coordinates, and funds programs to strengthen the lives of children and families in the Baltimore area with the hope of improving the lives of the city's youth from birth to their entry into adulthood.</p>

^a These programs can be found at the NFL's Player Engagement Department website at <https://www.nflplayerengagement.com>.

To Whom Available	Program	Program Description (According to NFL)
NCAA Student-Athletes	NFL-NCAA Life Skills Roundtable	<p>The NFL-NCAA Life Skills Roundtable for Student-Athletes is designed to provide student-athletes with a forum to discuss the resources and support that they need in order to meet their personal and professional goals. Through intimate discussions with a diverse representation of student-athletes (sport, gender, ethnicity), the NFL and the NCAA will gain a better understanding of the personal and professional development needs and goals of student-athletes. The student-athletes will also afford the opportunity to participate in professional development seminars as well as assessments to increase self-awareness.</p>
Rookie NFL players	Rookie Transition Program	<p>The NFL Rookie Transition Program is an orientation for all drafted and undrafted rookies based on the four principles of NFL History, Total Wellness, Experience and Professionalism. The symposium includes presentations, videos, and workshops focused on these principles as well as other topics, including player health and safety, decision making, mental health, substance abuse and domestic violence prevention, non-discrimination, and maintaining positive relationships. Rookies are provided with resources and best practices to assist them with their shared responsibility in successfully identifying off-the-field challenges and transitioning from college to the professional level.</p> <p><i>The Rookie Transition Program is the only program listed here that is mandatory.</i></p>
Current players	Continuing Education	<p>The Continuing Education Program (CEP) assists current and former NFL players to complete their undergraduate degree, pursue graduate studies and utilize other educational opportunities to prepare for life after football.</p> <p>The CEP partners with colleges and universities across the country to design detailed plans to assist players in reaching their educational goals. By working closely with academic advisors, these individualized educational plans may include opportunities to pursue coursework in a player's franchise city, at his original institution or through distance learning via Internet-based coursework.</p> <p>Players who have already completed their undergraduate degree may opt to participate in graduate school or professional certification programs aimed at enhancing their skills and abilities. The CEP can assist players to identify appropriate, accredited schools, provide guidance on admission requirements including graduate exams (GRE, GMAT, LSAT, etc.) and assist players in the preparation of their graduate application.</p>
Current players	Financial Education	<p>The National Football League Financial Education Program (FEP) provides players with valuable knowledge to manage their personal finances and improve financial decision-making. The objective of the program is to ensure the long-term financial stability of players throughout the League. The program offers players resources and a realistic perspective on the current economic environment. The non-credit seminars teach players about cash management, insurance, tax planning, estate planning, investments, retirement planning and other related topics.</p>

Appendix D: Summary Of Programs Offered By NFL's Player Engagement Department (continued)

To Whom Available	Program	Program Description (According to NFL)
Current and former NFL players	Broadcast Boot Camp	A hands-on program that offers current and former NFL players the opportunity to explore multiple on-air job functions in the television/media business. The program includes sessions on tape study, editing, show preparation, radio production, control room operation, studio preparation, production meetings, field reporting and game preparation. Each player has the opportunity to tape segments in a studio environment as a game analyst and as a field reporter. Players are also able to experience what life is like in the broadcast booth and in other media positions.
Current and former NFL players	NFL Business Management and Entrepreneurial Program	The NFL Business Management and Entrepreneurial Program is a joint effort between the NFL, the NFLPA and premiere graduate business schools. These custom programs seek to improve players' ability to evaluate business opportunities through interactive workshops, stimulating discussions and practical knowledge. This program is ideal for NFL players interested in owning, operating or building their own businesses. Topics covered include: personal investments, non-profit and social awareness foundations, business plan review and assessment, property management, operations and cash-flow management, recruiting, hiring, and human resource management. Players are provided the opportunity to look at realistic business scenarios and dissect opportunities they may be considering. The Wharton School, University of Pennsylvania, Harvard Business School, Kellogg School of Management, Northwestern University, University of Notre Dame, and, the Stanford Graduate School of Business are all participating schools in the program.
Current and former NFL players	Business of Music Boot Camp	The NFL Business of Music Boot Camp is an intensive immersion program for current and former NFL players who are interested in understanding the essential components and make up of today's music industry. Utilizing the world-renowned faculty of NYU's Clive Davis Institute of Recorded Music, top industry professionals, and internationally recognized artists, participants experience the creative process first-hand via classroom sessions and round table discussions. Over the course of four days, participants will engage in discussions and interactive workshops covering all contemporary aspects of the music industry including production, artist development, digital music, publishing, artist management, marketing, and touring. Participants will gain a better understanding of the steps they should take to pursue a successful career in the music industry and will learn how to turn their creative ideas into concrete business plans.
Current and former NFL players	Hospitality & Culinary Management Workshop	Hosted at New York City's award winning Institute for Culinary Education, the Hospitality & Culinary Management Workshop introduces participants to the fundamental skills required for success in the hospitality and culinary industries. Whether you're considering owning or managing a small inn, a large hotel chain, a local café, or a five-star restaurant, learning from some of the best in the business will help you avoid the pitfalls of the industry and get a head start on your future career.

To Whom Available	Program	Program Description (According to NFL)
Current and former NFL players	NFL-NCAA Coaches Academy	<p>The program provides 30 current and former NFL players with tools and networking opportunities for potential careers as football coaches. Many of the participants currently have high school or college coaching positions. The NCAA also invites football coaches who have less than eight years of college coaching experience to take part. This is an excellent opportunity for players who are looking to continue their careers on the football sidelines to learn leadership, management and administrative skills from football coaches at all levels.</p> <p>Sessions include instruction from NFL, college and high school coaches, business leaders and athletic administrators. Topics include how to build a personal and professional brand; managing budgets; successful networking; media messaging; coaching contracts; building relationships in college; effective leadership; understanding the academic landscape; and, the interview process. Participants also experience mock interview sessions.</p>
Current and former NFL players	Pro Hollywood Boot Camp	<p>The NFL Pro Hollywood Boot Camp is an intensive filmmaking workshop for players aspiring to careers in the motion picture industry. Through classroom learning and practical application, current and former NFL players receive a crash course in the art of moviemaking and are introduced to various disciplines and careers in the film business.</p>
Current and former NFL players	Consumer Products Boot Camp	<p>The NFL Consumer Products department is the architect of the NFL's brand as it relates to Retail products, On-Field product, Club Practice Gear and Promotional items. This division works with NFL licensing partners and retailers to identify key product trends and new business opportunities.</p> <p>This custom program is tailored to those who are interested in learning more about the consumer products design, licensing, and manufacturing industries. Under the guidance of faculty from the University of Maryland Robert H. Smith School of Business and official NFL Licensees, participants will receive an overview of the consumer products field with a focus on business planning, product marketing, and industry trends and practices. A tour of a licensee campus and an exclusive visit to the NFL's Consumer Products Summit will enhance the lessons learned in classroom sessions and provide a great backdrop for the extensive mentoring and networking opportunities available.</p> <p>The four days will culminate in a Group Pitch Project in which participants will compete in groups to develop, create, and deliver a product pitch to a panel comprised of League executives and industry experts.</p>

Appendix D: Summary Of Programs Offered By NFL's Player Engagement Department (continued)

To Whom Available	Program	Program Description (According to NFL)
Current and former NFL players, along with spouses	Franchising Boot Camp	<p>The NFL Franchising Boot Camp, open to current and former players and their significant others, focuses on the franchising industry and how to take advantage of the resources and business practices franchisors provide to their franchisees. The program will cover the types of businesses that rely on franchising, where to get information about them, how to devise a franchise business plan, what annual and daily operational costs to expect, how to put together a winning team and whether or not franchising is right for each player and spouse.</p>
Former NFL players	Legends Community	<p>The NFL Legends Community is designed to connect former players with each other, their former teams and the NFL. Twenty Legends will lead the outreach and assist the NFL in administering the NFL Legends Community.</p>
Former NFL players and spouses	Transition Assistance Program	<p>The NFL Transition Assistance Program (TAP) marks the evolution of the NFL Career Transition Program (CTP), which hosted over 250 former NFL players from 2010–2013. TAP has been created in a partnership with former players and Georgia Tech faculty experts. The purpose of TAP is to provide transitioning players and their significant others peer to peer support through relationships with trained NFL Transition Coaches (former players) who will emphasize a holistic approach to Total Wellness.</p> <p>Transition is a continuous process unique to each individual's situation. At TAP, all attendees will chart their specific course through conversations with others who have experienced the physical, psychological, and social aspects of transition. The curriculum also features sessions pertaining to fitness, nutrition, career development, financial success, and much more.</p> <p>Upon completion of the program, attendees will leave with their Transition Playbook resource guide, which includes customized tools for success, Player Engagement resources, and NFL Player Benefits information.</p>
Minorities interested in coaching	Bill Walsh NFL Minority Coaching Fellowship	<p>The Bill Walsh NFL Minority Coaching Fellowship is an annual program administered by the NFL Management Council and NFL Player Engagement.</p> <p>The program's objective is to use NFL clubs' training camps, offseason workout program and minicamps to give talented minority coaches opportunities to: observe; participate; gain experience; and, ultimately gain a full-time NFL coaching position.</p> <p>Designed as a vocational tool to increase the number of full-time NFL minority coaches, all 32 NFL clubs participate in the program on an annual basis. Participants are hired for the duration of training camp, including all pre-season games, and clubs are encouraged to hire a minimum of four participants.</p>

To Whom Available	Program	Program Description (According to NFL)
Potential head coaches	NFL-NCAA Champion Forum	The NFL-NCAA Champion Forum is an educational forum where individuals who have been identified as a potential head coaches by administrators in the membership will simulate the intercollegiate interview process from researching the position to their first staff meeting after becoming a head coach. By achieving the following objectives, the forum is providing tailored education to future head coaches at the intercollegiate level.
Potential college football coaches	NFL-NCAA Future Football Coaches Academy	The NFL-NCAA Future Football Coaches Academy is an educational forum where individuals who have recently completed their collegiate eligibility, and have a desire to enter the college football coaching profession, will learn about and explore football coaching careers with a primary focus on intercollegiate athletics. By achieving the following objectives, the academy is educating participants on the various aspects of securing, managing and excelling as a coach at the intercollegiate level.
Head football coaches, athlete development professionals, clinicians, and directors of football operations from the NCAA and NFL	NFL-NCAA Summit	The summit allows each group participating individual sessions focused on becoming a more informed and educated administrator and coach. A clinician led session provides attendees with valuable skill enhancement and professional development education focused on protecting the mental and physical well-being of athletes. In addition, participants spend time together to discuss key cross collaboration opportunities that will allow them to serve student-athletes, professional athletes and executives in a more informed and efficient fashion.
Aspiring journalists and communications professionals	Sports Journalism & Radio Boot Camp	Hosted at Bowling Green State University, the Sports Journalism & Radio Boot Camp will provide aspiring journalist and communications professionals the opportunity to hear the latest from industry leaders; find out what social media options are available, including creating your own blog; and, learn what it would take to become a sports communications professional at the pro or college level.

APPENDIX E \ Summary of Programs Offered by the NFLPA¹

To Whom Available	Program	Program Description (According to NFLPA)
Current players	Externship Program	Matches current players with companies for a 3-week internship during the offseason. In 2015, the NFLPA matched 25 players with 9 organizations, including an ESPN radio station, Comcast SportsNet, Under Armour, and two college athletic departments.
Current players	Business Classes	The NFLPA has partnered with Indiana University's Kelley School of Business to give players the opportunity to participate in a variety of webinars, business certificate courses, professional courses, and for-credit courses toward an M.B.A. The Trust, below, runs a similar program in collaboration with Babson College.
Current players	Coaching Internship	The NFLPA partnered with the American Football Coaches Association (AFCA) to place former players as coaching interns at Division II, Division III, and National Association of Intercollegiate Athletics (NAIA) institutions for an entire football season.
Former players with at least 2 Credited Seasons	The Trust	A "set of resources, programs and services designed to provide former players with the support, skills and tools to help ensure success off the field and in life after football." The Trust has partnered with a variety of organizations and institutions to assist former players in the areas of physical health, career transitioning, and financial health. For example, in the area of physical health, the University of North Carolina, the Tulane University Institute of Sport Medicine, the Cleveland Clinic, and Massachusetts General Hospital will all provide former players with a full body physical examination, including but not limited to musculoskeletal, neurological, and cardiovascular analyses. According to the NFLPA, more than 1,500 former players have availed themselves of The Trust's resources since it was launched in 2013.
Former players	Gene Upshaw Player Assistance Trust Fund	"The Gene Upshaw Players Assistance Trust assists former players who are facing financial hardship due to unforeseen crisis, unaffordable medical situations and players who wish to go back to school to finish their undergraduate degrees."

Endnote

1. For more on these programs, see NFLPA Externship Program Enters Second Year, NFLPA (Feb. 23, 2015), <https://nflpa.com/news/all-news/nflpa-externship-program-enters-second-year>, archived at <https://perma.cc/G2HJ-TCRU>; A Winning Team: Kelley School of Business and the NFLPA, Kelley Sch. Business, https://nflpawebqa.blob.core.windows.net/media/Default/PDFs/Player%20Development/NFLPA-Kelley_%20Program.pdf (last visited Aug. 7, 2015), archived at <https://perma.cc/8WPH-A8GD?type=pdf>; Career, Trust, <http://playerstrust.com/your-trust/career> (last visited Aug. 7, 2015), archived at <http://perma.cc/QZJ5-9URR>; Active Players – Grow Experience, NFLPA, <https://nflpa.com/active-players/playerdevelopment/experience> (last visited Aug. 7, 2015), archived at <https://perma.cc/5JPR-RR9E> (However, we note that it is unclear why Division I institutions are not included. Additionally, it would seem very possible that players could obtain such positions without the internship program); Emily Kaplan, The Games Go On, And So Does Life, *MMQB* (Dec. 26, 2013), <http://mmqb.si.com/2013/12/26/nfl-nflpa-the-trust-player-retirement-benefits/>, archived at <http://perma.cc/Z2LH-V8PM> (discussing creation of the Trust); Frequently Asked Questions, Trust, <http://playerstrust.com/frequently-asked-questions> (last visited Aug. 7, 2015), archived at <http://perma.cc/7NLC-HDTB> (describing The Trust and its purpose); Brain and Body, Trust, <http://playerstrust.com/your-trust/brain-and-body> (last visited Aug. 7, 2015), archived at <http://perma.cc/4HN3-HSHL>; Gene Upshaw Player Assistance Trust Fund, <https://www.yourpaf.com/gupat/#.Vuhhvn0rLIU> (last visited Mar. 15, 2016), archived at <https://perma.cc/S9T8-RYHF>.

APPENDIX F \ Article 39 of the 2011 Collective Bargaining Agreement—Players’ Rights to Medical Care and Treatment

Note: Below is the current text of Article 39 of the 2011 Collective Bargaining Agreement, entitled “Players’ Rights to Medical Care and Treatment.” In Appendix G, we provide a revised, Model Article 39 based on the recommendations made in this Report.

ARTICLE 39

PLAYERS’ RIGHTS TO MEDICAL CARE AND TREATMENT

Section 1. Club Physician:

(a) **Medical Credentials.** Each Club will have a board-certified orthopedic surgeon as one of its Club physicians, and all other physicians retained by a club to treat players shall be board-certified in their field of medical expertise. Each Club will also have at least one board-certified internist, family medicine, or emergency medicine physician (non-operative sports medicine specialist). Any Club medical physician (internist, family medicine or emergency medicine) hired after the effective date of this Agreement must also have a Certification of Added Qualification (CAQ) in Sports Medicine; any head team physician (orthopedic or medical) hired after the effective date of this Agreement must have a CAQ in Sports Medicine; and any current team physician promoted to head team physician after the effective date of this Agreement has until February 2013 to obtain a CAQ in Sports Medicine or relinquish the position.

(b) **Team Consultants.** All Clubs shall have the consultants with the following certifications:

- (i) Neurological (head trauma): Board certification in neurosurgery, neurology, sports medicine, emergency medicine, or psychiatry, with extensive experience in mild and moderate brain trauma;
- (ii) Cardiovascular: Board certified in cardiovascular disease;
- (iii) Nutrition (athletes): licensed;
- (iv) Neuropsychologist: Ph.D and certified/licensed.

(c) **Doctor/Patient Relationship.** The cost of medical services rendered by Club physicians will be the responsibility of the respective Clubs, but each Club physician’s primary duty in providing player medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. In addition, all Club physicians and medical personnel shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club’s city. All Club physicians are required to disclose to a player any and all information about the player’s physical condition that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player’s performance or health. If a Club physician advises a coach or other Club representative of a player’s serious injury or career threatening physical condition which significantly affects the player’s performance or health, the physician will also advise the player in writing. The player, after being advised of such serious injury or career-threatening physical condition, may request a copy of the Club physician’s record from the examination in which such physical condition was diagnosed and/or a written explanation from the Club physician of the physical condition.

(d) **NFLPA Medical Director.** The NFL recognizes that the NFLPA Medical Director has a critical role in advising the NFLPA on health and safety issues. Accordingly, the NFL agrees that the NFLPA Medical Director shall be a voting member of all NFL health and safety committees, including but not limited to the NFL Injury & Safety Panel and its subcommittees and shall have access to all of the same data,

Article 39: Players' Rights to Medical Care and Treatment (continued)

records and other information provided to the NFL Medical Advisor and/or any other members of such committees.

(e) **Home Game Medical Coverage-Neutral Physician:** All home teams shall retain at least one RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies.

Section 2. Club Athletic Trainers: All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer. In addition, each Club shall be required to have at least one full time physical therapist who is certified as a specialist in physical therapy to assist players in the care and rehabilitation of their injuries.

Section 3. Accountability and Care Committee:

(a) The parties agree to establish an Accountability and Care Committee, which will provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players by all clubs during the term of this Agreement. The Committee shall consist of the NFL Commissioner and the NFLPA Executive Director (or their designees). In addition, the Commissioner and Executive Director shall each appoint three additional members of the Committee, who shall be knowledgeable and experienced in fields relevant to health care for professional athletes.

(b) The Committee shall meet in person or by conference call at least three times per year, or at such other times as the Commissioner and Executive Director may determine.

(c) The Committee shall: (i) encourage and support programs to ensure outstanding professional training for team medical staffs, including by recommending credentialing standards and continuing education programs for Team medical personnel; sponsoring educational programs from time to time; advising on the content of scientific and other meetings sponsored by the NFL Physicians Society, the Professional Football Athletic Trainers Association, and other relevant professional institutions; and supporting other professional development programs; (ii) develop a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the role of the player and the team medical staff in preventing and treating illness and injury in professional athletes; (iii) conduct research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods; (iv) conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analyses of the results of such surveys; (v) assist in the development and maintenance of injury sur-

Article 39: Players’ Rights to Medical Care and Treatment (continued)

veillance and medical records systems; and (vi) undertake such other duties as the Commissioner and Executive Director may assign to the Committee.

(d) If any player submits a complaint to the Committee regarding Club medical care, the complaint shall be referred to the League and the player’s Club, which together shall determine an appropriate response or corrective action if found to be reasonable. The Committee shall be informed of any response or corrective action. Nothing in this Article, or any other Article in this Agreement, shall be deemed to impose or create any duty or obligation upon either the League or NFLPA regarding diagnosis, medical care and/or treatment of any player.

(e) Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry.

Section 4. Player’s Right to a Second Medical Opinion: A player will have the opportunity to obtain a second medical opinion. As a condition of the Club’s responsibility for the costs of medical services rendered by the physician furnishing the second opinion, such physician must be board-certified in his field of medical expertise; in addition, (a) the player must consult with the Club physician in advance concerning the other physician; and (b) the Club physician must be furnished promptly with a report concerning the diagnosis, examination and course of treatment recommended by the other physician. A player shall have the right to follow the reasonable medical advice given to him by his second opinion physician with respect to diagnosis of injury, surgical and treatment decisions, and rehabilitation and treatment protocol, but only after consulting with the club physician and giving due consideration to his recommendations.

Section 5. Player’s Right to a Surgeon of His Choice: A player will have the right to choose the surgeon who will perform surgery provided that: (a) the player will consult unless impossible (e.g., emergency surgery) with the Club physician as to his recommendation regarding the need for, the timing of and who should perform the surgery; (b) the player will give due consideration to the Club physician’s recommendations; and (c) the surgeon selected by the player shall be board-certified in his field of medical expertise. Any such surgery will be at Club expense; provided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery.

Section 6. Standard Minimum Preseason Physical: Each player will undergo the standardized minimum preseason physical examination and tests outlined in Appendix K, which will be conducted by the Club physician(s) as scheduled by the Club. No Club may conduct its own individual testing for anabolic steroids and related substances or drugs of abuse or alcohol.

