

## SCHOOL OF HARD KNOCKS — THE IMPACT OF THE NFL CONCUSSION LITIGATION<sup>♦</sup>

“[The NFL is] forced to care now because it’s politically correct to care. Lawsuits make you care. I think the PR makes you care.” Terry Bradshaw<sup>1</sup>

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### INTRODUCTION

On June 7, 2012, over 4,500 former professional football players (“Plaintiffs”) filed a Complaint in the United States District Court for the Eastern District of Pennsylvania against the National Football League (“NFL”). The Plaintiffs’ lawsuit (“Class Action suit”) sought financial compensation for “long-term chronic injuries, financial losses, expenses, and intangible losses suffered by the [players and their families.]”<sup>2</sup> The Class Action suit was not taken lightly, and as Terry Bradshaw, a former top NFL quarterback and current leading TV commentator, stated, “[l]awsuits make you care.”<sup>3</sup> Given the financial and medical needs of the Plaintiffs, and the continued cost and risk of

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<sup>1</sup> *Terry Bradshaw: I Don’t Think NFL Cares About Concussions*, DETROIT FREE PRESS (June 15, 2012), <http://www.freep.com/apps/pbcs.dll/article?AID=/20120615/SPORTS18/206150444/Terry-Bradshaw-nfl-concussions>.

<sup>2</sup> Plaintiff’s Master Administrative Long-Form Complaint at 4, *In re Nat’l Football Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. June 7, 2012), MDL No. 2323 [hereinafter Plaintiff’s Complaint].

<sup>3</sup> *Terry Bradshaw: I Don’t Think NFL Cares About Concussions*, *supra* note 1.

bad publicity for the NFL, the parties agreed to a \$765 million settlement, which did not require the NFL to admit liability.<sup>4</sup> Despite the parties' agreement, Senior United States District Judge Anita Brody denied preliminary approval of the settlement.<sup>5</sup> Judge Brody requested more financial information to confirm that the payouts and medical testing will cover the needs of the current and future retired players for the agreed upon sixty-five year period.<sup>6</sup> The terms of the proposed settlement require the NFL to create a \$675 million pool for players who have sustained brain injuries.<sup>7</sup> Ex-players (whether or not a named Plaintiff) who have or develop Amyotrophic lateral sclerosis ("ALS"), Parkinson's disease, Alzheimer's disease, or any other severe cognitive impairment will receive distributions up to \$5 million; the estate or heirs of ex-players diagnosed with Chronic Traumatic Encephalopathy ("CTE") after their death will receive up to \$4 million; and ex-players diagnosed with dementia will receive up to \$3 million.<sup>8</sup> In addition, \$75 million will be used to conduct medical exams on the field during current and future NFL games, and \$10 million will be allocated to conducting neurological research.<sup>9</sup> In June 2014, the parties agreed to revise the proposed settlement and remove the NFL's damages cap, enabling any retired player who develops a qualifying severe cognitive impairment to have access to funds.<sup>10</sup> While the original settlement was still awaiting judicial approval eleven months after it was proposed, Judge Brody granted preliminary approval to the revised settlement in a mere eleven days.<sup>11</sup>

If granted final approval, the settlement will end the lawsuit permanently, but the impact will undoubtedly remain. The litigation

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<sup>4</sup> Steve Fainaru & Mark Fainaru-Wada, *Some Players May Be Out of NFL Deal*, ESPN (Sept. 20, 2013), [http://espn.go.com/espn/otl/story/\\_id/9690036/older-players-cut-nfl-settlement-concerns-growing-whether-enough-money-exists](http://espn.go.com/espn/otl/story/_id/9690036/older-players-cut-nfl-settlement-concerns-growing-whether-enough-money-exists); Doug Farrar, *Judge Anita Brody Denies Preliminary Approval for NFL Concussion Settlement*, SPORTS ILLUSTRATED (Jan. 14, 2014), <http://nfl.si.com/2014/01/14/nfl-concussion-lawsuit-settlement-2/>; see also Ken Belson, *N.F.L. Agrees to Settle Concussion Suit for \$765 Million*, N.Y. TIMES (Aug. 29, 2013), [http://www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html?\\_r=0](http://www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html?_r=0); Press Release, ALT. DISPUTE RESOLUTION CTR., NFL, Retired Players Resolve Concussion Litigation; Court-Appointed Mediator Hails "Historic" Agreement, [http://a.espncdn.com/pdf/2013/0829/nfl\\_concussion\\_press\\_release.pdf](http://a.espncdn.com/pdf/2013/0829/nfl_concussion_press_release.pdf).