Section 7. Substance Abuse:

(a) **General Policy.** The parties agree that substance abuse and the use of anabolic steroids are unacceptable within the NFL, and that it is the responsibility of the

Article 39: Players' Rights to Medical Care and Treatment (continued)

parties to deter and detect substance abuse and steroid use and to offer programs of intervention, rehabilitation, and support to players who have substance abuse problems.

(b) **Policies.** The parties confirm that the Program on Anabolic Steroids and Related Substances will include both annual blood testing and random blood testing for human growth hormone, with discipline for positive tests at the same level as for steroids. Over the next several weeks, the parties will discuss and develop the specific arrangements relating to the safe and secure collection of samples, transportation and testing of samples, the scope of review of the medical science, and the arbitrator review policy, with the goal of beginning testing by the first week of the 2011 regular season. Pending agreement by both parties regarding the implementation of this program of blood testing, and such other policy amendments as the parties may agree upon, the Policy and Program on Substances of Abuse and the Policy on Anabolic Steroids and Related Substances, will remain in full force and effect as each existed during the 2010 season.

APPENDIX G \ Model Article 39 of the Collective Bargaining Agreement — Players' Medical Care and Treatment

Preliminary Note: Below is a model collective bargaining agreement (CBA) provision setting forth our proposed recommendation for the structure of NFL player healthcare, discussed at length in Chapter 2: Club Doctors. This CBA provision would replace the existing Article 39, which governs “Players’ Medical Care and Treatment.” In particular, the model CBA provision is focused on the creation of a Medical Committee to select, review, and terminate the doctors that care for players. We leave the processes for such selection, review, and termination to medical experts and the proposed Medical Committee. Nevertheless, it seems at a minimum that the Players’ Medical Staff should be reviewed each year.

This model CBA provision does not address certain related issues. First, it does not address medical sponsorships, discussed in detail in Chapter 2: Club Doctors, Section (A)(i). While medical sponsorship is an important issue, it is not an issue that has been collectively bargained, *i.e.*, has not been included in Article 39 or prior CBA provisions governing player medical care. Consequently, we do not address the issue in our model Article 39. Second, our proposal may be complicated to implement. The logistics of implementation, including any phasing in process, are determinations best left to the NFL and NFLPA and thus are not addressed here. Third, the model CBA provision does not include a dispute resolution mechanism. There are a variety of dispute resolution mechanisms in the 2011 CBA, and which one is best for resolving issues under our model CBA provision is not our principal focus and thus not addressed here.

ARTICLE 39: Players’ Medical Care and Treatment

SECTION 1: MEDICAL COMMITTEE

- (a) **Responsibilities.** The Medical Committee shall be responsible for selecting, reviewing, and terminating (as necessary) the Players’ Medical Staff, as described in Section 2. The process for selecting, reviewing, and terminating members of the Players’ Medical Staff is at the Medical Committee’s discretion.
- (b) **Composition.** The NFL and NFLPA shall each select three medical professionals to serve on the Medical Committee. The NFL and NFLPA must each select two doctors (either M.D. or D.O.) and one athletic trainer (certified by the Board of Certification for the Athletic Trainer). The six members collectively chosen by the NFL

and NFLPA shall then jointly select a seventh medical professional to serve as Chairperson of the Medical Committee. The NFL and NFLPA retain the right to select and replace their three members of the Medical Committee according to their discretion, provided neither the NFL or NFLPA shall take any action that interferes or potentially interferes with a member of the Medical Committee performing his or her obligations as described in this Article with the utmost professionalism and independence. The Chairperson may only be replaced or removed by a majority vote of the other members of the Medical Committee.

- (c) **Funding.** The NFL and NFLPA shall be jointly responsible for providing the Medical Committee with funding sufficient to permit the Medical Committee to carry out its obligations as described in this Article, including but not limited to hiring other professionals the Medical Committee determines to be necessary. Nothing in this Article shall be deemed to impose or create any duty or obligation upon the NFL, NFLPA or Medical Committee regarding diagnosis, medical care and/or treatment of any player.

SECTION 2: PLAYERS’ MEDICAL STAFF

- (a) **Players’ Doctors.** For each Club, the Medical Committee shall select two appropriately qualified “Players’ Doctors” who shall be responsible for providing medical care to the Club’s players in accordance with all applicable laws and ethical standards, except as otherwise provided for in this Article. The Medical Committee shall designate one of the two Players’ Doctors as the Head Players’ Doctor, who shall be responsible for directing and supervising the work of the other members of the Players’ Medical Staff, as defined in this Section. The Players’ Doctors must have a Certificate of Added Qualification in Sports Medicine at the time of their selection.
- (b) **Players’ Specialists.** In addition to the Players’ Doctors, for each Club, the Medical Committee shall also select a doctor board-certified in each of the following specialties or sub-specialties to be available for the treatment of players as determined to be necessary by the Head Players’ Doctor (“Players’ Specialists”):
- i. Orthopaedic surgery;
 - ii. Internal medicine;
 - iii. Emergency medicine;
 - iv. Family medicine;
 - v. Cardiovascular disease or interventional cardiology; and,
 - vi. Neurological surgery.

If one of the Players' Doctors is certified in one or more of the above-listed specialties or sub-specialties, the Medical Committee need not select an additional Players' Specialist with the same specialty or sub-specialty. The Specialists shall be responsible for providing medical care to the Club's players in accordance with all applicable laws and ethical standards, except as otherwise provided for in this Article. The Players' Specialists will at all times provide medical care and advice that is in the player's best interests, taking into account the player's own goals and interests, without regard to any interest of the Club.

- (c) **Players' Athletic Trainers.** For each Club, the Medical Committee shall select four athletic trainers who shall be responsible for providing medical care to the Club's players in accordance with all applicable laws and ethical standards, except as otherwise provided for in this Article. The Medical Committee shall designate one of the four Players' Athletic Trainers as the Head Players' Athletic Trainer, who shall be responsible for directing and supervising the work of the other Players' Athletic Trainers. The Head Players' Doctor shall supervise and direct the work of all Players' Athletic Trainers. The Players' Athletic Trainers must be certified by the Board of Certification for the Athletic Trainer at the time of their selection.
- (d) **EMRs.** The Players' Athletic Trainers shall be responsible for entering all diagnosis and treatment notations into the electronic medical record ("EMR") system, including the notations of any examinations performed on a player during a game and any consultation with, or treatment provided by, Second Opinion Doctors as described in Section 5 below.
- (e) **Players' Other Medical Professionals.** In addition to the Players' Doctors, Players' Specialists, and Players' Athletic Trainers, for each Club, the Medical Committee shall also select one of each of the following medical professionals to be available for the treatment of players as reasonably determined to be necessary by the Head Players' Doctor:
- i. Physical therapist;
 - ii. Massage therapist;
 - iii. Nutritionist;
 - iv. Psychiatrist; and,
 - v. Neuropsychologist.
- (f) **Access to Club Facilities and Events.** The Players' Doctors, Players' Specialists, Players' Athletic Trainers, and Players' Other Medical Professionals (collectively, "Players' Medical Staff"), shall have access to Club facilities and events (including but not limited to locker rooms, practices, and games) as needed to perform their duties as described in this Article. The Club shall be responsible for providing all equipment and supplies as reasonably determined by the Head Players' Doctor to be necessary for the Players' Medical Staff to perform their duties as described in this Article.
- (g) **Compensation Arrangement.** The Club is responsible for compensating the Players' Medical Staff, in amounts to be determined by the Medical Committee. All members of the Players' Medical

Staff shall enter into written contracts detailing the terms of the arrangement between the Players' Medical Staff member and the Club. The contract between the Players' Medical Staff member and the Club must be approved by the Medical Committee prior to execution and shall explicitly reference this Article as controlling and superseding any provision of the contract in the event of a conflict. The Club has no authority to select, control, or terminate any member of the Players' Medical Staff. It is the intention of the NFL and NFLPA that each member of the Players' Medical Staff be considered and treated as an independent contractor under all applicable laws and regulations.

- (h) **Avoidance of Conflicts.** The Players' Medical Staff will at all times provide medical care and advice that is in the player's best interests, taking into account the player's own goals and interests, without regard to any interest of the Club. No member of the Players' Medical Staff shall have any obligation to the Club, except for the Player Health Report, discussed below in Section 4.

SECTION 3: CLUB MEDICAL STAFF

- (a) **Retention and Duties.** Each Club is free to retain any qualified medical professional to provide services to the Club ("Club Medical Staff"). The Club Medical Staff shall not provide medical care to any player, except in emergency situations. The Club Medical Staff shall have no communication with players or the Players' Medical Staff, except as otherwise described in this Article.
- (b) **Physical Examinations.** Within the limitations set forth below, the Club shall be permitted to conduct physical examinations of players via Club Medical Staff. During any such physical examinations, the player will make full and complete disclosure of any physical or mental condition known to him which might impair his performance under his contract and will respond fully and in good faith when questioned by the Club Medical Staff about his condition.
- (c) A player under contract to a Club shall, upon the Club's request, submit to a complete physical examination by the Club Medical Staff at the following times:
- i. Once within seven days following the Club's last game of the season.
 - ii. After seven days following the Club's last game of the season, once before two days prior to the commencement of preseason training camp, provided the player is otherwise with the Club, e.g., during offseason workouts or minicamps.
 - iii. Once within two days prior and two days after commencement of the Club's preseason training camp.
 - iv. After two days following commencement of the Club's preseason training camp and before the last game of the season, upon the Club's reasonable request.
- (d) In addition to a physical examination, the Club may also request that the player submit to drills or other football-related activities for the purpose of assessing the player's fitness-to-play, unless the Head Players' Doctor states in writing that such

drills or football-related activities create an unreasonable risk of worsening the player's condition or delaying his recovery from such condition.

- (e) A player not currently under contract may be required to submit to any physical examination, drills or other football-related activities requested by a Club as part of the negotiation of a prospective contract between the player and Club, provided such physical examinations, drills or other football-related activities otherwise comply with all applicable laws and regulations.
- (f) **Access to Medical Records.** The Club Medical Staff shall have full access to the EMRs of each player on its roster, subject to applicable law.
- (g) **Compliance with the Law.** All examinations (physical or otherwise) and possession or use of medical records by Club Medical Staff must comply with all applicable laws.

SECTION 4: PLAYER HEALTH REPORT

- (a) **Content.** The Players' Medical Staff, under the direction of the Head Players' Doctor and Head Players' Athletic Trainer, are responsible for providing the Club with a regular status report of all players currently receiving medical treatment for a diagnosed condition ("Player Health Report"). The Player Health Report shall briefly describe: (1) the player's condition; (2) the player's permissible level of participation in practice and other Club activities; (3) the player's current status for the next game; (4) any limitations on the player's potential participation in the next game; and, (5) an estimation of when the player will be able to return to full participation in practice and games.^a The Players' Medical Staff shall complete the Player Health Report in a good faith effort to permit the Club to be properly prepared for its next game.
- (b) **Provision of Player Health Report.** The Player Health Report will be provided to an individual designated by the Club at the following times:
 - i. At least one hour before practice on the day of the practice;
 - ii. Within two hours of the conclusion of practice on the day of the practice;
 - iii. Between 28 and 20 hours prior to kickoff of a game;
 - iv. Between 3 and 2 hours prior to kickoff of a game;
 - v. Within 2 hours after the conclusion of a game (provided there are games or the possibility of games remaining in the season);
 - vi. By the end of the day following a game (provided there are games or the possibility of games remaining in the season); and,
- (c) **Clearance to Practice.** The Head Players' Doctor's determinations, as detailed in the Player Health Report, concerning whether a player can practice or participate in football-related activities, including with any relevant limitations, are controlling, subject to Section 5 below. A Club shall not permit a player to practice or participate in football-related activities beyond the limitations set forth in the Player Health Report. If a player suffers an injury or other condition during the course of a practice, the Head Players' Doctor and Head Athletic Trainer will make best efforts to advise a designated Club representative of a player's status for the remainder of the practice as soon as is practicable.
- (d) **Clearance to Play.** As part of the Player Health Report provided between 3 and 2 hours prior to kickoff of a game, the Head Players' Doctor will declare: (i) whether the player can or cannot play; and, (ii) if the player can play, any relevant limitations on the player's playing. The Head Players' Doctor's determinations, as detailed in the Player Health Report, concerning whether a player can play, or whether the player can play with limitations, are controlling as to the player's status to play, subject to Section 5 below. A Club shall not permit a player to play beyond the limitations set forth in the Player Health Report. If a player suffers an injury or other condition during the course of a game, the Head Players' Doctor and Head Athletic Trainer will make best efforts to advise a designated Club representative of a player's status for the remainder of the game as soon as is practicable.
- (e) **Communication with Club Medical Staff.** The Club Medical Staff may seek reasonable clarification or explanation of the information contained in the Player Health Report via direct communication with only the Head Players' Doctor. The Head Players' Doctor shall make reasonable efforts to respond in good faith to all reasonable inquiries from the Club Medical Staff concerning the Player Health Report. At no time other than provided for in this Section shall the Players' Medical Staff communicate with any employee, representative, consultant or agent of the Club concerning the medical care or condition of a player.
- (f) **Compliance with the Law.** The creation, possession and use of the Player Health Report must comply with all applicable laws.

^a We recommend that the NFL and NFLPA jointly agree on the form of the Player Health Report, which should be completed electronically and automatically incorporated into the players' EMRs. Additionally, the Player Health Report should mirror the terminology historically used by the NFL's Injury Reporting Policy concerning a player's status: Out (definitely will not play); Doubtful (at least 75 percent chance will not play); Questionable (50-50 chance will not play); and, Probable (virtual certainty player will be available for normal duty).

SECTION 5: PLAYERS' RIGHT TO A SECOND MEDICAL OPINION

- (a) **Second Opinion Doctors List.** The Medical Committee shall create a list of doctors with whom players are permitted to consult for the purposes of providing a medical opinion other than that of the Players' Medical Staff ("Second Opinion Doctors"). In creating the Second Opinion Doctors List, the Medical Committee shall seek to identify well-qualified doctors in all relevant specialties for which a player might seek a second medical opinion. A player can request that a doctor be added to the Second Opinion Doctors List by submitting such a request to the Medical Committee Chairperson prior to the consultation or treatment. The NFL, NFLPA or a Club can request a doctor be added to or removed from the Second Opinion Doctors List by submitting such a request to the Medical Committee detailing the reason for the request. The Medical Committee shall act promptly with regard to all requests. Where a player has requested a doctor be added to the Second Opinion Doctors List, a doctor need not be added to the Second Opinion Doctors List in advance of such consultation or treatment to be considered a Second Opinion Doctor; so long as the doctor is at some point added to the Second Opinion Doctors List per the player's request. The existence of the Second Opinion Doctor List shall in no way limit players to their own choice of personal doctor. Players need only consult with a Second Opinion Doctor for purposes of Payment, discussed in Section (b) below, and Clearance to Practice or Play, discussed in Section (c) below.
- (b) **Payment.** The Club is responsible for the payment of any consultation with, or treatment provided by, a Second Opinion Doctor provided the following conditions are met:
- i. The player has first consulted in good faith with the Head Players' Doctor;
 - ii. At the time of the consultation or treatment, the Second Opinion Doctor is on the Second Opinion Doctor List, or the player has requested the doctor be added to the Second Opinion Doctors List in accordance with Section 5(a) above and the doctor is added pursuant to the player's request; and,
 - iii. All relevant records from the consultation or treatment are either incorporated into the player's EMR or provided to the Club within two business days of their receipt by the player or the player's NFLPA-certified Contract Advisor.
- (c) **Clearance to Practice or Play.** If at any time on the Player's Health Report, the Head Players' Doctor has limited a player's clearance to practice or has determined that a player is "Out," "Doubtful," or "Questionable" for the next game, the player has the right to seek clearance to practice or play from a Second Opinion Doctor. If the Second Opinion Doctor states in writing that the

player can practice or play in a manner more extensive than that determined by the Head Players' Doctor, the player, at his sole discretion, has the right to practice or play up to the limits imposed by the Second Opinion Doctor, if any. If the Second Opinion Doctor states in writing that the player can practice or play in a manner less extensive than that determined by the Head Players' Doctor, the player, at his sole discretion, has the right to practice or play up to the limits imposed by the Head Players' Doctor.

SECTION 6: TREATMENT DETERMINATIONS

- (a) **Surgery.** A player has the right to choose the surgeon who will perform any surgery on him. A player is not obligated to undergo any surgery, regardless of the recommendations of the Players' Medical Staff, a Second Opinion Doctor, the Club Medical Staff, or any other party.
- (b) **Payment.** The Club is responsible for the payment of any surgery provided:
- i. The surgery is performed by: (x) a member of the Players' Medical Staff; (y) a surgeon who, at the time of the surgery, is on the Second Opinion Doctor List, or the player has requested the doctor be added to the Second Opinion Doctors List in accordance with Section 5(a) above and the doctor is added pursuant to the player's request and, the player has first consulted in good faith with the Head Players' Health Doctor; or, (z) any other medical professional in an emergency situation.
 - ii. All relevant records from the surgery are either incorporated into the player's EMR or provided to the Club within two business days of their receipt by the player or the player's NFLPA-certified Contract Advisor.

SECTION 7: HOME GAME EMERGENCY MEDICAL COVERAGE

- (a) For each game, the Medical Committee shall select one doctor who is board-certified in emergency medicine, anesthesiology, pulmonary disease, or thoracic and cardiac surgery, and who has documented competence in rapid sequence intubations in the past twelve months. This doctor shall be responsible for game-day medical intervention for catastrophic emergencies.

APPENDIX H \ Medical Malpractice Cases Against Club Doctors^a

1. *Butkus v. Chicago Bears, Fox*

In 1976, former Chicago Bears linebacker and Hall of Famer Dick Butkus settled a lawsuit against the Bears and their doctor Theodore Fox for \$600,000 after Butkus alleged that Fox negligently and repeatedly injected Butkus' knee with painkillers and refused to cooperate with Butkus' efforts to obtain a second opinion following a 1971 surgery.¹

2. *Siani v. Oakland Raiders, Rosenfeld*

In 1980, former Oakland Raiders wide receiver Mike Siani settled a lawsuit against the Raiders and Raiders doctor Robert Rosenfeld for \$120,000.² Siani alleged that Rosenfeld repeatedly injected Siani's foot with painkillers to numb Siani's broken toes which eventually caused the removal of the bones from his toes.³

3. *Hendy v. San Diego Chargers, Losse*⁴

In 1988, former San Diego Chargers defensive back John Hendy sued the Chargers and club doctor Gary Losse alleging that: (1) the Chargers were negligent in their hiring and retention of Losse; (2) Losse intentionally and negligently withheld medical information from Hendy concerning the extent of Hendy's knee injury; and, (3) Losse misrepresented to Hendy that he was fit to play.⁵ The United States Court of Appeals for the Ninth Circuit held that the Chargers' hiring obligations and Losse's duty to disclose were not controlled by the CBA and thus not preempted.⁶ The Ninth Circuit thus remanded the case to state court for consideration of the state tort law claims.⁷

The case eventually reached the Supreme Court of California.⁸ Rephrased as a "medical malpractice" claim, the Supreme Court of California held that Hendy's claims were barred by California's workers' compensation statutes.⁹ In so doing, the Supreme Court of California relied on Hendy's allegation that Losse was an employee of the Chargers and that Hendy had not alleged any facts which

would have permitted him to amend his complaint to allege that Losse was instead an independent contractor.¹⁰

Hendy's claims against the Chargers were found to be preempted by the Labor Management Relations Act and dismissed.¹¹

4. *Krueger v. San Francisco 49ers, Taylor, Millburn*

In 1988, former San Francisco 49ers offensive lineman Charlie Krueger settled a lawsuit against the 49ers and the 49ers' doctors Lloyd Taylor and Lloyd Millburn for approximately \$1.5 million.¹² Krueger alleged that Taylor injected Krueger's knee with painkilling injections dozens of times a season between a 1963 knee surgery and the end of Krueger's career in 1973 without informing him of the true condition of his knee.¹³

5. *Easley v. Seattle Seahawks, Scranton, Whitesel, Whitehall Laboratories*

In 1989, former Seattle Seahawks safety Kenny Easley sued the Seahawks, the Seahawks doctor Pierce Scranton, athletic trainer James Whitesel and Whitehall Laboratories, a maker of Advil.¹⁴ Easley alleged that his use of Advil, as prescribed by the club doctors, caused him kidney damage which the doctors failed to treat or disclose and ultimately necessitated a transplant.¹⁵ Easley settled the case for an undisclosed sum in 1991.¹⁶

6. *Daniels v. Seattle Seahawks, Auld*

In 1992, then-Seattle Seahawk David Daniels was treated by the Seahawks' orthopedist, Dr. Merrit Auld, for an apparent groin strain. Daniels was unable to play due to the pain and it was later determined he had a fractured rectus femoris. Daniels alleged he was never able to fully recover from his injury, contributing to the end of his career. Daniels sued Auld for medical malpractice. A Washington state court held that because Auld, like Daniels, was an employee of the Seahawks, Daniels' lawsuit was barred by Washington's workers' compensation laws.¹⁷

The result of Daniels' claims against the Seahawks is unclear.

^a The cases listed here were found through searching legal and news databases or otherwise discovered during our research. This list should not be considered an exhaustive list of medical malpractice cases by NFL players against club doctors. For example, the list does not include non-published case dispositions which were not reported in the news. Additionally, we know of one case pending as of the date of publication brought by former Miami Dolphins wide receiver O.J. McDuffie. See *McDuffie v. Mills*, Docket No. 2002-014638-CA-01 (Fla. Cir. Ct.).

7. Novak v. Lucie

In 1999, former Jacksonville Jaguars offensive lineman Jeff Novak sued the Jaguars' doctor Stephen Lucie alleging Lucie improperly operated on him in the locker room, a non-sterile environment, resulting in a hematoma and infection in his leg.¹⁸ Lucie settled the case for \$2.2 million.¹⁹

8. Hoge v. Munsell

In 2000, former Chicago Bears running back Merrill Hoge won a \$1.55 million jury award in a lawsuit against former Bears' doctor John Munsell.²⁰ Hoge alleged that Munsell failed to properly treat Hoge's concussions and negligently cleared Hoge to play, resulting in further injury and Hoge's forced retirement.²¹

9. Stringer v. Minnesota Vikings, et al.

In 2001, Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.²² Stringer's family later sued the Vikings, Vikings coaches and affiliated doctors, the NFL and Riddell. Stringer's family reached undisclosed settlements with one of the three doctors involved, David Knowles,²³ after a Minnesota trial court determined that Dr. Knowles was an independent contractor.²⁴ The claims against the two other Vikings doctors (Sheldon Burns and David Fischer) were dismissed on the ground that they were employees of the Vikings and the claims were thus barred by workers' compensation laws.²⁵

In 2003, a Minnesota trial court granted summary judgment^b in favor of the Vikings and its coaches.²⁶ The *Stringer* case is discussed in greater detail in Chapter 3: Athletic Trainers, Chapter 7: The NFL and NFLPA, and Chapter 9: Coaches.

10. Wilson v. Prusmack

In 2008, former Denver Broncos linebacker Al Wilson sued the Broncos' Club doctor, Chad Prusmack, alleging that Prusmack failed to treat properly a neck injury, requiring Wilson's retirement.²⁷ Wilson commenced the action approximately one month after an arbitrator ruled his grievance against the Broncos concerning the same issue was time-barred.²⁸ In 2011, a jury found that Prusmack was not negligent.²⁹

11. Jurevicius v. Cleveland Browns, Figler, Miniaci³⁰

In 2009, Cleveland Browns wide receiver Joe Jurevicius sued the Browns and Browns' doctors (Richard Figler and Anthony Miniaci) in Ohio state court, alleging causes of

action for negligence, negligent misrepresentation, fraud, constructive fraud, breach of fiduciary duty, common law intentional tort and statutory intentional tort against the Browns. Jurevicius generally alleged that the Browns and their doctors failed to take proper precautions to prevent staph infections and lied to players about what steps the club had taken to prevent infections.³¹ The Browns and the doctors attempted to remove the case to federal court, arguing that Jurevicius' claims were barred by the CBA.³² In a March 31, 2010 decision, the United States District Court for the Northern District of Ohio determined that Jurevicius' negligence, negligent misrepresentation, fraud, common law intentional tort and statutory intentional tort claims were not preempted while the constructive fraud and breach of fiduciary duty claims were. Concerning the doctors, the Court found that the CBA did not address the alleged obligations of club doctors to warn players about the conditions at a medical facility and thus the claims were not preempted.³³ The lawsuit settled a few months after the Court's decision.³⁴

12. Jones v. Gill, Zarins

In 2009, former New England Patriots defensive back Tebucky Jones sued Patriots doctors Tom Gill and Bertram Zarins alleging they failed to tell him that he had suffered a tear in his knee ligament during a 2006 game.³⁵ Jones claimed that the doctors' failure to inform him of his condition delayed proper treatment and caused further problems which ultimately caused the end of his career.³⁶ A jury awarded Jones \$3.75 million but the verdict was overturned by a Massachusetts judge for reasons which are unclear.³⁷

13. Rolle v. Brigham

In 2014, former Baltimore Ravens cornerback Samari Rolle was awarded \$650,000 in a medical malpractice lawsuit against then-Carolina Panthers Club doctor Craig Brigham and his OrthoCarolina healthcare practice.³⁸ In September 2008, Rolle was referred to Brigham by the Ravens' doctors for spinal surgery, an area of Brigham's expertise.³⁹ Rolle alleged that Brigham cleared Rolle to return to play too soon.⁴⁰ Rolle required a second surgery by Andrew Dossett, the Dallas Cowboys' Spine Consultant, which, although performed properly, forced Rolle to retire.⁴¹ Dossett, a member of the NFL Physicians Society, testified against Brigham, also a member of the NFL Physicians Society, at trial.⁴²

^b Summary judgment is "[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law." Black's Law Dictionary (9th ed. 2009).

Endnotes

- 1 Fred Mitchell, *Butkus Recalls Battles with Docs*, Chic. Trib., Nov. 1, 2007, available at 2007 WLNR 21518086; Dick Butkus & Pat Smith, Butkus—Flesh and Blood, 227–30, 257,279–95 (1997) (describing Fox's treatment of Butkus' knee conditions and lawsuit).
- 2 Angelo Cataldi & Glen Macnow, *Shots for the Pain Led to Permanent Damage*, Phil. Inquirer, Jun. 21, 1989, http://articles.philly.com/1989-06-21/sports/26105705_1_injections-cortisone-robert-rosenfeld, archived at <http://perma.cc/LFL5-2N72>.
- 3 *Id.*
- 4 F.2d 1470 (9th Cir. 1991).
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 P.2d 1, 54 Cal.3d 723 (Cal. 1991).
- 9 *Id.*
- 10 *Id.* at 743.
- 11 See *Hendy v. Losse*, 274 Cal.Rptr. 31, 33 (Cal. App. 1990).
- 12 Jennifer Lynn Woodlief, *The Trouble with Charlie: Fraudulent Concealment of Medical Information in Professional Football*, 9 SPG Ent. & Sports L. 3, 3 (1991). See also *Krueger v. San Francisco Forty Niners*, 234 Cal.Rptr. 579 (Cal.App. 1987) (ordering judgment in favor of Krueger and remanding for further proceedings).
- 13 *Id.*
- 14 Tom Farrey, *Easley Settles with Doctors, Drug Maker*, Seattle Times, Sept. 18, 1991, available at 1991 WLNR 984467; Glenn Nelson, *Courting Danger Krueger's Advice to Easley: Put Up Fight*, Seattle Times, May 31, 1989, available at 1989 WLNR 654489.
- 15 *Id.*
- 16 Tom Farrey, *Easley Settles with Doctors, Drug Maker*, Seattle Times, Sept. 18, 1991, available at 1991 WLNR 984467.
- 17 See *Daniels v. Seattle Seahawks*, 92 Wash.App. 576 (Wash. Ct. App. 1998).
- 18 Tom Farrey, *At What Price a Player's Pain?* ESPN (updated Nov. 4, 2002, 10:44 AM), <http://espn.go.com/gen/s/2002/0912/1431095.html>, archived at <http://perma.cc/TRN5-GQE6>.
- 19 Jason Cole, *Lawsuits Are Bad Medicine for Pro Sports Doctors*, Wash. Post, Apr. 27, 2003, available at 2003 WLNR 19263311.
- 20 Mark Fainaru-Wada & Steve Fainaru, *League of Denial: The NFL, Concussions, and the Battle for Truth* 121 (2013).
- 21 See *id.* at 41–46 (discussing treatment provided by Munsell to Hoge).
- 22 *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 748 (Minn. 2005).
- 23 See *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 2003 WL 25766738 (Minn. Dist. Ct. Dec. 8, 2003) (mentioning settlement with W. David Knowles, MD and Mankato Clinic, Ltd.).
- 24 Pam Louwagie & Kevin Seifert, *Stringer Claims Against Vikings Dismissed*, Newspaper—Twin Cities (Minneapolis), Apr. 26, 2003, available at 2003 WLNR 14250471.
- 25 See Memorandum and Order, *Stringer v. Minn. Vikings Football Club, No. 02-415*, 20–23 (Minn. Dist. Ct. Apr. 25, 2003).
- 26 See Memorandum and Order, *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415 (Minn. Dist. Ct. Apr. 25, 2003); *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 2003 WL 25766738 (Minn. Dist. Ct. Dec. 8, 2003) (discussing Court's prior order). Following Stringer's death, the NFL now issues an annual memorandum to NFL Clubs warning them about the risks of players overheating during training camp. See, e.g., Memorandum from NFL Injury and Safety Panel (Elliott Hershman, M.D., Chairman), to General Managers, Head Coaches, Team Physicians, and Team Athletic Trainers re: 2014 Training Camps—Adverse Weather Conditions (July 11, 2014) (on file with author).
- 27 Felisa Cardona, *Jury finds doctor not negligent in advice to former Bronco Al Wilson*, Denver Post, June 17, 2011, http://www.denverpost.com/ci_18296823, archived at <http://perma.cc/T4QV-7SBD>; *Wilson v. Prusmack*, Case # 2008CV-010376 (Col. Dist. Ct. 2008).
- 28 (Townley, Arb. Oct. 29, 2008), available as Exhibit 16 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), *Dent v. Nat'l Football League*, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.
- 29 Cardona *supra* note 27.
- 30 *Jurevicius v. Cleveland Browns Football Co. LLC*, 09-cv-1803, 2010 WL 8461220 (N.D. Ohio Mar. 31, 2010).
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 *Jurevicius Settles Lawsuit with the Browns*, ESPN (June 15, 2010, 6:37 PM), <http://sports.espn.go.com/nfl/news/story?id=5289486>, archived at <http://perma.cc/JJH7-CR37>.
- 35 Jessica Farge, *Jones Claims Pats Docs Cut Short Career*, Bos. Herald, Aug. 9, 2009, available at 2009 WLNR 15475294.
- 36 *Id.*
- 37 Bob Hohler, *Lawsuit Won't Change Jones's Loyalties*, Bos. Globe, Feb. 2, 2012, available at 2012 WLNR 2249010.
- 38 Erin Bacon, *Former NFL Player Wins Lawsuit Against Orthocarlina for \$650,000*, Charlotte Observer, Sept. 5, 2014, <http://www.charlotteobserver.com/2014/09/05/5152485/former-nfl-player-wins-lawsuit.html#.VFfaBWe9b2o>, archived at <http://perma.cc/98V7-4ENF>. Additional information concerning Rolle's case was gathered from a November 3, 2014 interview with Gary Fox of Stewart Tilghman Fox Bianchi & Cain, P.A. in Miami, Florida. Fox represented Rolle in the lawsuit. The case did not include any motions to dismiss or for summary judgment. Thus, there were no court orders on the substantive legal issues discussed in this Report.
- 39 *Id.*
- 40 *Id.*
- 41 Interview with Fox, *supra* note 38.
- 42 *Id.*

APPENDIX I \ History of Health-Related NFL Playing Rules Changes^a

For an explanation of how rule changes take place, see Chapter 7: The NFL and NFLPA, Section A(ii): Rule Changes.

1955:

- The ball is dead immediately if the runner touches the ground with any part of his body except his hands or feet while in the grasp of an opponent.

1956:

- The ball is dead immediately if a runner touches the ground with any part of his body except his hands or feet after being contacted by a defensive player.
- Grasping the face mask of any opponent except a runner is illegal use of hands. Penalty: Five yards.

1962:

- Grasping the face mask of an opponent is illegal. Penalty: 15 yards.

1966:

- All goal posts must be offset from the goal line.

1971:

- A team will not be charged a timeout for an injured player unless the injury occurs in the last two minutes of either half.

1973:

- A defensive player who jumps or stands on a teammate or who is picked up by a teammate cannot attempt to block an opponent's kick. Penalty: 15 yards.

1974:

- Eligible receivers who take a position more than two yards from the offensive tackle, whether on or behind the line, may not be blocked below the waist at or behind the line of scrimmage.
- No receiver can be blocked below the waist after moving beyond the line of scrimmage.
- An offensive player who is aligned in a position more than two yards laterally outside of the offensive tackle may not contact an opponent below the waist if the blocker is moving toward the position of the ball either at the snap or after it is made, and contact occurs within an area three yards on either side of the

line of scrimmage. This is known as a crackback block. Penalty: 15 yards.

1976:

- A defender cannot place a hand or hands on a teammate to gain additional height in an attempt to block a kick.
- A defender is not permitted to run or dive into a ball carrier who has fallen to the ground untouched.

1977:

- It is illegal for a defensive lineman to strike an opponent above the shoulders (head slap) during his initial charge. (Previously, it was legal only during the first step.)
- The crackback prohibition is extended to running backs who move outside the tight end and back inside to deliver a block below the waist.

1979:

- Mandatory equipment is specified for all players to wear during a game.
- Players on the receiving team are prohibited from blocking opponents below the waist during kickoffs, punts, and field goal attempts.
- The crackback zone is extended from three yards to five yards on either side of the line of scrimmage.
- Officials will declare the ball dead as soon as the quarterback is clearly in the grasp and control of any tackler.
- A player may be penalized for unsportsmanlike conduct for non-contact acts such as throwing a punch or a forearm, or kicking at an opponent.
- It is unnecessary roughness if a tackler uses his helmet to butt, spear, or ram an opponent, or if any player uses the crown or top of the helmet unnecessarily.
- A player in the backfield is prohibited from chopping an outside rusher on a pass play.

1980:

- A Chop block (below the waist) is also prohibited by a tight end against an outside rusher. The prohibition applies to pass plays and any plays in which the player receiving the snap initially shows pass.

^a For rule changes through the year 2012, we relied on an NFL website that lists "NFL rule changes focused on protecting player health and safety[.]" See *Evolution of the Rules: From Hashmarks to Crackback Blocks*, NFL Evolution (Aug. 2, 2013, 01:23 AM), <http://www.nfl.com/news/story/0ap1000000224872/article/evolution-of-the-rules-from-hashmarks-to-crackback-blocks>, archived at <http://perma.cc/WZ8Q-GM43> (discussing rule changes from 1920–2012). For rule changes after 2012, we relied on news articles as indicated.

1981:

- Chop blocks (at or below the knee) are prohibited by interior linemen on passing plays or plays in which a lineman shows an attempt to pass block. If an offensive player who fires out at the snap blocks an opponent at or below the knee, the defender cannot be double-teamed by a teammate of the offensive player.

1982:

- It is illegal for any player to use the crown or top of his helmet against a passer, a receiver in the act of catching a pass, or a runner who is in the grasp of a tackler.

1983:

- All mandatory player equipment must be designed and made by a professional manufacturer and cannot be altered, except by direction of the club doctor.
- A player who uses a helmet he is not wearing as a weapon shall be ejected.
- The chop block rule applies to blocks at “thigh or lower.”

1985:

- During the last two minutes of a half, the play ends when a quarterback kneels or simulates kneeling on the ground.
- The ball is dead when any runner slides to the ground feet first, thereby declaring himself down.

1986:

- Blocking below the waist on punts is prohibited during the entire down.
- The “lure” technique is prohibited. When an offensive tackle shows pass set, a teammate lined up outside him cannot chop a defender who is lined up over the tackle, even if the tackle and defender are not engaged (a “lure”).

1987:

- An offensive lineman may not clip a defender who, at the snap, is aligned on the line of scrimmage opposite another offensive lineman who is more than one position away, when the defender is responding to the flow of the ball away from the blocker. Example: A tackle cannot clip the nose tackle on a sweep to the opposite side.
- It is illegal for the kicking team to block below the waist after a free kick or punt has been made. (Low blocks by the receiving team became illegal in 1979).
- Both teams are prohibited from blocking below the waist after a change of possession.

1989:

- A defender (approaching from any direction) who has an unrestricted path to the quarterback is prohibited from flagrantly hitting him in the area of the knee(s).

1990:

- A player who butts, spears, or rams an opponent may be disqualified if the action is flagrant or vicious.

1991:

- Officials will whistle the play dead whenever a defensive lineman clearly penetrates beyond the neutral zone before the ball is snapped and continues unabated toward the quarterback.

1992:

- For the first time the chop block is illegal on some running players: It is illegal on a running play for an offensive player who is lined up in the backfield at the snap to deliberately block a defensive player in the thigh or lower (chop) if the defensive player is engaged by an offensive player who was on the line of scrimmage at the snap. This action is prohibited whether on or behind the line of scrimmage in an area that extends laterally to the position originally occupied by the tight end on either side.
- When a defensive player runs forward and leaps in an attempt to block an extra point or field goal, it is a foul only if the leaping player lands on other players.

1994:

- Defensive players are prohibited from blocking low during a punt, field goal, or extra point attempt (kick), except those defensive players at the snap that are lined up on or inside the normal tight end position. Previously, all players on the defensive team could block low during the field goal or extra point attempt.

1995:

- Protection for defenseless players is clarified and expanded. Since 1982, a defensive player was prohibited from using the crown or top of his helmet against a passer, a receiver in the act of catching a pass, or a runner who is in the grasp of a tackler. The clarification provided that:
 - Defenseless players included a kickoff or punt returner attempting to field a kick in the air, and a player on the ground at the end of a play.
 - Defensive players are prohibited from lowering their heads to make forcible contact with the facemask, or with the “hairline” or forehead part of the helmet, against an opponent, instead of only with the top/crown.
 - Defensive players are prohibited from forcibly hitting the defenseless player’s head, neck, or face with the helmet or facemask.
 - Defensive players are prohibited from launching into a defenseless player in a way that causes the defensive player’s helmet or facemask to forcibly strike the defenseless player’s head, neck, or face, even if the initial contact of the defender’s helmet or facemask is lower than the defenseless player’s neck.
- When tackling a passer during or just after throwing a pass, a defensive player is prohibited from unnecessarily and violently throwing him down and landing on top of him with all or most of the defender’s weight.

1996:

- On running plays, a chop block is prohibited by an offensive player who is aligned more than one position away from the engaged defender when the block occurs away from the flow of the play.
- A defender cannot be chopped even after he has disengaged from an offensive opponent, if he is still confronting the offensive player.
- Prohibition of the “lure” technique is applicable all along the offensive line, instead of only to a player outside a tackle.
- Blocking from behind, at, or below the knees in the clipping zone is prohibited.

2002:

- The Chop block technique is illegal on all kicking plays.
- It is illegal to hit a quarterback helmet-to-helmet any time after a change of possession.

2005:

- It is illegal to grab the inside collar of the shoulder pads to tackle a runner (“horse-collar tackle”).
- Unnecessarily running, diving into, or throwing the body against a player who should not have reasonably anticipated such contact by an opponent is unnecessary roughness. Previously, the rule only protected a player who is out of the play.
- A kicker/punter must not be unnecessarily contacted by the receiving team through the end of the play or until he assumes a distinctly defensive position. An opponent may not unnecessarily initiate helmet-to-helmet contact to the kicker/punter during the kick or during the return.
- An offensive player who is aligned in the tackle box at the snap and moves to a position outside the box is prohibited from initiating contact on the side or below the waist of an opponent if the blocker is moving toward his own end line and approaches the opponent from behind or from the side (“Peel Back Block”). The near shoulder of the blocker must be in front of his opponent’s body.

2006:

- Low hits on the quarterback are prohibited when a rushing defender has an opportunity to avoid such contact.
- Blocks in the back above the waist by the kicking team while the ball is in flight during a scrimmage kick are illegal.
- The definition of a “horse-collar tackle” is expanded to include grabbing the inside collar of the jersey.
- During a field-goal attempt or a try, a defensive player who is within one yard of the line of scrimmage at the snap must have his helmet outside the snapper’s shoulder pad.

2007:

- A block below the waist against an eligible receiver while the quarterback is in the pocket is a 15-yard penalty instead of a 5-yard penalty (an illegal cut block).

2009:

- Teams are not permitted to intentionally form a wedge of more than two players on a kickoff return in an attempt to block for the runner. Penalty: 15 yards.
- The “bunch” formation on kickoffs is eliminated. The kickoff team must have at least three players outside each hash mark, one of whom must be outside the yard-line number.
- It is an illegal “blindside” block if the blocker is moving toward his own endline and approaches the opponent from behind or from the side, and the initial force of the contact by the blocker’s helmet, forearm, or shoulder is to the head or neck area of an opponent. Penalty: 15-yards.
- It is an illegal hit on a defenseless receiver if the initial force of the contact by the defender’s helmet, forearm, or shoulder is to the head or neck area of the receiver. Penalty: 15 yards.
- Clarified rule regarding low hits on passers:
 - A defender cannot initiate a roll or lunge and forcibly hit the passer in the knee area or below, even if he is being contacted by another player.
 - It is not a foul if the defender swipes, wraps, or grabs a passer in the knee area or below in an attempt to tackle him.