<sup>5</sup> Belson, *supra* note 4.

<sup>6</sup> Farrar, *supra* note 4; see also Steve Eder & Ken Belson, *In N.F.L. Suit, Judge Flags Provision Protecting N.C.A.A.*, N.Y. TIMES (Jan. 15, 2014), [http://www.nytimes.com/2014/01/16/sports/football/in-nfl-suit-clause-is-a-concern.html?\\_r=0](http://www.nytimes.com/2014/01/16/sports/football/in-nfl-suit-clause-is-a-concern.html?_r=0).

<sup>7</sup> Belson, *supra* note 4.

<sup>8</sup> Mark Fainaru-Wada et al., *NFL Players Reach Concussion Deal*, ESPN (Aug. 29, 2013), [http://espn.go.com/nfl/story/\\_id/9612138/judge-nfl-players-settle-concussion-suit](http://espn.go.com/nfl/story/_id/9612138/judge-nfl-players-settle-concussion-suit).

<sup>9</sup> *Id.*

<sup>10</sup> Doug Farrar, *NFL Removes Cap on Funds in Revised Concussion Lawsuit Settlement*, SPORTS ILLUSTRATED (June 25, 2014), <http://www.si.com/nfl/2014/06/25/concussion-settlement>.

<sup>11</sup> Andrew Brandt, *A Tie's a Win for the NFL*, SPORTS ILLUSTRATED (July 10, 2014), <http://mmqb.si.com/2014/07/10/nfl-concussion-lawsuit-settlement-preliminary-approval/>.

created awareness for the long-term effects of concussions and the NFL's duty to exercise reasonable care for its players.<sup>12</sup> The underlying issue of the case was whether the NFL knew, or had reason to know, that its rules and practices were putting players in harm's way; and, if so, whether the NFL had a duty to change its harmful practices or, at a bare minimum, provide the players with information regarding the risk of injury.

The Plaintiffs asserted causes of action against the NFL based on fraud, fraudulent concealment, negligence, negligent omission, negligent misrepresentation and negligent hiring and retention.<sup>13</sup> Without question, there is public relations power in using the terms "fraud" and "negligence;" but this Note will discuss the existence of a stronger argument that case law supports: that the NFL fostered conditions of unreasonable risk and did not exercise reasonable care for the players. The argument that the NFL was responsible for a condition of unreasonable risk, and must therefore remedy it, is much stronger than the claims that the Plaintiffs asserted because fraudulent concealment and general negligence require elements that are difficult to establish. A claim of fraud requires intent,<sup>14</sup> and a claim of general negligence requires direct causation.<sup>15</sup> Based on the allegations in the Complaint,<sup>16</sup> neither of those elements is easy to prove against the NFL.

While the doctrine of unreasonable risk is also based on negligence, it requires a balancing test rather than a strict subjective element test.<sup>17</sup> The unreasonable risk test is based on a risk-benefit analysis: "balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued."<sup>18</sup> As the supervisory authority over the interests of its teams and players, the NFL had a duty to know the prevailing research on the long-term effects of concussions at the time, and make and enforce the rules of play accordingly. The public record makes it clear that the NFL knew, or had reason to know, that concussions led to long-term brain injuries, but chose not to inform the players of the risk nor make the game safer. Therefore, the NFL fostered conditions of unreasonable risk and failed in its duty of care to

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<sup>12</sup> *Id.*

<sup>13</sup> Plaintiff's Complaint, *supra* note 2, at 2–3.

<sup>14</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107 (5th ed. 1984) ("[I]t has never been disputed that the 'scienter' or intent which is a basis for deceit is sufficient to justify relief in equity, restitution at law, the defense of fraud, or estoppel.")

<sup>15</sup> *Id.* at § 30. The elements for a cause of action founded upon negligence are: (1) duty; (2) breach of duty; (3) *causation* and; (4) actual loss or damage resulting from the breach of duty (emphasis added).

<sup>16</sup> Plaintiff's Complaint, *supra* note 2.