2010:

- During a field-goal attempt, punt, or try-kick, a defensive team player, who is within one yard of line of scrimmage at snap, must have his entire body outside the snapper’s shoulder pads.
- A player who has just completed a catch is protected from blows to the head or neck by an opponent who launches.
- All “defenseless players” are protected from blows to the head delivered by an opponent’s helmet, forearm, or shoulder.
- Kickers and punters during the kick and return, and quarterbacks after a change of possession, are protected from blows to the head delivered by an opponent’s helmet, forearm, or shoulder, instead of just helmet-to-helmet contact.
- The ball is declared dead at the spot if a runner’s helmet comes completely off.

2011:

- The restraining line for the kicking team is moved from the 30- to the 35-yard line in an effort to increase touchbacks.
- All kicking team players other than the kicker must be lined up no more than five yards behind their restraining line, eliminating the 15–20 yard running “head start” that had become customary for many players.
- The list of “defenseless players” is expanded to include a kicker/punter during the kick or during the return, a quarterback at any time after a change of possession, and a player who receives a “blindside” block when the blocker is moving toward his own endline and approaches the opponent from behind or from the side. Previously, these players were protected against blows to

the head, but not against blows delivered by an opponent with the top/crown or forehead/"hairline" parts of the helmet against other parts of the body.

- A receiver who has completed a catch is a "defenseless player" until he has had time to protect himself or has clearly become a runner. A receiver/runner is no longer defenseless if he is able to avoid or ward off the impending contact of an opponent. Previously, the receiver who had completed a catch was protected against an opponent who launched and delivered a blow to the receiver's head.

2012:

- The list of "defenseless players" is expanded to include defensive players on crackback blocks, making it illegal to hit them in the head or neck area.
- Players are required to wear protective knee and thigh pads beginning with the 2013 season.

2013:¹

- Ball-carriers who grab and twist, turn or pull on an opponent's face mask, or grab the face mask and use it to control an opponent will be penalized 15 yards.
- "Peel back" blocks are illegal inside the tackle box. Previously they were only illegal outside the tackle box.
- Ball-carriers and tacklers cannot lead with the crown of their helmets when both players are outside of the tackle box.
- Long-snappers, while in the act of snapping the ball, are considered defenseless players.

2014:²

- Blockers cannot hit an opponent in the side of the legs. Rule previously only prohibited blockers from hitting an opponent in the back of the legs.

2015:³

- Defensive players prohibited from pushing teammates at the line of scrimmage when the offense is in punt formation.
- Offensive players prohibited from engaging in peel back blocks.
- Wide receivers are given defenseless player protection when a pass is intercepted.
- Running backs prohibited from chop blocking a defensive player engaged above the waist by another offensive player outside the tackle box.
- Allows the athletic trainer in the press box designated for spotting injuries to stop the game if a player appears to have suffered a concussion.

2016:⁴

- Prohibited all forms of the chop block.
- On a one-year trial basis, any player who is penalized twice in one game for certain types of unsportsmanlike conduct fouls is ejected.
- On a one-year trial basis, any touchback resulting from a kickoff will give the receiving team the ball at the 25-yard line (as opposed to the 20-yard line under the prior rule).
- Expanded the horse collar tackle rule to also prohibit grabbing the jersey at the name plate or above and pulling a runner to the ground.

Endnotes

1 Brian McIntyre, *2013 NFL Rule Changes Include Elimination of 'Tuck Rule', Peel-Back Blocks*, Yahoo! Sports (Aug. 6, 2013 3:03 PM), <http://sports.yahoo.com/blogs/shutdown-corner/2013-nfl-rule-changes-elimination-tuck-rule-peel-190327171.html>, archived at <http://perma.cc/8RL7-C3S9>.

2 Michael David Smith, *Five Rules Changes Get NFL Owners' Approval at League Meeting*, ProFootballTalk (Mar. 26, 2014, 10:11 AM), <http://profootballtalk.nbcsports.com/2014/03/26/five-rules-changes-pass-as-nfl-owners-vote-at-league-meeting/>, archived at <http://perma.cc/CV3R-TWXN>.

3 Michael David Smith, *NFL Passes Five Player Safety Rules*, ProFootballTalk (Mar. 24, 2015, 3:06 PM), <http://profootballtalk.nbcsports.com/2015/03/24/nfl-passes-five-player-safety-rules/>, archived at <http://perma.cc/WNT9Z-3CU8>.

4 Lorenzo Reyes, *NFL approves automatic ejection rule and touchbacks moved to 25-yard line for 2016*, USA Today, Mar. 23, 2016, <http://www.usatoday.com/story/sports/nfl/2016/03/23/rule-changes-automatic-ejections-touchback-25-yard-line/82158540/>, archived at <https://perma.cc/SAN7-KC3C>.

APPENDIX J \ Timeline of Equipment-Related Events and Policies^a

Note: Below we discuss the evolution and advances made in football equipment. Nevertheless, we generally do not know when, if at all, the newer equipment models were first used in the NFL.

1869:

- Rutgers University and Princeton University played the first game of what would become American football.¹

1905:

- After 45 players died between 1890 and 1905, President Teddy Roosevelt summoned a meeting of college football coaches to broker changes in the rules that would make the game safer.² Among the changes were the introduction of the forward pass and the stoppage of play when the ball carrier was down.³

1920:

- The American Professional Football Conference begins play, changing its name to the National Football League in 1922.⁴

1920s:

- Players used a hardened leather helmet and shoulder pads made of felt wool and leather.⁵

1929:

- John T. Riddell, a high school football coach in Indiana, creates the equipment company bearing his name after inventing the removable football cleat.⁶
- Introduction of fibershell helmets, which would be used into the 1950s.⁷

1930s:

- Introduction of molded leather helmets, foam pads and facemasks.⁸

1940:

- Introduction of hardened leather shoulder pads, used into the 1960s.⁹
- Introduction of the plastic helmet.¹⁰ The plastic was brittle and would tend to break upon impact.¹¹
- Introduction of the leather chin strap to help hold the helmet in place.¹²

1943:

- Helmets become mandatory in the NFL.¹³

1950s:

- Introduction of fibershell shoulder pads, used into the 1960s, and a plastic helmet with pads on the interior.¹⁴

1963:

- Riddell¹⁵ introduces first helmet that uses air inflation for fitting the helmet snug to the head.¹⁶

1969:

- National Operating Committee on Standards for Athletic Equipment (NOCSAE) is formed as a non-profit organization with the purpose of improving athletic equipment and reducing injuries through equipment standards.¹⁷ NOCSAE was formed in response to more than 100 high school and college football players killed by skull fractures and acute brain bleeding.¹⁸

1973:

- NOSCAE introduces its first helmet testing standards. Today, “under NOCSAE’s standard, the football helmet is placed on a synthetic head model that is filled with glycerin and fitted with various measuring instruments. The head model fitted with the helmet is then dropped sixteen times onto a polymer anvil with two of the drops from a height of sixty inches onto six different locations of the helmet at varying temperatures determined by NOCSAE to simulate different potential game temperatures. After each drop a “Severity Index,” which measures the severity of the impact absorbed by the head model at the moment of impact, is determined. Helmets are graded on a pass-fail basis, and the helmets that pass are those meeting an acceptable Severity Index.”¹⁹ For more information on NOCSAE, see Chapter 16: Equipment Manufacturers.

1970s:

- Introduction of plastic shoulder pads; facemasks expand beyond the single bar.²⁰

^a To create this timeline, we relied on a timeline included on an NFL website, see *NFL Evolution—Health & Safety*, NFL Evolution, <http://www.nflevolution.com/nfl-timeline/index.html> (last visited Aug. 7, 2015), archived at <http://perma.cc/PVP6-PA6C>, a timeline included on Riddell’s website, *See History*, Riddell, <http://www.riddell.com/history> (last visited Aug. 7, 2015), archived at <http://perma.cc/A9DF-MF5V>, and a variety of other news sources. It should not be considered an exhaustive list. More information and context is available in Chapter 16: Equipment Manufacturers.

1979:

- NFL mandates the use of thigh and knee pads. The rule is revoked in 1994, but reinstated in 2013.²¹

1982:

- Riddell introduces helmet with a combination of foam and liquid-filled cells used for padding.²²

1983:

- All mandatory player equipment must be designed and made by a professional manufacturer and cannot be altered, except by the direction of the club doctor.²³

1988:

- NFL and Riddell entered into agreement without duration whereby Riddell provides free helmets, pads and jerseys to all NFL clubs in exchange for Riddell receiving the exclusive right to display its logo on Riddell helmets used by NFL players. Competing helmet manufacturers could not display its logo on its helmets used by NFL players. Schutt Athletic, a Riddell competitor, lost its antitrust challenge to the agreement.²⁴

1992:

- Riddell introduces the Variable Size Range (VSR) series, designed with additional inflation points for a more customized fit.²⁵ As a result of its agreement with the NFL, VSR helmets would come to be used by more than 60 percent of NFL players.²⁶

1994:

- NFL removes rule requiring players to wear thigh and knee pads. Rule reinstated in 2013.²⁷

2001:

- Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.²⁸ Stringer's family later sued the Vikings, Vikings coaches and affiliated doctors, the NFL, and Riddell. Stringer's family reached undisclosed settlements with one of the doctors involved,²⁹ the NFL³⁰ and Riddell.³¹

2002:

- Riddell introduces the Riddell Revolution helmet, designed with the intent of reducing concussion risk.³²
- Riddell also funds research project led by two University of Pittsburgh Medical Center professors and a Riddell employee designed to compare the concussion rates and recovery times for athletes wearing Riddell's Revolution helmet compared to athletes wearing older model helmets manufactured by both Riddell and its competitors.³³ After tracking 2,141 Pennsylvania high school football players, the authors found 5.3 percent of players using Revolution helmets suffered concussions as compared to 7.6 percent of players using other helmets.³⁴ The authors described the difference as "statistically significant" and said the results "demonstrated a trend toward a lowered incidence of concussion" but that the

"limited sample size precludes a more conclusive statement of findings at this time."³⁵ The study also highlighted that there was a 31-percent decreased relative risk for athletes wearing the Revolution helmet, comparing the 5.3-percent and 7.6-percent concussion rates.³⁶ Riddell seized on that last statistic and began to advertise that the Revolution helmet reduced the risk of concussion by 31 percent.³⁷ Riddell's competitor, Schutt Sports, later lost a lawsuit alleging Riddell's advertisements were false and based on an unreliable study.³⁸ The study has nonetheless been controversial, as discussed in Chapter 16: Equipment Manufacturers.

2008:

- Introduction of shoulder pads which allow cold air to be pumped through them while on the sidelines.³⁹

2010:

- NFL clubs test new girdles with built-in padding at the hip, thigh and tailbone during training camp and preseason with hope of encouraging more players to wear leg pads.⁴⁰

2011:

- Chicago Bears become the first NFL club to adopt Riddell RipKord shoulder pads. According to Riddell, "[b]y pulling a single cord, shoulder pads outfitted with RipKord can be quickly and easily removed by two trained professionals without elevating a player," providing "more efficient and immediate access to an athlete's chest and airway in the event of a suspected head, spine or chest injury."⁴¹
- NFL begins relationship with the United States military aimed at preventing and treating head injuries.⁴²
- NFL players begin to put Kevlar in their helmets, generating controversy.⁴³
- Riddell introduces 360 Helmet, designed to disperse the energy of frontal impacts as a result of examining over 1.4 million impacts collected through Riddell's impact-tracking technology.⁴⁴
- The first lawsuits against the NFL and Riddell concerning concussions are filed. Hundreds followed.⁴⁵

2012:

- All cases concerning concussions are consolidated in the United States District Court for the Eastern District of Pennsylvania *In re National Football League Players' Concussion Injury Litigation*, 12-md-23-23 (E.D.Pa.). Claims generally allege that NFL knew of risk of concussions and intentionally and fraudulently concealed those risks from NFL players, and that Riddell made defective helmets while failing to inform players of the risks of using their helmets.⁴⁶

2013:

- NFL sends memo to clubs reminding them that players must have the opportunity to see and try "a wide range of helmets from leading manufacturers," at no cost to the player. NFL locker

rooms include large posters with 18 helmets from six different brands including their ratings according to Virginia Tech's "STAR" evaluation system.⁴⁷

- NFL institutes policy whereby teams playing games in "throw-back" uniforms must still use their current, regular helmets.⁴⁸
- NFL reinstates rule requiring players to wear thigh and knee pads. The NFL estimated that, prior to reinstating the rule, 70 percent of players were not wearing thigh and knee pads.⁴⁹ Nevertheless, even with the existence of the rule, players have a long-standing practice of modifying and minimizing the required pads in favor of speed and mobility.⁵⁰
- NFL's indefinite agreement with Riddell expired as a result of NFL negotiations. NFL states that there will no longer be an official helmet of the NFL.⁵¹
- NFL announces a \$40 million research and development program with General Electric and Under Armour to improve concussion diagnosis and treatment, including \$10 million incentive programs aimed at discovering new and improved technology.⁵²

2014:

- NFL and Riddell enter into five-year agreement by which Riddell would be the exclusive licensee for collectible helmets.⁵³
- Riddell introduces SpeedFlex helmet, which includes a five-sided indentation on the crown of the helmet.⁵⁴ The helmets are adopted by several major college football programs.

2015:

- United States District Court for the Eastern District of Pennsylvania approves settlement between NFL and plaintiffs *In re National Football League Players' Concussion Injury Litigation*, providing for compensation to qualifying former NFL players depending on the severity of their medical conditions. The settlement does not limit the total amount the NFL might eventually have to pay to satisfy its obligations under the settlement.⁵⁵ The lawsuit was not settled with Riddell.

2016:

- United States Court of Appeals for the Third Circuit affirms the District Court's approval of the settlement between NFL and plaintiffs *In re National Football League Players' Concussion Injury Litigation*. Claims against Riddell remain in litigation.

Endnotes

- 1 *Chronology of Professional Football*, 2013 NFL Record & Fact Book, 353, 353–54 (2013), <http://static.nfl.com/static/content/public/image/history/pdfs/History/2013/353-372-Chronology.pdf>, archived at <https://perma.cc/TT7V-PK84?type=pdf>.
- 2 Katie Zezima, *How Teddy Roosevelt Helped Save Football*, Wash. Post, May 29, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/>, archived at <http://perma.cc/8EMV-4RJJ>.
- 3 *Id.*
- 4 *Chronology of Professional Football*, *supra* note 1 at 353–54
- 5 *NFL Evolution—Health & Safety*, NFL Evolution, <http://www.nflevolution.com/nfl-timeline/index.html> (last visited Aug. 7, 2015), archived at <http://perma.cc/PVP6-PA6C> ("NFL Evolution").
- 6 *History*, Riddell, <http://www.riddell.com/history> (last visited Aug. 7, 2015), archived at <http://perma.cc/A9DF-MF5V> ("Riddell History").
- 7 NFL Evolution.
- 8 NFL Evolution.
- 9 NFL Evolution.
- 10 NFL Evolution.
- 11 Riddell History.
- 12 Riddell History.
- 13 NFL Evolution.
- 14 NFL Evolution.
- 15 Mentions of Riddell mean all the various entities which generally operate under the name "Riddell."
- 16 Riddell History.
- 17 *About NOSCAE*, Nat'l Operating Comm. on Standards for Athletic Equipment, <http://nocsae.org/about-nocsae/> (last visited Aug. 7, 2015), archived at <http://perma.cc/6AD8-UJ96>.
- 18 Alan Schwarz, *As Concussions Rise, Scant Oversight for Football Helmet Safety*, N.Y. Times, Oct. 21, 2010, <http://www.nytimes.com/2010/10/21/sports/football/21helmets.html?pagewanted=all>, available at <http://perma.cc/2LJV-K2RQ>.
- 19 Jason Navia, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 Admin. L. Rev. 265, 276–77 (2012).
- 20 NFL Evolution.
- 21 Tom Pelissero, *More Padding Mandatory in NFL, Protection of Knees, Thighs Now Required*, USA Today, July 12, 2013, available at 2013 WLNR 16937591.
- 22 Riddell History.
- 23 NFL Evolution.
- 24 *See* *Schutt Athletic Sales Co. v. Riddell, Inc.*, 727 F.Supp. 1220 (N.D.Ill. 1989); *see also* Jenny Vrentas, *The First Line of Defense*, MMQB (Oct. 22, 2013), <http://mmqb.si.com/2013/10/22/nfl-helmets-head-injury-concussion/print/>, archived at <http://perma.cc/WL9Q-7PXT> (describing Riddell agreement as "indefinite").
- 25 Riddell History.
- 26 *Id.*
- 27 Pelissero, *supra* note 21.
- 28 *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 748 (Minn. 2005).
- 29 *See* *Stringer v. Minnesota Vikings Football Club, LLC*, No. 02-415, 2003 WL 25766738 (Minn. Dist. Ct. Dec. 8, 2003) (mentioning settlement with W. David Knowles, MD and Mankato Clinic, Ltd.).
- 30 *Stringer's Widow Settles Lawsuit With N.F.L.*, N.Y. Times, Jan. 27, 2009, <http://www.nytimes.com/2009/01/27/sports/football/27stringerbox.html?ref=topics>, archived at <http://perma.cc/L39K-9BB2>.

- 31 *Jackson Ends His Holdout, Saying He Always Wanted to Remain an Eagle*, N.Y. Times, Aug. 9, 2011, <http://www.nytimes.com/2011/08/09/sports/football/eagles-desean-jackson-ends-holdout-after-11-days.html>, archived at <http://perma.cc/L39K-9BB2>.
- 32 Riddell History.
- 33 *See Riddell, Inc. v. Schutt Sports, Inc.*, 724 F. Supp. 2d 963, 967 (W.D.Wis. 2010) (describing background of the study).
- 34 *Id.*
- 35 *Id.*
- 36 *Id.* 7.6% less 31% of 7.6% = approximately 5.3%.
- 37 *Id.*
- 38 *See id.*
- 39 Janet Cromley, *Air-Conditioned Pads Make Football Cooler*, Star-Ledger (Newark, NJ), Aug. 5, 2008, available at 2008 WLNR 14600368.
- 40 Judy Battista, *N.F.L. Gives Lower-Body Padding a Tryout*, N.Y. Times, Aug. 6, 2010, <http://www.nytimes.com/2010/08/06/sports/football/06pads.html>, archived at <http://perma.cc/R3EQ-46LP>.
- 41 *Chicago Bears to be First NFL Team to Adopt New Riddell RipKord Shoulder Pad Technology*, PR Newswire (Aug. 1, 2011), <http://www.prnewswire.com/news-releases/chicago-bears-to-be-first-nfl-team-to-adopt-new-riddell-ripkord-shoulder-pad-technology-126508183.html>, archived at <http://perma.cc/DGH8-Y9HM>.
- 42 Bill Bradly, *Department of Defense, Veterans Affairs Focus on Brain Injuries*, NFL (Aug. 22, 2013, 10:41 PM), <http://www.nfl.com/news/story/0ap1000000232809/article/department-of-defense-veterans-affairs-focus-on-brain-injuries>, archived at <http://perma.cc/6DMF-KCQB>.
- 43 Sean Conboy, *The Helmet Con: How to Make a Buck Off the Concussion Crisis*, Deadspin (Aug. 21, 2013), <http://deadspin.com/the-helmet-con-how-to-make-a-buck-off-the-concussion-c-1173019556>, archived at <http://perma.cc/J9JV-XBVD>.
- 44 Riddell History.
- 45 *See Court Documents*, NFL Concussion Litigation.com, http://nflconcussionlitigation.com/?page_id=18 (last visited Aug. 7, 2015), archived at <http://perma.cc/FYW5-NN7A>.
- 46 *See Plaintiffs' Amended Master Administrative Long-Form Complaint, In re National Football League Players' Concussion Injury Litigation*, 2:12-md-2323 (E.D.Pa. July 17, 2012), ECF No. 2642.
- 47 Jenny Vrentas, *The First Line of Defense*, MMQB (Oct. 22, 2013), <http://mmqb.si.com/2013/10/22/nfl-helmets-head-injury-concussion/print/>, archived at <http://perma.cc/WL9Q-7PXT>.
- 48 Paul Lukas, *Uni Watch: Impact of Helmet Policy*, ESPN (Sept. 19, 2013), <http://espn.go.com/espn/print?id=9694560&type=Columnist&imagesPri>, archived at <http://perma.cc/6D33-32UL>.
- 49 Tom Pelissero, *More Padding Mandatory in NFL, Protection of Knees, Thighs Now Required*, USA Today, July 12, 2013, available at 2013 WLNR 16937591.
- 50 See Jere Longman, *Slim is In*, N.Y. Times, Jan. 31, 2014, <http://www.nytimes.com/2014/01/31/sports/football/shoulder-pads-slim-down-in-faster-sleeker-nfl.html>, archived at <https://perma.cc/K9VJ-U8NS>; *When it Comes to Pads, Fewer the Better*, Indianapolis Star, Aug. 22, 2010, available at 2010 WLNR 16781303; Stefan Fatsis, *Padded Stats: Protective Gear in Today's NFL is Becoming an Endangered Species as Players Gladly Sacrifice Equipment for Speed and Mobility*, Nat'l Post (Canada), Dec. 24, 2004, available at 2004 WLNR 14897899; Steve Aschburner, *Tricks of the Trade: Protective Paraphernalia Puts Players at Peace*, Star Trib. (Minneapolis, St. Paul), Oct. 9, 1988, available at 1988 WLNR 1648115.
- 51 Vrentas, *supra* note 47.
- 52 Gary Mihoce, *NFL Offering Millions for Helmet Innovations*, USA Today, Sept. 4, 2013, <http://www.usatoday.com/story/sports/nfl/2013/09/04/helmets-concussions-roger-goodell/2768237/>, archived at <http://perma.cc/37F6-MHDT>.
- 53 *Riddell Enters New Agreement with NFL into 2019*, J. Engineering, Apr. 9, 2014, available at 2014 WLNR 8998904.
- 54 *In Race to Develop Safer Football Helmets, Many Questions Remain*, N.Y. Times, Aug. 23, 2014, <http://www.nytimes.com/2014/08/24/sports/football/in-race-to-develop-safer-football-helmets-many-questions-remain.html?mabReward=RI%3A7>, archived at <https://perma.cc/W8MD-774C?type=pdf>.
- 55 Michael David Smith, *NFL, Concussion Plaintiffs Announce Revised Settlement*, ProFootballTalk (June 25, 2014, 12:05 PM), <http://profootballtalk.nbcsports.com/2014/06/25/nfl-concussion-plaintiffs-announce-revised-settlement/>, archived at <http://perma.cc/LL9Q-D6NK>.

APPENDIX K \ Players' Options to Enforce Stakeholders' Legal and Ethical Obligations^a

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Players	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award 	<ul style="list-style-type: none"> • Length of time • Cost • Conduct must have been intentional, reckless, or willful and wanton • Potentially preempted by CBA • Almost definitely barred by workers' compensation statutes if injured by player's own teammate
Athletic Trainers	Accountability and Care Committee – Art. 39	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Claim is referred to NFL and club • Committee has no binding authority • No neutral adjudicatory process
	Non-Injury Grievance – Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available • Can allege ethical violations 	<ul style="list-style-type: none"> • CBA likely cannot be enforced in an action against athletic trainers • Almost definitely barred by workers' compensation statutes • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Joint Committee on Player Safety and Welfare – Art. 50	<ul style="list-style-type: none"> • Inexpensive • Informal • Private • Review by neutral doctors 	<ul style="list-style-type: none"> • Claim is referred to NFL and club • Committee has no binding authority • No neutral adjudicatory process

^a The chart here includes players' options to enforce a stakeholder's legal and ethical obligations, except for The Media, Fans, and NFL Business Partners. Enforcement against those stakeholders is too unlikely and tangential to be included among these enforcement options.

APPENDIX K: Players' Options To Enforce Stakeholders' Legal And Ethical Obligations (continued)

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Athletic Trainers (continued)	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Very likely barred by workers' compensation statutes • Potentially preempted by CBA
	File complaint with Professional Football Athletic Trainers Society (PFATS).	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
	File complaint with National Athletic Trainers Association (NATA).	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
	File complaint with Board of Certification for the Athletic Trainer.	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
Club Doctors	Accountability and Care Committee – Art. 39	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Claim is referred to NFL and club • Committee has no binding authority • No neutral adjudicatory process
	Non-Injury Grievance – Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available • Can allege ethical violations 	<ul style="list-style-type: none"> • CBA likely cannot be enforced in an action against club doctors • Might be barred by workers' compensation statutes • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Joint Committee on Player Safety and Welfare – Art. 50	<ul style="list-style-type: none"> • Inexpensive • Informal • Private • Review by neutral doctors 	<ul style="list-style-type: none"> • Unclear whether Committee has any authority to compensate player

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Club Doctors (continued)	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Potentially preempted by CBA • Possibly barred from workers' compensation statutes (depending on relationships between club and doctor)
	File complaint with the doctor's state licensing board	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
Second Opinion Doctors	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost
	File complaint with the doctor's state licensing board	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
Neutral Doctors	Non-Injury Grievance — Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available • Can allege ethical violations 	<ul style="list-style-type: none"> • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Potentially preempted by CBA
	File complaint with the doctor's state licensing board.	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
Personal Doctors	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost
	File complaint with the doctor's state licensing board	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player

APPENDIX K: Players' Options To Enforce Stakeholders' Legal And Ethical Obligations (continued)

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
The NFL	Non-Injury Grievance — Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available 	<ul style="list-style-type: none"> • 50 day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Claims often preempted by CBA
The NFLPA	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Potentially preempted by CBA and National Labor Relations Act (NLRA)
	Arbitration pursuant to NFLPA Constitution	<ul style="list-style-type: none"> • Less costly and faster than court action • Private 	<ul style="list-style-type: none"> • Mechanism has never been used • Unclear if damages available to injured player
NFL Clubs	Accountability and Care Committee — Art. 39	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Claim is referred to NFL and club • Committee has no binding authority • No neutral adjudicatory process
	Non-Injury Grievance — Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available • Can allege ethical violations 	<ul style="list-style-type: none"> • 50 day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Joint Committee on Player Safety and Welfare — Art. 50	<ul style="list-style-type: none"> • Inexpensive • Informal • Private • Review by neutral doctors 	<ul style="list-style-type: none"> • Unclear whether Committee has any authority to compensate player
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Claims likely preempted by CBA

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Coaches	Non-Injury Grievance – Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available 	<ul style="list-style-type: none"> • CBA likely cannot be enforced in an action against coaches • Almost definitely barred by workers' compensation statutes • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Almost definitely barred by workers' compensation statutes • Potentially preempted by CBA
	File complaint with the American Football Coaches Association (AFCA)	<ul style="list-style-type: none"> • Inexpensive • Fast • Private 	<ul style="list-style-type: none"> • AFCA cannot order recompense to the injured player • AFCA generally not involved in NFL coach matters
Club Employees	Non-Injury Grievance – Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available 	<ul style="list-style-type: none"> • CBA likely cannot be enforced in an action against club employees • Almost definitely barred by workers' compensation statutes • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Very likely barred by workers' compensation statutes • Potentially preempted by CBA

APPENDIX K: Players' Options To Enforce Stakeholders' Legal And Ethical Obligations (continued)

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Equipment Managers	Non-Injury Grievance – Art. 43	<ul style="list-style-type: none"> • Less costly and faster than court action • Private • Money damages explicitly available • Can allege ethical violations 	<ul style="list-style-type: none"> • CBA likely cannot be enforced in an action against equipment managers • Almost definitely barred by workers' compensation statutes • 50-day statute of limitations strictly enforced • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Almost definitely barred by workers' compensation statutes • Potentially preempted by CBA
	File complaint with Athletic Equipment Managers Association (AEMA)	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player • Not all Equipment Managers are members of the AEMA
Contract Advisors	Grievance pursuant to Contract Advisor Regulations	<ul style="list-style-type: none"> • Less costly and faster than court action • Private 	<ul style="list-style-type: none"> • No jury • Less public scrutiny than court action
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Almost definitely barred by Contract Advisor Regulations
	File complaint with Committee on Agent Regulation and Discipline (CARD)	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
	File complaint with the contract advisor's state bar (if contract advisor is attorney)	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player

Stakeholder Against Whom Relief is Sought	Enforcement Mechanism	Strengths	Weaknesses
Financial Advisors	File grievance with Financial Industry Regulation Authority (FINRA)	<ul style="list-style-type: none"> • Less costly and faster than court action • Private 	<ul style="list-style-type: none"> • No jury • Less public scrutiny than court action
	File complaint with NFLPA	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Likely barred by arbitration clause in financial advisor agreement
	File complaint with the financial advisor's relevant professional societies	<ul style="list-style-type: none"> • Inexpensive • Informal • Private 	<ul style="list-style-type: none"> • Unlikely to result in tangible benefit to player
Family Members	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Public airing of family matters
Officials	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Potentially preempted by CBA
Equipment manufacturers	Civil lawsuit	<ul style="list-style-type: none"> • Potential for jury award • Public scrutiny 	<ul style="list-style-type: none"> • Length of time • Cost • Potentially preempted by CBA

APPENDIX L \ Authorization for Use and Disclosure of Records and Information

Note: Below is a form executed by players permitting their medical records to be used by and disclosed among the NFL, NFL clubs, and related parties. This form was collectively bargained between the NFL and NFLPA.

INSERT CLUB NAME AND/OR LOGO

AUTHORIZATION FOR USE AND DISCLOSURE OF RECORDS AND INFORMATION

Name: _____ D.O.B.: _____

Address: _____

1. Persons/Entities Authorized to Release and Disclose Information:

I hereby authorize and give my permission to the following persons and/or entities to release and disclose my medical records and/or protected health information ("PHI") (as defined under the Health Insurance Portability and Accountability Act, as amended ("HIPAA") and the regulations thereunder) in the manner described in this Authorization:

INSERT CLUB NAME, ("Club"), the National Football League and each of its member Clubs, as now existing or at any time in the future, the National Football League Drug Advisers, National Invitational Camp, Inc., National Football Scouting, Inc., the advisors to the National Football League's Policy and Program on Substances of Abuse, the advisors to the National Football League's Policy on Anabolic Steroids and Related Substances, and respective representatives, agents, and/or employees, owners, officers, servants, staff members, and contractors, any NFL Club medical staff members, team physicians, athletic training staff members, as well as any outside or third-party physicians, physician groups, hospitals, clinics, laboratories, consulting physicians, specialists, and/or healthcare professionals engaged by the NFL or NFL Clubs, and any present and future electronic medical record vendors used by the NFL or NFL Clubs, including, but not limited to, eClinicalWorks, Inc., Infinitt, Inc., and/or Surescripts.

2. Personal Health Information to Be Used and Disclosed:

I hereby authorize the following medical records and/or PHI to be used and disclosed as described in this Authorization to the Authorized Parties:

My entire health or medical record and/or PHI relating to any injury, sickness, disease, mental health condition, physical condition, medical history, medical or clinical status, diagnosis, treatment or prognosis from any source, including without limitation all written and/or electronic information or data, clinical notes, progress notes, discharge summaries, lab results, pathology reports, operative reports, consultations, physicals, physicians' records, athletic trainers' records, diagnoses, findings, treatments, history and prognoses, test results, laboratory reports, x-rays, MRI, and/or imaging results, outpatient notes, physical therapy records, occupational therapy records, prescriptions, and any and all other information pertaining to my past or present medical condition, diagnosis, treatment, history, and prognosis. This Authorization expressly includes all records and PHI relating to any mental health treatment, therapy, and/or counseling, but expressly excludes psychotherapy notes.

For purposes of use and disclosure to the National Football League this disclosure shall be subject to the limitations set forth in Section 4(f) below.

3. Persons/Entities Authorized to Receive and Use:

I hereby authorize the following persons and/or entities to receive and use my medical records and/or PHI only for the purposes that are permitted under this Authorization. These persons and entities will be referred to as the "Authorized Parties":

[INSERT CLUB NAME], the National Football League and each of its member Clubs, as now existing or at any time in the future, the National Football League Drug Advisers, National Invitational Camp, Inc., National Football Scouting, Inc., the advisors to the National Football League’s Policy and Program on Substances of Abuse, the advisors to the National Football League’s Policy on Anabolic Steroids and Related Substances, and respective representatives, agents, and/or employees, owners, officers, servants, staff members, and contractors, any NFL Club medical staff members, team physicians, athletic training staff members, as well as any outside or third-party physicians, physician groups, hospitals, clinics, laboratories, consulting physicians, specialists, and/or healthcare professionals engaged by the NFL or NFL Clubs, and any present and future electronic medical record vendors used by the NFL or NFL Clubs, including, but not limited to, eClinicalWorks, Inc., Infinit, Inc., and/or Surescripts.

4. Purpose of the Disclosure:

For purposes relating only to my actual or potential employment in the National Football League including the provision of healthcare, evaluation, consultation, treatment, therapy, and related services, which purposes are limited to reviewing, discussing, transmitting, disclosing, sharing, and/or using my medical records and PHI: (a) between and among any of the Authorized Parties; (b) with any of my healthcare providers and/or mental health providers; (c) for employment-related injury reports; (d) for the activities of the National Football League Drug Advisers, the advisors to the National Football League’s Policy and Program on Substances of Abuse, and/or the advisors to the National Football League’s Policy on Anabolic Steroids and Related Substances, specifically limited to due diligence and audit activities, investigations of possible violations of the Policies or eligibility for a “therapeutic-use” exception under either Policy; (e) for ophthalmic examinations, consultations or treatment; and/or (f) with respect to disclosure to the National Football League, this authorization shall not be used by the NFL or its member Clubs to obtain documents, evidence, or material for purposes of litigation, grievances, or any dispute with the National Football League or its member clubs, except as contemplated by the August 4, 2011 Collective Bargaining Agreement (CBA), and as is necessary for the NFL and its member Clubs to fulfill their obligations under the CBA.

5. Expiration Event: This Authorization will expire two years from the date on which I was last employed by any NFL Club.

6. Photocopy: A photostatic copy of this Authorization shall be considered as effective and valid as the original.

7. Signature: By my signature below, I acknowledge that I have read this Authorization, understand my rights as described herein, understand that I am allowing medical and mental healthcare providers to disclose my PHI, and have had any questions answered to my satisfaction. I also acknowledge and understand that: this Authorization has been collectively bargained for by the National Football League and the National Football League Players Association.

Signature: _____ Date: _____

NOTICE: You are entitled to a copy of this Authorization after you sign it. You have the right to revoke this Authorization any time by presenting a written request to the Club’s Head Athletic Trainer or his designee, except to the extent that any Authorized Party has relied upon it. Revocation will not apply: 1) to information that has already been released in connection with this Authorization, 2) during a contestability period under applicable law, or 3) if the Authorization was obtained as a condition of obtaining insurance coverage. We may not condition treatment, payment, enrollment or eligibility for benefits on your execution of this authorization, except for the purpose of creating protected health information for disclosure to a third party on provision of Authorization. Information disclosed pursuant to this Authorization may be re-disclosed by the recipient(s) and no longer protected by federal or state privacy laws or regulations. Information disclosed pursuant to this Authorization may include records created by a healthcare provider or mental healthcare provider other than the disclosing party, unless access to such PHI has been restricted as permitted under HIPAA or such provider has expressly prohibited such re-disclosure.

APPENDIX M \ Authorization for Release and Disclosure of Medical & Mental Health Records

Note: Below is a form executed by players permitting their medical providers to release their medical records to the NFL, NFL clubs, and related parties. This form was collectively bargained between the NFL and NFLPA.

INSERT CLUB NAME AND/OR LOGO

AUTHORIZATION FOR RELEASE & DISCLOSURE OF MEDICAL & MENTAL HEALTH RECORDS

Player Name: _____ Date of Birth: _____

Club Name: _____

1. Persons/Entities Authorized to Release and Disclose Information. I hereby authorize, empower, request, and direct all healthcare providers, physicians, hospitals, mental health providers, counselors, therapists, clinics, schools, universities, colleges, student health services, dispensaries, sanatoriums, any other agencies, NFL Clubs, professional football teams, athletic trainers, all other amateur or professional teams or organizations, facilities, and/or entities that may possess my medical records and/or my protected health information (“PHI”) (as defined under the Health Insurance Portability and Accountability Act, as amended (“HIPAA”) and the regulations thereunder): (1) to release, disclose, and to make these records and/or PHI freely available to the persons and entities identified on this Authorization as the Authorized Parties; and (2) to discuss the contents of these records and PHI with the Authorized Parties and their representatives. I hereby release and discharge all persons and institutions from any and all claims by reason of their releasing such records and information.

2. Persons/Entities Authorized to Receive and Use the Information. I hereby authorize, empower, and give permission to the following persons and/or entities and their representatives to receive, inspect, copy, obtain copies, examine, and/or use of any and all medical records and PHI described in this Authorization. These persons and entities will be referred to as the “Authorized Parties”:

[INSERT CLUB NAME], hereinafter “Club”, the National Football League and each of its member Clubs, as now existing or at any time in the future, the National Football League Drug Advisers, National Invitational Camp, Inc., National Football Scouting, Inc., the advisors to the National Football League’s Policy and Program on Substances of Abuse, the advisors to the National Football League’s Policy on Anabolic Steroids and Related Substances, respective representatives, agents, and/or employees, owners, officers, servants, staff members, and contractors, any NFL Club medical staff members, team physicians, athletic training staff members, as well as any outside or third-party physicians, physician groups, hospitals, clinics, laboratories, consulting physicians, specialists, and/or healthcare professionals engaged by the NFL or NFL Clubs, and any present and future electronic medical record vendors used by the NFL or NFL Clubs, including, but not limited to, eClinicalWorks, Inc., Infinit, Inc., and/or Surescripts.

3. Description of the Information to be Released and Disclosed. I hereby authorize, empower, direct, and give permission for the following medical records and/or PHI to be released and disclosed to the Authorized Parties:

My entire health or medical record and/or PHI relating to any injury, sickness, disease, mental health condition, physical condition, medical history, medical or clinical status, diagnosis, treatment or prognosis from any source, including without limitation all written and/or electronic information or data, clinical notes, progress notes, discharge summaries, lab results, pathology reports, operative reports, consultations, physicals, physicians' records, athletic trainers' records, diagnoses, findings, treatments, history and prognoses, test results, laboratory reports, x-rays, MRI, and/or imaging results, outpatient notes, physical therapy records, occupational therapy records, prescriptions, and any and all other information pertaining to my past or present medical condition, diagnosis, treatment, history, and prognosis. This Authorization applies to any and all medical records and/or PHI, including medical records and/or PHI which the Persons/Entities Authorized to Release and Disclose Information may have received from another provider, unless access to such PHI has been restricted as permitted under HIPAA or that provider has expressly prohibited re-disclosure.

This Authorization expressly includes all records and PHI relating to any mental health treatment, therapy, and/or counseling, but expressly excludes psychotherapy notes.

4. Purpose of the Disclosure. For purposes relating only to my actual or potential employment in the National Football League including the provision of healthcare, evaluation, consultation, treatment, therapy, and related services, which purposes are limited to reviewing, discussing, transmitting, disclosing, sharing, and/or using my medical records and PHI: (a) between and among any of the Authorized Parties; (b) with any of my healthcare providers and/or mental health providers; (c) for employment-related injury reports; (d) for the activities of the National Football League Drug Advisors, the advisors to the National Football League's Policy and Program on Substances of Abuse, and/or the advisors to the National Football League's Policy on Anabolic Steroids and Related Substances, specifically limited to due diligence and audit activities, investigations of possible violations of the Policies or eligibility for a "therapeutic-use" exception under either Policy; (e) for ophthalmic examinations, consultations or treatment; and/or (f) with respect to disclosure to the National Football League, this authorization shall not be used by the NFL or its member Clubs to obtain documents, evidence, or material for purposes of litigation, grievances, or any dispute with the National Football League or its member

clubs, except as contemplated by the August 4, 2011 Collective Bargaining Agreement (CBA), and as is necessary for the NFL and its member Clubs to fulfill their obligations under the CBA.

5. Expiration Event. This Authorization will expire two years from the date on which my employment with any NFL Club ceases.

6. Photocopy. A photostatic copy of this Authorization shall be considered as effective and valid as the original.

7. Signature. By my signature below, I acknowledge that I have read this Authorization, understand my rights as described herein, understand that I am allowing medical and mental healthcare providers to disclose my PHI, and have had any questions answered to my satisfaction. I expressly and voluntarily authorize the release, disclosure, and use of my medical records and/or PHI as described in this Authorization. I also acknowledge and understand that: this Authorization has been collectively bargained for by the National Football League and the National Football League Players Associations.

Signature

Date

If a personal representative signs this Authorization on behalf of the Player, complete the following:

Personal Representative's Name: _____

Relationship to Individual: _____

NOTICE: You are entitled to a copy of this Authorization after you sign it. You have the right to revoke this Authorization any time by presenting a written request to the Club's Head Athletic Trainer or his designee, except to the extent that any Authorized Party has relied upon it. Revocation will not apply: 1) to information that has already been released in connection with this Authorization, 2) during a contestability period under applicable law, or 3) if the Authorization was obtained as a condition of obtaining insurance coverage. We may not condition treatment, payment, enrollment or eligibility for benefits on your execution of this authorization, except for the purpose of creating protected health information for disclosure to a third party on provision of Authorization. Information disclosed pursuant to this Authorization may be re-disclosed by the recipient(s) and no longer protected by federal or state privacy laws or regulations. Information disclosed pursuant to this Authorization may include records created by a healthcare provider or mental healthcare provider other than the disclosing party, unless access to such PHI has been restricted as permitted under HIPAA or such provider has expressly prohibited such re-disclosure.

APPENDIX N \ Reviewers of This Report

After this Report was reviewed by The Football Players Health Study team at Harvard, we subjected it to review by numerous advisors, experts, readers, and stakeholders before publication. We identify these reviewers below.

Importantly, while the below reviewers had the opportunity to comment, and their comments in many instances did inform the content of this Report, we retained control over its final content. Thus, review alone should not necessarily be considered an individual endorsement by that reviewer of the final Report in its entirety.

LAW & ETHICS ADVISORY PANEL (LEAP)

The LEAP is a multidisciplinary group of individuals who advise the Law & Ethics Initiative of The Football Players Health Study. We hold semi-annual meetings or conference calls with members of the LEAP to update them on our projects and receive their feedback. In addition, we communicate with individual members of the LEAP from time to time if they have expertise relevant to a particular issue we are facing or working through. The LEAP members are not paid for their assistance.

Specific to the LEAP's role in reviewing this Report, we consulted with LEAP members early in the drafting process, and members were given the opportunity to comment on the Report's organization, selection of stakeholders, and relevant ethics principles. They also had the opportunity to review a complete draft of the Report and provide detailed feedback. We listened to this feedback, and where appropriate, made changes.

APPENDIX N-A:

LEAP Members

LEAP Member	Relevant Titles and Affiliations	Relevant Expertise
Nita Farahany, J.D., M.A., Ph.D.	Professor, Duke University and Duke University School of Law; Member, Presidential Commission for the Study of Bioethical Issues.	Farahany is an expert in bioethics and the law.
Joseph J. Fins, M.D., M.A.C.P.	Professor, Attending Physician and Chief of Division of Medical Ethics, Weill Cornell Medical College.	Fins is an expert in medicine, public health, and bioethics.
Ashley Foxworth, J.D., M.A.	Attorney; Student, Harvard Graduate School of Education.	Foxworth is an attorney and her husband, Domonique, played in the NFL from 2005–11 and was President of the NFLPA from 2012–14.
Walter Jones	Former NFL Player.	Jones is a former offensive lineman and a member of the Pro Football Hall of Fame. Jones played with the Seattle Seahawks from 1997–2009.

APPENDIX N-A: LEAP Members (continued)

LEAP Member	Relevant Titles and Affiliations	Relevant Expertise
Isaiah Kacyvenski, M.B.A.	Former NFL Player; Head of Sport & Fitness, MC10 Inc.	Kacyvenski played in the NFL from 2000–07. After earning his M.B.A. at Harvard Business School, Kacyvenski joined the health technology company MC10.
Bernard Lo, M.D.	President, Greenwall Foundation; Professor of Medicine Emeritus and Director of the Program in Medical Ethics Emeritus, University of California, San Francisco.	Lo is an expert in medicine and bioethics.
Chris Ogbonnaya, B.A., B.S.	Former NFL Player (current player at the time of joining LEAP).	Ogbonnaya played in the NFL from 2009–14.
Dick Vermeil, M.A.	Former NFL Coach.	Vermeil coached in the NFL for 29 years, including 15 as a head coach. Vermeil won Super Bowl XXXIV as the coach of the St. Louis Rams in 1999.

PEER REVIEWERS:

Following LEAP review, we provided each of the below reviewers a draft copy of the Report and asked them, within 30 days, to provide written comments focusing on the following items:

- a) Does the Report contain any legal or factual errors or omissions?
- b) Is the Report fair in its tone and analysis?
- c) Is the Report understandable? Do you have any suggestions for improving the Report's accessibility?
- d) Is the Report missing anything that would help contribute to player health?
- e) Are the Report's recommendations meaningful and realistic?
- f) Are there additional recommendations you would make, or recommendations that should be excluded?
- g) Do you have any other comments or feedback concerning the Report?

We reviewed the reviewers' comments and made the changes we believed were necessary and appropriate. The reviewers were paid \$5,000 each for their work.

Gabriel Feldman, Associate Professor of Law and Director, Sport Law Program, Tulane University Law School, additionally served as a "lead" peer reviewer. Professor Feldman provided his own comments on the Report and also reviewed the comments of the other reviewers as well as any changes we made in response to those comments to ensure we had properly considered and addressed the comments of the reviewers. In light of his increased responsibilities, Professor Feldman was paid \$10,000 for his work. Professor Feldman's review of our work is further described in Appendix O.

APPENDIX N-B:
Peer Reviewers

Reviewer	Relevant Titles and Affiliations	Relevant Expertise
Andrew Brandt, J.D.	Director, Moorad Center for Sports Law, Villanova University; Contributor on NFL legal and business affairs, ESPN and Sports Illustrated.	Brandt is an expert in sports law and business, including particular expertise in the law and business of the NFL. Prior to his current positions, Brandt was an NFLPA-certified Contract Advisor, the General Manager of an NFL World League Club, and Vice President of the Green Bay Packers from 1999–2008.
Gabriel Feldman, M.A., J.D.	Associate Professor of Law and Director, Sport Law Program, Tulane University School of Law; Associate Provost for NCAA Compliance, Tulane University; Board Member, Sports Lawyers Association.	Feldman is an expert in sports law, including particular expertise in the application of antitrust law to the sports industry.
Michelle Mello, M.Phil., Ph.D., J.D.	Professor, Stanford Law School and Stanford University School of Medicine.	Mello is an expert in health law, including particular expertise in medical liability, patient safety and medical ethics.
Matt Mitten, J.D.	Professor of Law and Director, National Sports Law Institute, Marquette University Law School; Arbitrator, Court of Arbitration for Sport; Board Member and Current President, Sports Lawyers Association.	Mitten is an expert in sports law, including particular expertise in the application of tort law and health law in the sports setting.
William Sage, M.D., J.D.	Professor, University of Texas School of Law; Member, National Academy of Medicine; Fellow, The Hastings Center.	Sage, a licensed attorney and doctor, is an expert in health law and bioethics.
Paul Wolpe, M.A., M.Phil., Ph.D.	Professor of Bioethics, Director, Center for Ethics, Emory University; Senior Bioethicist, National Aeronautics and Space Administration; Fellow, The Hastings Center.	Wolpe is an expert in bioethics.
Cindy Chang, M.D.	Sports Medicine Specialist, University of California, San Francisco, Benioff Children’s Hospitals and Sports Medicine Center for Young Athletes; Team doctor, University of California, Berkeley; Former President, American Medical Society for Sports Medicine.	Chang is a sports medicine expert and practitioner, having served as a physician for University of California, Berkeley athletic teams, Ohio State University athletic teams and the United States Olympic teams.

ADDITIONAL READERS:

We provided each of the below readers a draft copy of the Report (or parts thereof) and asked them to provide written comments on those chapters or areas relevant to their expertise. We reviewed the readers' comments and made the changes we believed were necessary and appropriate but did not provide Professor Feldman with the comments from the readers. Each of them has a perceived or potential conflict of commitment that differentiates them from the peer reviewers discussed above. Consequently, Carfagna, Goldberg, and Robertson were not paid for their comments. Gusmano, Maschke, and Solomon were not paid directly for their comments, but The Hastings Center does receive compensation from The Football Players Health Study at Harvard University pursuant to an agreement between The Hastings Center and Harvard University under which The Hastings Center is a collaborator on certain Football Players Health Study research projects. Through that agreement, The Hastings Center also arranged the review by Dr. Hoberman.

APPENDIX N-C:

Additional Readers

Reader	Relevant Titles and Affiliations	Relevant Expertise
Peter Carfagna, J.D.	Lecturer, Harvard Law School; Chairman, Lake County Captains; Board Member; Concussion Legacy Foundation.	Carfagna is an expert in sports law.
John Goldberg, M.A., M.Phil., J.D.	Professor, Harvard Law School.	Goldberg is an expert in tort law.
Michael Gusmano, M.A., Ph.D.	Research Scholar, The Hastings Center; Lecturer, Yale University.	Gusmano is an expert in health policy.
John Hoberman, Ph.D.	Professor, University of Texas.	Hoberman is an expert in the culture and history of sports and medicine.
Karen Maschke, M.A., Ph.D.	Research Scholar, The Hastings Center.	Maschke is an expert in bioethics and health policy.
Christopher Robertson	Associate Professor, University of Arizona College of Law; Affiliate, Edmond J. Safra Center for Ethics, Harvard University; Affiliate, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School.	Robertson is an expert in health law and bioethics.
Mildred Solomon, Ed.D.	President and Chief Executive Officer, The Hastings Center.	Solomon is an expert in bioethics, health policy, and social science research.

STAKEHOLDER REVIEWERS:

After the peer review process, we offered most of the stakeholders covered in this Report the opportunity to review the chapter or chapters concerning them. For example, players only reviewed Chapter 1: Players, but the NFL Physicians Society (NFLPS) reviewed Chapter 2: Club Doctors, Chapter 3: Athletic Trainers, Chapter 4: Second Opinion Doctors, Chapter 5: Neutral Doctors, and Chapter 6: Personal Doctors. To protect the confidentiality of the Report prior to publication, only the NFL and NFLPA were offered the opportunity to review the *entire* Report before publication.

Other than the NFL and NFLPA, all of the stakeholders are a group of individual persons or entities. We could not realistically provide each individual person or entity within these groups the opportunity to respond to the Report. Thus, where possible, we provided an organization that represents these individual persons or entities an opportunity to do so. Additionally, in certain cases, we offered certain individuals or entities within the group the opportunity to review the Report.

Below is a list of individuals and entities we invited to review the Report on behalf of each stakeholder. Some of the stakeholders do not have a well-defined representative to review the Report. Thus, there was no review on behalf of these stakeholders, as is explained in further detail in Table N-D. Table N-D also identifies those individuals or entities that accepted our invitation to review the Report. None of the stakeholders were compensated in any way for their review.

In providing each of the stakeholders the opportunity to review the Report, we requested written comments within 30 days. We reviewed the stakeholders' comments and made the changes we believed were necessary and appropriate.

APPENDIX N-D:

Stakeholder Reviewers

Stakeholder	Invited Reviewer(s)	Reviewer(s)
Chapter 1: Players	All 13 players confidentially interviewed as part of this Report.	Seven of the 13 players that we confidentially interviewed as part of this Report agreed to review the Report; three provided comments.
Chapter 2: Club Doctors	We invited the NFL to arrange review by Club doctors of the NFL's choosing and through the NFLPS.	The NFLPS reviewed relevant parts of the Report and provided its own set of comments via the NFL. The NFLPS also provided a commentary in a Special Report of The Hastings Center Report discussing our recommendations concerning club doctors.
Chapter 3: Athletic Trainers	(1) National Athletic Trainers Association (NATA); and, (2) we invited the NFL to arrange review by athletic trainers of the NFL's choosing and through the Professional Football Athletic Trainers Society (PFATS).	NATA reviewed relevant parts of the Report and provided comments. PFATS reviewed relevant parts of the Report and provided their own set of comments via the NFL.
Chapter 4: Second Opinion Doctors	We did not seek a second opinion doctor reviewer because there is no readily available list of such doctors as described in this Report.	No one reviewed the Report on behalf of second opinion doctors.
Chapter 5: Neutral Doctors	We did not seek a neutral doctor reviewer because there is no readily available list of such doctors as described in this Report.	No one reviewed the Report on behalf of neutral doctors.

APPENDIX N-D: Stakeholder Reviewers (continued)

Stakeholder	Invited Reviewer(s)	Reviewer(s)
Chapter 6: Personal Doctors	We did not seek a personal doctor reviewer because there is no readily available list of such doctors as described in this Report.	No one reviewed the Report on behalf of personal doctors.
Chapter 7: NFL	We invited the NFL to arrange review by a maximum of 15 NFL employees or persons working with the NFL, e.g., outside counsel.	The NFL reviewed the entire Report and provided comments.
Chapter 7: NFLPA	We invited the NFLPA to arrange review by NFLPA employees as it deemed appropriate. The NFLPA's review was broader than the NFL's due to the contract between Harvard and the NFLPA, including relevant confidentiality provisions.	The NFLPA reviewed the entire Report and provided comments.
Chapter 8: NFL Clubs	We invited the NFL to arrange review by club officials of the NFL's choosing.	The NFL reviewed the Report and provided comments.
Chapter 9: Coaches	(1) NFL Coaches Association; (2) American Football Coaches Association; and, (3) we invited the NFL to arrange review by coaches of the NFL's choosing.	The NFL, the American Football Coaches Association, and the NFL Coaches Association reviewed relevant parts of the Report and provided comments.
Chapter 10: Club Employees	We invited the NFL to arrange review by club employees of the NFL's choosing.	The NFL reviewed the Report and provided comments.
Chapter 11: Equipment Managers	(1) American Equipment Managers Association; and, (2) we invited the NFL to arrange review by equipment managers of the NFL's choosing.	The NFL and the American Equipment Managers Association reviewed relevant parts of the Report and provided comments.
Chapter 12: Contract Advisors	All 6 contract advisors confidentially interviewed as part of this Report.	Five of the six contract advisors that we confidentially interviewed as part of this Report agreed to review relevant parts; three provided comments.
Chapter 13: Financial Advisors	All 3 financial advisors confidentially interviewed as part of this Report.	Two of the three financial advisors confidentially interviewed as part of this Report agreed to review its relevant parts; Mark Doman, one of the financial advisors interviewed, was the only one who provided comments and asked to be identified.
Chapter 14: Family Members	The Off the Field Players' Wives Association (OTFPWA).	The President of the OTFPWA, Ericka Lassiter, who is also a Family Advisor to The Football Players Health Study at Harvard University, arranged for three wives of former NFL players to review relevant parts of the Report; two provided comments.

Stakeholder	Invited Reviewer(s)	Reviewer(s)
Chapter 15: Officials	(1) NFL Referees Association; and, (2) National Association of Sports Officials.	The National Association of Sports Officials reviewed relevant parts of the Report and provided comments. The NFL Referees Association declined our invitation to review the Report.
Chapter 16: Equipment Manufacturers	(1) National Operating Committee on Standards for Athletic Equipment (NOCSAE); (2) Riddell; and, (3) Schutt.	NOCSAE, Riddell and Schutt all reviewed relevant parts of the Report and provided comments.
Chapter 17: The Media	(1) Pro Football Writers Association; and, (2) National Sports Media Association.	The Pro Football Writers Association and the National Sports Media Association both declined to review the Report.
Chapter 18: Fans	We did not seek a fans reviewer because: (1) NFL fans are too heterogeneous of a group to allow review by only a small sample; and, (2) most (if not all) of the other reviewers of this Report are also fans.	No one reviewed the Report on behalf of fans.
Chapter 19: NFL Business Partners	(1) Verizon; (2) Nike; (3) Anheuser-Busch; (4) Pepsi; (5) Microsoft; (6) Gatorade; (7) McDonald's; (8) Nationwide Insurance; and, (9) FedEx.	Verizon, Anheuser-Busch, Pepsi, and McDonald's did not respond to multiple invitations to review the Report. Gatorade, FedEx, and Nationwide Insurance declined to review the Report. Nike and Microsoft reviewed relevant parts of the Report and provided comments.

APPENDIX O \ Certification From Gabriel Feldman



TULANE LAW SCHOOL

Gabe Feldman
Paul and Abram B Barron Associate Professor of Law
Director, Tulane Sports Law Program
Associate Provost for NCAA Compliance,
Tulane University

To Whom It May Concern:

The authors of this Report have demonstrated a strong commitment to ensuring their integrity and independence as academic researchers. To help ensure the quality of their work, the authors of this Report sought peer reviews from well-respected experts in the relevant fields addressed by the Report, and asked me to serve as “lead reviewer” to certify the adequacy and integrity of the peer review process. In that role, I have reviewed the comments from the reviewers, the changes the authors made to the Report in light of those comments, and the authors’ explanations for changes not made. I have also provided my own comments on the Report and have reviewed the authors’ response to those comments. Based on this review, I certify that the peer reviewers possess the appropriate expertise to review this Report, the authors adequately, fully, and fairly considered the comments received and the Report reflects appropriate changes where warranted.

It is my understanding that the stakeholders discussed in this report also submitted comments to the authors. My certification only applies to the comments made by the peer reviewers. Review and response to the comments made the respective stakeholders was part of a separate process.

Sincerely,

/Gabe Feldman

APPENDIX P \ Glossary of Terms and Relevant Persons and Institutions

88 Plan: Provides benefits for former players suffering from dementia, amyotrophic lateral sclerosis (ALS), or Parkinson's disease. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

ACC: *See* Accountability and Care Committee.

Accountability and Care Committee (ACC): A CBA-mandated committee consisting of the NFL Commissioner (or his designee), the NFLPA Executive Director (or his designee), and six additional members “experienced in fields relevant to health care for professional athletes,” three appointed by the Commissioner and three by the NFLPA Executive Director. The ACC is to “provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players by all clubs.”¹

Accrued Season: A player receives an Accrued Season “for each season during which he was on, or should have been on, full pay status for a total of six or more regular season games.”² Accrued Seasons are used for calculating a player's right to be a Restricted Free Agent and Unrestricted Free Agent, as differentiated from a Credited Season.

AEMA: *See* Athletic Equipment Managers Association.

AFCA: *See* American Football Coaches Association.

AFL: *See* American Football League.

Agent: *See* Contract advisor.

All Revenue (AR): “[T]he aggregate revenues received or to be received on an accrual basis, for or with respect to a League Year during the term of [the CBA], by the NFL and all NFL Clubs (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games,” with a few specific exceptions.³ The term was introduced as part of the 2011 CBA. From 1993 to 2006, All Revenue was known as Defined Gross Revenue (“DGR”), and from 2006 to 2011, was known as Total Revenue (“TR”).

AMA: *See* American Medical Association.

American Football Coaches Association (AFCA): A voluntary organization of more than 11,000 high school, college or professional football coaches, but principally focused on college coaches.

American Football League (AFL): A major professional American football league that operated from 1960 until 1969, when it merged with the NFL.

American Medical Association (AMA): a voluntary professional association for physicians with the leading code for ethical medical practice.

Appeals Panel: A three-member arbitration panel designated to hear appeals of System Arbitrations. The Appeals Panel currently consists of Georgetown Law professor James Oldham, former judge on the United States District Court for the Northern District of California Fern Smith, and former judge on the United States District Court for the Southern District of New York Richard Holwell.

AR: *See* All Revenue.

Athletic Equipment Managers Association (AEMA): A voluntary organization which provides certification to equipment managers working in sports across the country.

Benefits Arbitrator: An arbitrator appointed to hear player complaints concerning the benefits available under the CBA.

Board of Certification for the Athletic Trainer (BOC): The nation's only accredited certification program for entry-level athletic trainers, setting the standards and codes of conduct for the practice of athletic training.

BOC: *See* Board of Certification for the Athletic Trainer.

Brady v. NFL, 11-cv-639 (D. Minn.): A class action antitrust lawsuit brought by NFL players in 2011 against the NFL challenging the NFL's policies on compensation, free agency and the NFL Draft. The settlement of the case resulted in the 2011 CBA. New England Patriots quarterback Tom Brady was the lead plaintiff in the case. *See also* *White v. NFL*.

Canadian Football League (CFL): A professional football league in Canada that largely follows the same playing rules of the NFL. The CFL has nine teams and it is common for players to leave the CFL for the NFL.

CARD: *See* Committee on Agent Regulation and Discipline.

Casson, Ira: Neurologist and member of the MTBI Committee from 1994–2009.

CBA: *See* Collective Bargaining Agreement.

CFL: *See* Canadian Football League.

Chronic Traumatic Encephalopathy (CTE): A “progressive neurodegenerative disease.”⁴ Retrospective case reports have found CTE pathology in the brains of former athletes—including former professional football players—who manifested mood disorders, headaches, cognitive difficulties, suicidal ideation, difficulties with speech, and aggressive behavior.⁵ The vast majority of cases in these studies were associated with repetitive head trauma.⁶ However, a mechanistic connection between head trauma and CTE remains elusive.⁷ Similarly, whether CTE is distinct from other neurodegenerative diseases⁸ or whether repetitive head traumas are necessary and sufficient to cause CTE has not been definitively established.⁹

Club: One of 32 separate professional football franchises which collectively, via the NFL’s Constitution and Bylaws, make up the NFL.

Collective Bargaining Agreement (CBA): “A contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.”¹⁰ The NFL and NFLPA have executed ten CBAs, the first in 1968 and the most recent in 2011.

Commissioner: The Chief Executive Officer of the NFL, as elected by NFL club owners pursuant to the NFL Constitution and Bylaws. The current NFL Commissioner is Roger Goodell.

Committee on Agent Regulation and Discipline (CARD): A committee made up of three to five players responsible for investigating and taking disciplinary action against contract advisors pursuant to the NFLPA Regulations Governing Contract Advisors.

Concussion: As defined in the Concussion Protocol, a complex pathophysiological process affecting the brain induced by biomechanical forces.

Concussion Protocol: Officially titled the NFL Head, Neck and Spine Committee’s Protocols Regarding Diagnosis and Management of Concussion (Appendix A), the Concussion

Protocol is the procedures required to be followed by NFL club medical staff in diagnosing and managing players suspected of suffering a concussion.

Constitution and Bylaws of the NFL: The governing and operating agreement among the 32 member NFL clubs that dictates and controls many aspects of the NFL’s operations.

Contract advisor: An individual certified by the NFLPA to act as a player’s representative in contract negotiations with NFL clubs. More commonly known as an “agent.” Contract advisors are governed by the NFLPA Regulations Governing Contract Advisors.

Contract Advisor Regulations: *See* NFLPA Regulations Governing Contract Advisors.

Covington & Burling LLP: Washington, D.C. law firm that has served as the NFL’s chief outside counsel since the early 1960s. *See also* Tagliabue, Paul and Pash, Jeffrey.

Credited Season: A player receives a Credited Season “for each season during which he was on, or should have been on, full pay status for a total of three or more regular season games.”¹¹ Credited Seasons are used for calculating a player’s right to financial benefits under the CBA, as differentiated from an Accrued Season.

CTE: *See* Chronic Traumatic Encephalopathy.

Defined Gross Revenue (DGR): *See* All Revenue.

DePaso, Tom: NFLPA General Counsel since 2012. DePaso played in the NFL for one year in 1978.

Disability & Neurocognitive Benefit Plan: Provides eligible players with disability benefits, including benefits based on neurocognitive disability. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Dissolution: The legal process of removing a labor organization as the representative of a group of employees for purposes of collective bargaining with one or more employers. The NFLPA has dissolved itself twice: from December 1989 to March 1993, and from March 2011 to July 2011. Dissolution permits the employees to bring antitrust claims which are otherwise unavailable while represented by a union. Dissolution is sometimes referred to as “disclaimer” or “decertification” but each of these terms has specific legal significance under federal labor and antitrust laws. The distinction is complex and not relevant to this Report and thus, for our purposes here, “dissolution” captures both terms.

DGR: *See* All Revenue.

Extended Injury Protection: An Injury Protection benefit that permits a player to earn 50 percent of his salary up to \$500,000 for the **second** season after suffering an injury that prevented the player from continuing to play. *See also* Injury Protection.

Fédération Internationale de Médecine du Sport (FIMS): The world's leading sports medicine organization, comprised of national sports medicine associations across five continents which seeks to maximize athlete health and performance.

FIMS: *See* Fédération Internationale de Médecine du Sport.

Financial advisor: A financial professional providing services to NFL players in the areas of tax planning, investment advice and services, budgeting, financial planning, insurance, estate planning, and/or retirement planning.

Financial Advisor Regulations: *See* NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors.

Former Player Life Improvement Plan: A medical plan that permits qualifying former players (and in some cases their dependents) not otherwise covered by health insurance to receive reimbursement for medical costs for “joint replacements, prescription drugs, assisted living, Medicare supplemental insurance, spinal treatment, and neurological treatment.” For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Free Agency: A system by which players are able to sign contracts with new clubs after a certain number of seasons played (*see* Accrued Season), provided their prior contract is expired. *See also* Unrestricted Free Agent and Restricted Free Agent.

Garvey, Ed: Former labor attorney with the Minneapolis law firm Lindquist & Vennum, PLLP, and the NFLPA's first Executive Director, a post he held from 1971–1983.

General Manager: The individual generally responsible for the overall control and direction of an NFL club, including player personnel decisions.

Goodell, Roger: Commissioner of the NFL since 2006, and NFL employee since 1981. Son of former New York Senator Charles Goodell and 1981 graduate of Washington & Jefferson College.

Head, Neck and Spine Committee: Formerly known as the MTBI Committee, an NFL Committee of doctors and scientists that exists for the purpose of studying head, neck and spine injuries in the NFL. The current co-chairmen

of the Head, Neck and Spine Committee are Drs. Richard Ellenbogen and Hunt Batjer.

Health (for purposes of this Report): A state of overall wellbeing in fundamental aspects of a person's life, including physical, mental, emotional, social, familial, and financial components.

Health Reimbursement Account: Helps to pay out-of-pocket healthcare expenses after players are no longer employed by an NFL club and after the period of extended medical coverage under the NFL Player Insurance Plan that is paid by the NFL has ended. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Injured Reserve (IR): A roster designation for players who are injured and are unable to return that season, with the exception of one player per season per club who can be placed on the IR but designated to be able to return. Players on IR do not count towards the club's 53-man Active/Inactive List.

Injury Grievance: “[A] claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.”¹² If successful, the club must pay the player his salary for the duration of his injury, but only for the season of injury. An Injury Grievance is a much narrower claim than a Non-Injury Grievance—Non-Injury Grievances can include a wide variety of claims related to player health.

Injury Protection: A benefit available to NFL players where the player has met the following criteria: (a) “[t]he player must have been physically unable, because of a severe football injury in an NFL game or practice, to participate in all or part of his Club's last game of the season, as certified by the Club physician following a physical examination after the last game; or the player must have undergone Club-authorized surgery in the off-season following the season of injury; and (b) [t]he player must have undergone whatever reasonable and customary rehabilitation treatment his Club required of him during the off-season following the season of injury; and (c) [t]he player must have failed the preseason physical examination given by the Club physician for the season following the season of injury because of such injury and as a result his Club must have terminated his contract for the season following the season of injury.” In 2015, an NFL player can receive Injury Protection in “an amount equal to 50 percent of his Paragraph 5 Salary for the season following the season of injury, up to a maximum

payment of” \$1,100,000. A player is only entitled to Injury Protection once in his career.¹³ *See also* Extended Injury Protection.

Injury Report: A list of injured players, each injured player’s type or location of injury, and the injured player’s status for the upcoming game. Each injury must be described “with a reasonable degree of specificity,” *e.g.*, ankle, ribs, hand or concussion. For a quarterback’s arm injury or a kicker’s or punter’s leg injury, the description must designate left or right. The player’s status for the upcoming game is classified into three categories: Out (will not play) (designation not used until 2 days prior to the game); Doubtful (unlikely the player will participate); and, Questionable (uncertain as to whether the player will play in the game). The Injury Report also indicates whether a player had full, limited or no participation in practice, whether due to injury or any other cause (*e.g.*, team discipline, family matter, etc.). The Injury Report is issued after practice each Wednesday, Thursday and Friday. *See also* Injury Reporting Policy.

Injury Reporting Policy: An NFL policy that requires each club to report information on injured players to both the NFL and the media each game week. The stated purpose of this reporting is “to provide a full and complete rendering of player availability” to all parties involved, including the opposing team, the media, and the general public. *See also* Injury Report.

In re National Football League Players’ Concussion Injury Litigation, 12-md-2323 (E.D.Pa.) (“Concussion Litigation”):

A lawsuit consisting of several hundred consolidated lawsuits whereby approximately 5,500 former NFL players alleged that the NFL had negligently and fraudulently concealed the risk of brain injury associated with playing football. The case was settled in 2013, approved by the United States District Court for the Eastern District of Pennsylvania in 2015, and affirmed by the United States Court of Appeals for the Third Circuit in 2016.

IR: *See* Injured Reserve.

Joint Committee on Player Safety and Welfare (“Joint Committee”): A CBA-mandated committee consisting of three club representatives and three NFLPA representatives that discusses “player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects.”¹⁴ The Joint Committee is merely advisory and has no binding decision-making authority.

Kessler, Jeffrey: Partner with the law firm of Winston Strawn LLP and the NFLPA’s chief outside counsel. Kessler has represented the NFLPA and NFL players since the

early 1980s, having previously practiced at Weil, Gotshal & Manges LLP and Dewey & LeBoeuf.

Labor Management Relations Act (LMRA): A federal statute (also known as the Taft-Hartley Act), which, in conjunction with the National Labor Relations Act, governs relationships between labor organizations and employers. The LMRA is most often relevant in the NFL due to the fact that it often “preempts” or bars common law claims against the NFL and/or NFLPA. *See also* Preemption.

League Policies for Players: An annual document provided by the NFL to players describing various policies, including for discipline, uniforms, media, community relations, personal conduct, workplace conduct, guns and weapons, commercial substances and endorsements, gambling, ticket scalping, bounties, and HIV/AIDS.

League Year: The fiscal and operational year for the NFL and NFLPA, generally beginning and ending in March.¹⁵

Legacy Benefit: As part of the 2011 CBA, the NFL contributed \$620 million in benefits to players who played prior to 1993 through credits as part of the Retirement Plan. Players who played before 1975 received a \$124/month credit and those who played between 1975 and 1992 received a \$108/month credit. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

LMRA: *See* Labor Management Relations Act.

Long Term Care Insurance Plan: Provides medical insurance to cover the costs of long-term care for NFL players (but not their family members). For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Lystedt Law: A form of concussion-related legislation, initially passed in Washington state, generally requiring that youth athletes suspected of sustaining a concussion or head injury be removed from practice or the game and not return to play until approved by a healthcare provider. The law is named after Zackery Lystedt who, at the age of 13 in 2006, suffered brain hemorrhaging after he returned to a youth football game fifteen minutes after having suffered a concussion. All 50 states have some form of the Lystedt Law.

Mackey-White Committee: A Committee created by the NFLPA in 2009 consisting of current players, former players, doctors, and others for the purpose of “assist[ing] the NFLPA in its development of policies concerning workplace safety and the health of NFLPA members.”¹⁶

Major League Baseball (MLB): The world's premier professional baseball organization, consisting of 30 member clubs and headquartered in New York City. With the NFL, NBA and NHL, sometimes known as part of the "Big Four."

Mayer, Thom: Medical Director of the NFLPA since 2001 and CEO of the physician group Best Practices.

Mild Traumatic Brain Injury (MTBI) Committee: A committee created by the NFL in 1994 for the purpose of studying concussions and other head injuries to NFL players. The committee initially consisted of several club doctors, two club athletic trainers, a consulting engineer, a club equipment manager, neurologist Ira Casson (who had studied boxers), and Hank Feuer, an Indianapolis neurosurgeon who worked with the Colts. New York Jets Club doctor Elliot Pellman, a rheumatologist, was designated as Chairman of the Committee by Commissioner Paul Tagliabue. The MTBI Committee was renamed the Head, Neck and Spine Committee in 2010.

MLB: *See* Major League Baseball.

MTBI Committee: *See* Mild Traumatic Brain Injury Committee.

Nabel, Elizabeth: The NFL's Chief Health and Medical Advisor, President of Brigham and Women's Hospital in Boston and a professor of medicine at Harvard Medical School.

NASO: *See* National Association of Sports Officials.

NATA: *See* National Athletic Trainers Association.

National Association of Sports Officials (NASO): A voluntary organization of approximately 20,000 member officials, ranging from the lowest levels of youth sports to the professionals. NASO provides an extensive list of services to its members, including educational programs, legal advocacy and insurance policies. Every NFL official is a member of NASO.

National Athletic Trainers Association (NATA): A voluntary professional membership association for certified athletic trainers across all levels of competition. NATA's stated mission "is to enhance the quality of health care provided by certified athletic trainers and to advance the athletic training profession."

National Basketball Association (NBA): The world's premier professional basketball organization, consisting of 30 member clubs and headquartered in New York City. With the NFL, MLB and NHL, sometimes known as part of the "Big Four."

National Collegiate Athletic Association (NCAA): A non-profit unincorporated association headquartered in Indianapolis through which the nation's colleges and universities govern their athletic programs. The NCAA consists of more than 1,200 member institutions, all of which participate in the creation of NCAA rules and voluntarily submit to its authority.

National Hockey League (NHL): The world's premier professional ice hockey organization, consisting of 30 member clubs and headquartered in New York City. With MLB, the NFL and NBA, sometimes known as part of the "Big Four."

National Football League (NFL): An unincorporated association of 32 member clubs operating as the world's premier professional football league. The NFL has its headquarters in New York City and is led by Commissioner Roger Goodell. With MLB, the NBA and NHL, sometimes known as the "Big Four."

National Football League Players Association (NFLPA): A Virginia nonprofit, tax-exempt corporation and labor organization which, pursuant to the National Labor Relations Act, is "the exclusive representative[] of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The NFLPA has its headquarters in Washington, D.C., and is led by Executive Director DeMaurice Smith.

National Labor Relations Act (NLRA): A federal labor law statute that governs labor relations between employees and employers in the private sector and obligates both sides to negotiate in good faith concerning the wages, hours, and other terms and conditions of employment.

National Labor Relations Board (NLRB): An independent agency of the United States government responsible for administering and enforcing the provisions of the NLRA, including investigating and remedying unfair labor practices.

National Operating Committee on Standards for Athletic Equipment (NOCSAE): A nonprofit organization with the purpose of improving athletic equipment and reducing injuries through equipment standards. Safety standards for athletic equipment are almost exclusively determined by NOCSAE.

NBA: *See* National Basketball Association.

NCAA: *See* National Collegiate Athletic Association.

Neuro-Cognitive Disability Benefit: A medical benefit that permits qualifying retired players to receive no less than \$3,000 per month for a maximum of 180 months as part of the Disability Plan. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

NFL: *See* National Football League.

NFLCA: *See* NFL Coaches Association.

NFL Combine: An annual event held each February in Indianapolis in which approximately 300 of the best college football players undergo medical examinations, intelligence tests, interviews, and multiple football and other athletic drills and tests. NFL club executives, coaches, scouts, doctors and athletic trainers attend the Combine to evaluate the players for the upcoming NFL Draft (usually in April). The NFL Combine is organized by National Football Scouting, Inc., a Delaware corporation that is not owned or controlled by the NFL.

NFL Coaches Association (NFLCA): “[A] voluntary non-union association that represents the over six hundred coaches and assistant coaches currently employed by the thirty-two individual National Football League Clubs, as well as many retired coaches formerly employed by the NFL teams.” David Cornwell is the NFLCA’s Executive Director in a part-time capacity.

NFL Draft: An annual event held each April/May whereby NFL clubs select former college football student-athletes to join their roster. The Draft consists of seven rounds. Clubs are permitted to trade draft picks and players eligible for the Draft but who are not drafted are become Unrestricted Free Agents and are free to sign with any club.

NFL Injury Surveillance System (NFLISS): The standardized system, created in 1980, used by the NFL and NFL clubs to track and analyze NFL injuries and to provide data for medical research. Injury information is entered by club athletic trainers. Since 2011, the NFLISS is managed by the international biopharmaceutical services firm Quintiles.

NFLISS: *See* NFL Injury Surveillance System.

NFLPA: *See* National Football League Players Association.

NFLPA Constitution: The governing and operating document of the NFLPA, as voted on by its Board of Player Representatives.

NFLPA Regulations Governing Contract Advisors (Contract Advisor Regulations): The NFLPA’s rules of certification and conduct for contract advisors, *i.e.*, “agents.” First instituted in or about 1983, last amended in 2012.

NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors (Financial Advisor Regulations): The NFLPA’s rules of registration and conduct for Financial Advisors. First instituted in 2002, last amended in 2012.

NFL Physicians Society (NFLPS): A voluntary professional membership association for club doctors. NFLPS’ mission is “to provide excellence in the medical and surgical care of the athletes in the National Football League and to provide direction and support for the athletic trainers in charge of the care for these athletes.”

NFLPS: *See* NFL Physicians Society.

NFLRA: *See* NFL Referees Association.

NFL Referees Association (NFLRA): The labor organization that represents NFL officials in CBA negotiations and related proceedings with the NFL.

NHL: *See* National Hockey League.

NLRA: *See* National Labor Relations Act.

NLRB: *See* National Labor Relations Board.

NOCSAE: *See* National Operating Committee on Standards for Athletic Equipment.

Non-Injury Grievance: “Any dispute . . . arising after the execution of [the CBA] and involving the interpretation of, application of, or compliance with, any provision of [the CBA], the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players.”¹⁷ A Non-Injury Grievance is a much broader claim than an Injury Grievance and would include player complaints about their healthcare.

Paragraph 5 Salary: A player’s base compensation as outlined in Paragraph 5 of the Standard Player Contract. Paragraph 5 Salary is generally not guaranteed.

Pash, Jeffrey: Executive Vice President and General Counsel of the NFL. Pash was formerly an attorney with Covington & Burling LLP and joined the NFL in 1997.

PASPA: *See* Professional and Amateur Sports Protection Act.

Pellman, Elliot: Former New York Jets Club doctor, current NFL Medical Director and Chairman of the MTBI Committee from 1994 to 2009.

PES Policy: *See* Policy on Performance-Enhancing Substances.

PFATS: See Professional Football Athletic Trainers Society.

PFWA: See Pro Football Writers of America.

Physically Unable to Perform (PUP) List: A roster designation for players that have failed the preseason physical and are unable to participate in training camp but are expected to be able to play later in the season. A player on the PUP List cannot practice or play until after the sixth game of the regular season and does not count towards the club's 53-man Active/Inactive List during that time.

Player Annuity Program: A plan that provides deferred compensation to players. For additional details, see Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Player Benefit Costs: The total amounts the NFL and its clubs spend on NFL player benefits, programs and medical care.

Player Cost Amount: The players' share of All Revenue ("AR"), which is equal to: (1) 55 percent of League Media, which consists of all NFL broadcasting revenues; (2) 45 percent of NFL Ventures/Postseason revenue, which includes all revenues arising from the operation of postseason NFL games and all revenues arising from NFL-affiliated entities, including NFL Ventures, NFL Network, NFL Properties, NFL Enterprises, NFL Productions, and NFL Digital; and, (3) 40 percent of Local Revenues, which includes those revenues not included in League Media or NFL Ventures/Postseason, and specifically includes revenues from the sale of preseason television broadcasts.

Player Insurance Plan: An insurance plan that provides players and their family with life insurance, accidental death and dismemberment insurance, medical coverage, dental coverage, and wellness benefits. The wellness benefits include access to clinicians for mental health, alcoholism, and substance abuse, child and parenting support services, elder care support services, pet care services, legal services, and identity theft services. For additional details, see Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Players, Inc.: A Virginia for-profit entity formed by the NFLPA responsible for group licensing of NFL player rights.

Playing Rules: Rules governing the playing of professional football on the field. The NFL amends the Playing Rules from time to time, pursuant to the applicable voting procedures of the NFL Constitution and Bylaws.

Policy and Program on Substances of Abuse (Substance Abuse Policy): A collectively bargained document prohibiting players from using common street drugs, such as cocaine, marijuana, amphetamines, opiates, opioids, PCP, and MDMA (ecstasy). The Substance Abuse Policy includes treatment and disciplinary provisions.

Policy on Performance-Enhancing Substances (PES Policy): A collectively bargained document prohibiting players from using performance enhancing drugs. The PES Policy includes disciplinary but not treatment provisions.

Preemption: "The principle . . . that a federal law can supersede or supplant any inconsistent state law or regulation."¹⁸ In the NFL context, the Labor Management Relations Act will preempt, *i.e.*, bar, common law (*i.e.*, non-statutory) claims where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA.¹⁹ The preemption doctrine corresponds with the law's general preference that complaints between employees and employers be resolved through the collectively bargained grievance and arbitration mechanisms, where applicable.

Professional and Amateur Sports Protection Act (PASPA): A federal statute that outlaws sports betting nationwide, exempting certain states which had previously allowed sports betting activities, including Delaware, Montana, Nevada, and Oregon.

Professional Football Athletic Trainers Society (PFATS): A voluntary professional membership association for club athletic trainers.

Pro Football Writers of America (PFWA): A voluntary organization of journalists and writers that cover the NFL and its 32 clubs on a daily basis.

Restricted Free Agent: A "player with three Accrued Seasons, but less than four Accrued Seasons [who] . . . at the expiration of his last Player Contract . . . shall be completely free to negotiate and sign a Player Contract with any Club, and any Club shall be completely free to negotiate and sign a Player Contract with any such player, subject to" certain restrictions set forth in the CBA, including rights of first refusal and draft pick compensation.²⁰ See also Unrestricted Free Agent.

Retirement Plan: A retirement plan that provides eligible players with retirement benefits, and offers survivor benefits for players' wives and family. For additional details, see Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Riddell: One of the leading manufacturers for football equipment across all levels of football. Riddell offers all pads necessary for the game of football, including but not limited to helmets, faceguards, chin straps, mouth guards, shoulder pads, hip pads, thigh pads, knee pads and rib pads. Riddell is headquartered in Rosemont, Illinois and between 1988 and 2013 was the official helmet sponsor of the NFL.

Rozelle, Pete: NFL Commissioner from 1960 to 1989, widely credited with making the NFL one of the most successful sports leagues in the world.

Salary Cap: “[T]he absolute maximum amount of Salary that each Club may pay or be obligated to pay or provide to player . . . at any time during a particular League Year.” The Salary Cap is determined by subtracting Player Benefit Costs from the Player Cost Amount and dividing by the number of clubs in the NFL.

Schutt: One of the leading manufacturers for football equipment across all levels of football. Schutt offers all pads necessary for the game of football, including but not limited to helmets, faceguards, chin straps, mouth guards, shoulder pads, hip pads, thigh pads, knee pads and rib pads. Schutt is headquartered in Litchfield, Illinois.

Second Career Savings Plan: A 401(k) plan that helps NFL players save for retirement in a tax-favored manner. All NFL players are eligible for the Plan, regardless of the number of Credited Seasons. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Severance Pay: A benefit a player is eligible to receive as severance for each Credited Season. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Smith, DeMaurice: Executive Director of the NFLPA since 2009. Former Assistant United States Attorney for the District of Columbia and Partner with the law firms of Latham & Watkins and Patton Boggs LLP.

Society of Professional Journalists (SPJ): A voluntary organization of nearly 10,000 journalists that promotes and protects the interests of journalism and journalists.

SPJ: *See* Society of Professional Journalists.

SRA: *See* Standard Representation Agreement.

Standard Representation Agreement (SRA): The standard contract between contract advisors and players as provided for in the NFLPA Regulations Governing Contract

Advisors, subject to minimal variation as agreed upon by the parties.

Substance Abuse Policy: *See* Policy and Program on Substances of Abuse.

System Arbitration: A legal process for the resolution of disputes between the NFL and the NFLPA and/or a player concerning a subset of CBA provisions that are central to the NFL's operations and which invoke antitrust and labor law concerns, including but not limited to the NFL player contract, NFL Draft, rookie compensation, free agency, and the Salary Cap. System Arbitrations are presided over by the System Arbitrator and subject to appeal before the Appeals Panel.

System Arbitrator: The arbitrator designated to hear System Arbitrations. The current System Arbitrator is University of Pennsylvania Law School Professor Stephen B. Burbank.

Tagliabue, Paul: NFL Commissioner from 1989 to 2006. Prior to becoming Commissioner, Tagliabue was the NFL's chief outside counsel with the Washington, D.C. law firm of Covington & Burling LLP, the firm to which he returned after retiring as Commissioner.

Termination Pay: A player benefit whereby a player who has at least four years of credited service under the Retirement Plan is eligible to receive the unpaid balance of his Paragraph 5 Salary for a season after having had his contract terminated during that season, provided he was on the club's Active/Inactive List for at least one game that season. A player is entitled to Termination Pay only once during his career.

Toradol: The brand name for ketorolac tromethamine, a non-steroidal anti-inflammatory drug used for short-term relief of acute pain.

Total Revenue: *See* All Revenue.

TR: *See* All Revenue.

Tuition Assistance Plan: A benefit that permits players to receive reimbursement for tuition, fees and books from attending an eligible education institution. For additional details, *see* Appendix C: Summary of Collectively Bargained Health-Related Programs and Benefits.

Unrestricted Free Agent: A “player with four or more Accrued Seasons [who] . . . at the expiration of his Player Contract . . . shall be completely free to negotiate and sign a Player Contract with any Club, and any Club shall be completely free to negotiate and sign a Player Contract with such player without penalty or restriction[.]”²¹ *See also* Free Agency and Restricted Free Agent.

Upshaw, Eugene: Hall of Fame offensive lineman with the Oakland Raiders from 1967 to 1981 and Executive Director of the NFLPA from 1983 to 2008.

White v. NFL, 92-cv-906 (D. Minn.): A class action antitrust lawsuit brought by NFL players in 1992 against the NFL challenging the NFL's policies on compensation, free agency and the NFL Draft. The settlement of the case formed the basis of the 1993 CBA and every CBA since. Hall of Fame

defensive end Reggie White was the lead plaintiff in the case. *See also Brady v. NFL.*

Workers' Compensation: A state-based system which provides workers injured during the course of their employment with wages and medical benefits and which, as a tradeoff, generally bars employees from suing their employers and co-employees for negligence.

Endnotes

- 1 CBA, Art. 39, § 3.
- 2 CBA, Art. 8, § 1(a).
- 3 CBA, Art. 12, § 1.
- 4 *See* Michelle Saulle M & Brian D. Greenwald, *Chronic Traumatic Encephalopathy: A Review*, 2012 Rehabil. Res. Pract. 1 (2012) (defining CTE as "a progressive neurodegenerative disease that is a long-term consequence of single or repetitive closed head injuries for which there is no treatment and no definitive pre-mortem diagnosis."); Bennet Omalu et al., *Emerging Histophormorphic Phenotypes of Chronic Traumatic Encephalopathy in American Athletes*, 69 Neurosurgery 173 (2011) (defining CTE as "a progressive neurodegenerative syndrome caused by single, episodic or repetitive blunt force impacts to the head and transfer of acceleration–deceleration forces to the brain."); Ann McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. Neuropathology & Experimental Neurology 709 (2009) (describing CTE as "shar[ing] many features of other neurodegenerative disorders").
- 5 *See* Joseph C. Maroon et al. *Chronic Traumatic Encephalopathy in Contact Sports: A Systematic Review of All Reported Pathological Cases*, PLOS ONE (2015) (summarizing CTE case studies to date); Ann C. McKee et al., *The spectrum of disease in chronic traumatic encephalopathy*, 136 Brain 43 (2013); Bennet I. Omalu, *Chronic Traumatic Encephalopathy, Suicides and Parasuicides in Professional American Athletes*, 31 Am. J. Forensic Med. Pathol. 130 (2010); *What is CTE?* BU CTE Center, <http://www.bu.edu/cte/about/what-is-cte/> (last visited Mar. 31, 2016), archived at <https://perma.cc/W86H-886C> (CTE is associated with "athletes (and others) with a history of repetitive brain trauma," and "is associated with memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and, eventually, progressive dementia.")
- 6 *See* Maroon, *supra* note 5.
- 7 *See id.*; Paul McCrory et al., *Consensus statement on concussion in sport: the 4th Int'l Conference on Concussion in Sport held in Zurich, November 2012*, 47 Br. J. Sports Med. 250, 254, 257 (2013).
- 8 *See* Maroon, *supra* note 5.
- 9 *See* McCrory, *supra* note 7, at 257.
- 10 Black's Law Dictionary (9th ed. 2009).
- 11 CBA, Art. 26, § 2.
- 12 CBA, Art. 44, § 1.
- 13 CBA, Art. 45, § 1.
- 14 CBA, Art. 50, § 1.
- 15 CBA, Art. 1.
- 16 NFLPA Mackey-White Committee Charter, ¶ 2.
- 17 CBA, Art. 43, § 1.
- 18 Black's Law Dictionary (9th ed. 2009).
- 19 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985).
- 20 CBA, Art. 9, § 2.
- 21 CBA, Art. 9, § 1(a).

Index

A

Accountability and Care Committee (ACC), 119, 169, 212, 214, 215, 242, 260, 424

Accrued Season, 205, 481

All Revenue (AR), 207, 215, 216, 480, 481, 486, 487

American College of Occupational and Environmental Medicine (ACOEM), 97, 102, 107, 108, 109, 150, 151, 152, 153

American Football Coaches Association (AFCA), 273, 274, 278, 279, 280, 283, 284, 366, 480

American Football League (AFL), 203, 205, 207, 251, 480

American Medical Association (AMA), 70, 97, 100, 101, 104, 105, 106, 107, 109, 110, 122, 123, 125, 145, 150, 151, 155, 180, 181, 183, 194, 208, 480

Appeals Panel, 84, 85, 266, 480, 487

Arbitration, 17, 76, 114, 120, 121, 140, 141, 148, 154, 167, 170, 173, 177, 182, 186, 189, 191, 195, 221, 222, 227, 238, 240, 250, 254, 260, 263, 266, 272, 276, 277, 280, 284, 289, 290, 292, 296, 310, 480

Athletic Equipment Managers Association (AEMA), 294, 296, 298, 299, 366, 480

Autonomy, 31, 50, 98, 101, 102, 105, 106, 107, 124, 126, 130, 137, 151, 321, 340, 343, 352

Empowered Autonomy, 70, 77, 98, 101, 124, 125, 173, 183, 196, 231, 240, 244

B

Benefits Arbitrator, 133, 221, 480

Bias, 29, 78, 85, 141, 156, 222, 337

Bioethics, 155, 215

Board of Certification for the Athletic Trainer (BOC), 160, 162, 166, 167, 172, 175, 176, 178, 480

Boston University, 28, 209, 211, 232, 253

Brady v. NFL, 84, 211, 212, 245, 248, 265, 266, 275, 480

C

Canadian Football League (CFL), 239, 481

Casson, Ira, 208, 209, 211, 481

Chronic Traumatic Encephalopathy (CTE), 27, 28, 29, 44, 74, 209, 211, 217, 227, 250, 481, 488

Collaboration and Engagement, 77, 140, 231, 240, 244, 290, 298

Committee on Agent Regulation and Discipline (CARD), 481

Concussion, 13, 17, 18, 44, 66, 67, 68, 72, 73, 79, 82, 83, 84, 90, 102, 115, 116, 117, 129, 130, 137, 138, 150, 155, 156, 163, 187, 188, 190, 191, 208, 209, 210, 211, 212, 216, 217, 220, 222, 225, 228, 229, 235, 239, 240, 242, 243, 245, 247, 248, 250, 251, 252, 253, 254, 275, 276, 295, 299, 365, 366, 367, 368, 369, 370, 371, 372, 407, 458, 481, 483

Concussion Protocol, 13, 17, 18, 72, 84, 90, 115, 129, 130, 137, 187, 188, 190, 191, 212, 220, 225, 235, 239, 242, 243, 481

Incidence of, 364

Litigation related to, 68, 216, 217, 222, 228, 229, 240, 252, 369

Confidentiality, 66, 98, 99, 102, 103, 104, 106, 108, 109, 119, 125, 133, 137, 163, 164, 165, 166, 427

Conflict of Interest, 18, 74, 92, 93, 98, 104, 105, 106, 109, 117, 118, 124, 126, 127, 129, 133, 134, 136, 155, 165, 166, 173, 174, 183, 196, 227, 231, 244, 250, 260, 280, 290, 317, 334

Congress, 209, 413

Covington & Burling LLP, 207, 487

Credited Season, 246, 423, 425, 426, 427, 430, 432, 480, 481

D

Defined Gross Revenue (DGR), 207, 480, 481

Dementia, 44, 209, 213, 217, 423, 488

DePaso, Tom, 266, 481

Dissolution, 206, 211, 328, 481

Draft, 60, 61, 76, 111, 112, 113, 116, 161, 168, 174, 175, 176, 180, 185, 194, 205, 206, 223, 236, 237, 261, 272, 276, 285, 287, 292, 304, 315, 331, 348, 357, 363, 364, 366, 374, 385, 396, 480, 485, 487

E

88 Plan, 214

Electronic Medical Records (EMR), 62, 101, 161, 162, 163

Extended Injury Protection, 83, 212, 423, 482, 483

F

Federation Internationale de Medicine du Sport (FIMS), 100, 102, 104, 105, 108, 109, 123, 125, 150, 151, 152, 153, 155, 180, 181, 194, 482

Former Player Life Improvement Plan, 214, 424

Free Agency, 76, 95, 120, 132, 177, 189, 205, 206, 207, 211, 236, 246, 250, 252, 261, 266, 277, 289, 296, 480, 486, 487

G

Garvey, Ed, 126, 205, 206, 246

Goodell, Roger, 150, 173, 209, 210, 211, 220, 245, 247, 249, 252, 276, 330, 425, 484

Guaranteed Compensation, 236, 237, 238, 253

H

Head, Neck and Spine Committee, 208, 211, 295

Health Insurance Portability and Accountability Act (HIPAA), 66, 82, 102, 103, 163, 164, 180

Health Primacy, 70, 77, 98, 124, 173, 183, 196, 231, 236, 238, 242, 244, 280, 290, 298

Health Reimbursement Account, 209, 214, 423

Huizenga, Rob, 92, 110, 111, 113, 148, 149, 153, 166, 202, 245, 275, 299

I

Injured Reserve (IR), 60, 67, 82, 257, 287

Injury Grievance, 70, 73, 80, 81, 83, 85, 114, 120, 127, 155, 170, 177, 186, 187, 188, 189, 191, 197, 221, 227, 228, 239, 240, 242, 250, 251, 260, 266, 277, 289, 296, 362, 423

Injury Protection, 67, 70, 83, 114, 205, 207, 236, 240, 256, 423, 482

Injury Report, 62, 66, 111, 114, 116, 161, 195, 233, 292, 387, 483

Injury Reporting Policy, 387

J

Joint Committee on Player Safety and Welfare, 119, 120, 170, 177, 186, 187, 188, 189, 205, 208, 214, 226, 238, 242, 254, 262, 267, 483

Justice, 124, 140, 156, 173, 231, 238, 240, 242, 244, 280, 345

K

Kessler, Jeffrey, 68, 227

L

Labor Management Relations Act (LMRA), 121, 148, 171, 177, 189, 221, 222, 228, 229, 240, 251, 262, 278, 289, 296, 449, 486

League Policies for Players, 75

League Year, 70, 207, 215, 480

Legacy Benefit, 212, 214, 424

Long Term Care Insurance Plan, 214, 424, 432

M

Mackey-White Committee, 225, 252

Major League Baseball (MLB), 92, 94, 150, 154, 155, 205, 226, 235, 236, 239, 252, 253, 267, 484

Mayer, Thom, 219, 484

Medical malpractice, 71, 83, 92, 93, 98, 112, 120, 121, 122, 135, 141, 150, 151, 153, 154, 155, 162, 175, 177, 182, 184, 188, 189, 191, 195, 197, 238, 239, 254, 265, 266, 267, 284, 292, 449

Medical Sponsorship, 17, 91, 92, 93, 94, 105, 125, 139, 230, 445

Mental Health, 62, 68, 69, 83, 104, 131, 151, 176, 431

Michigan, University of, 61, 68, 274

Mild Traumatic Brain Injury (MTBI) Committee, 208, 209, 210, 211, 227, 232, 247, 248, 250, 409

N

Nabel, Elizabeth, 213, 232, 249, 484

National Association of Sports Officials (NASO), 357, 358, 361, 362, 484

National Athletic Trainers Association (NATA), 117, 160, 161, 162, 165, 166, 167, 168, 174, 175, 176, 178, 206, 256, 366, 484

National Basketball Association (NBA), 92, 94, 150, 152, 156, 170, 205, 236, 239, 252, 292, 484

National Collegiate Athletic Association (NCAA), 54, 146, 219, 283, 299, 309, 407, 484

National Hockey League (NHL), 92, 94, 99, 100, 102, 151, 154, 158, 163, 205, 226, 236, 239, 251, 252, 267, 484, 485

National Institute for Occupational Safety and Health (NIOSH), 207, 213

National Labor Relations Act (NLRA), 204, 206, 228, 230, 273, 484, 485

National Labor Relations Board (NLRB), 205, 273, 484, 485

National Operating Committee on Standards for Athletic Equipment (NOCSAE), 21, 364, 366, 367, 368, 369, 370, 371, 372, 484, 485

Neuro-Cognitive Disability Benefit, 212, 214, 424

NFL Coaches Association (NFLCA), 273, 280, 282, 283, 290, 485

NFL Combine, 80, 91, 95, 106, 111, 112, 113, 116, 132, 139, 146, 153, 223

NFL Injury Surveillance System (NFLISS), 62, 67, 162, 188, 233, 485

- NFL Physicians Society (NFLPS), 17, 98, 113, 114, 117, 137, 140, 141, 146, 149, 154, 161, 210, 215, 218, 485
- NFL Referees Association (NFLRA), 485
- Non-Injury Grievance, 18, 70, 120, 121, 133, 141, 147, 155, 170, 171, 177, 189, 191, 221, 238, 239, 240, 242, 251, 254, 260, 261, 262, 263, 266, 277, 278, 289, 296, 485
- O**
- Occupational Safety and Health Act, 103, 216, 257
- Owners, 10, 29, 32, 35, 44, 115, 148, 173, 200, 202, 203, 204, 207, 209, 226, 245, 248, 251, 255, 256, 287, 313, 362, 364, 394, 455, 481
- P**
- Paragraph 5 Salary, 256, 482, 487
- Pash, Jeffrey, 210, 481
- Pellman, Elliott, 208, 209, 211, 213, 247
- Physically Unable to Perform (PUP) List, 67, 256, 265
- Player Annuity Program, 207, 423
- Player Benefit Costs, 134, 215
- Player Cost Amount, 26, 45, 215, 259
- Player Engagement Department (NFL), 78, 219, 225, 250
- Player Insurance Plan, 432, 486
- Playing Rules, 71, 72, 75, 76, 83, 186, 203, 205, 214, 243, 295, 481
- Legal significance, 71, 97
- Policy and Program on Substances of Abuse (Substance Policy), 8, 143, 213, 216, 227, 246, 249, 487
- Policy on Performance-Enhancing Substances (PES Policy), 8, 11, 143, 213, 216, 221, 227, 485, 486
- Pop Warner, 412
- Preemption, 121, 123, 154, 157, 158, 171, 177, 189, 221, 222, 251, 257, 262, 263, 266, 267, 278, 289, 296, 368
- Professional Football Athletic Trainers Society (PFATS), 160, 162, 164, 165, 171, 174, 175, 176, 177, 215
- Pro Football Writers of America (PFWA), 374
- R**
- Regulations and Code of Conduct Governing Registered Player Financial Advisors, 331, 332, 334, 482, 485
- Regulations Governing Contract Advisors, 481, 485, 487
- Respect, 124, 140, 151, 166, 173, 183, 196, 231, 236, 238, 240, 242, 244, 280, 290, 298
- Retirement Plan, 61, 205, 208, 209, 212, 214, 254, 423, 425, 427, 430, 432, 487
- Riddell, 21, 171, 221, 278, 363, 364, 365, 368, 369, 370, 371, 372, 457, 458
- Rozelle, Pete, 205, 206, 207, 208, 246, 247, 254
- S**
- Salary Cap, 76, 177, 206, 207, 236, 237, 238, 246, 250, 253, 259, 261, 266, 277, 289, 292, 296, 487
- Schutt, 21, 363, 364, 369, 372
- Scranton, Pierce, 73, 80, 82, 92, 111, 113, 116, 149, 153, 156, 210, 218, 248, 275, 449
- Second Career Savings Plan, 214
- Severance Pay, 214, 423
- Smith, DeMaurice, 40, 210, 212, 225, 248, 252, 484, 487
- Society of Professional Journalists (SPJ), 487
- Standard Representation Agreement (SRA), 305, 487
- System Arbitration, 70, 76, 120, 177, 189, 221, 260, 261, 277, 289, 296, 480, 487
- System Arbitrator, 120, 133, 177, 189, 250, 266, 277, 289, 296, 487
- T**
- Tagliabue, Paul, 92, 149, 150, 207, 208, 209, 247, 272, 276, 277, 283, 284, 292, 487
- Termination Pay, 236, 487
- Toradol, 143, 146, 147, 148, 156, 157, 222, 487
- Total Revenue, 207, 480, 487
- Transparency, 124, 173, 176, 231, 240, 244
- Tuition Assistance Plan, 78, 208, 214, 423, 487
- U**
- Unaffiliated Neurotrauma Consultant, 17, 90, 115, 129, 130, 137, 138, 187, 188, 190
- Unrestricted Free Agent, 205, 485
- Upshaw, Eugene, 206, 207, 210, 225, 229, 237, 248, 252, 254
- W**
- Waiver, 99, 146, 147, 148, 153
- White v. NFL, 480

“Who is responsible for the health of NFL players, why, and what can be done to promote player health?”



**THE FOOTBALL PLAYERS
HEALTH STUDY**
AT HARVARD UNIVERSITY

10 Shattuck Street
Boston, MA 02115

617.584.5236

info@footballplayershealth.harvard.edu