<sup>17</sup> KEETON ET AL., *supra* note 14., at § 31.

<sup>18</sup> *Id.*

the players.

This Note explores the NFL's duty to protect its players, going beyond the allegations asserted in the concussion litigation. Part I will provide background on the NFL and its history of violence. Part II will describe the Class Action suit, and the weaknesses of the arguments the Plaintiffs brought forth. Part III will discuss the aforementioned superior argument the Plaintiffs should have asserted—that the NFL fostered conditions of unreasonable risk. Part IV will discuss the impact of this litigation with respect to the NFL; and Part V will discuss how this impact should extend to amateur football leagues as well.

#### PART I: THE NFL'S RISE TO POWER

The NFL is arguably the most powerful and popular sports league in America.<sup>19</sup> It is unquestionably the highest grossing and most watched sports league in the country.<sup>20</sup> The annual cumulative revenue of the teams that comprise the NFL has reached approximately \$9.5 billion.<sup>21</sup> This amount more than doubles the cumulative revenues of the teams making up the National Basketball Association in 2012 and is \$2 billion more than the annual cumulative revenues of the teams that comprise the second-highest grossing league, Major League Baseball.<sup>22</sup> In 2013, Forbes announced the world's fifty most valuable sports teams—and the NFL contained thirty of them.<sup>23</sup> From television contracts alone, the thirty-two NFL teams will share \$5 billion annually for each of the 2014–22 seasons.<sup>24</sup> ESPN's most recent contract extension for Monday Night Football will garner the NFL teams an additional \$1.95 billion per season.<sup>25</sup> The NFL even projects it will increase its yearly total revenue to \$25 billion over the next fifteen years.<sup>26</sup>

The popularity of professional football has been attributed to its violence and brutality.<sup>27</sup> The sport displays the brutal force and athletic

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<sup>19</sup> Soven Bery, *NFL: Is the Most Popular Sports League in the USA Really Too Big to Fail?*, BLEACHER REPORT (July 17, 2013), <http://bleacherreport.com/articles/1707663-nfl-is-the-most-popular-sports-league-in-the-usa-really-too-big-to-fail>.

<sup>20</sup> *Id.* (“NFL games have accounted for an amazing 55 percent of all TV shows averaging 20 million viewers, 70 percent of all TV shows averaging 30 million viewers and 92 percent of all TV shows averaging 40 million viewers.”).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also Press Release, Forbes, Forbes Announces The World's 50 Most Valuable Sports Teams (July 15, 2013), <http://www.forbes.com/sites/forbespr/2013/07/15/forbes-announces-the-worlds-50-most-valuable-sports-team/>.

<sup>24</sup> Bery, *supra* note 19.

<sup>25</sup> Bill Barnwell, *What You Need to Know About the NFL's \$765 Million Concussion Settlement*, GRANTLAND (Aug. 29, 2013), [http://www.grantland.com/blog/the-triangle/post/\\_id/72867/what-you-need-to-know-about-the-nfls-765-million-concussion-settlement](http://www.grantland.com/blog/the-triangle/post/_id/72867/what-you-need-to-know-about-the-nfls-765-million-concussion-settlement).

<sup>26</sup> *Id.*

<sup>27</sup> MARK FAINARU-WADA & STEVE FAINARU, LEAGUE OF DENIAL: THE NFL, CONCUSSIONS

prowess of larger-than-life men.<sup>28</sup> Michael Oriard, a historian and former Kansas City Chiefs offensive lineman, has aptly described the sport as a “contact ballet.”<sup>29</sup> Fans watch as these colossal super-humans battle each other in, what a spokesman for the NFL has called, the “ultimate reality show.”<sup>30</sup> As Vince Lombardi famously stated, football is not a “contact sport, it’s a collision sport.”<sup>31</sup> Research conducted between 1996 and 2001 regarding the violence of the sport found that football players were being hit by fully armored players at speeds between seventeen and twenty-five miles per hour.<sup>32</sup> For comparison, the world’s fastest man, Usain Bolt,<sup>33</sup> reaches a top speed of nearly twenty-eight miles per hour.<sup>34</sup> This means that for fifteen milliseconds, players are struck with between 17 and 126 g-forces.<sup>35</sup> This intensity would kill anyone for a longer duration; but in those fifteen milliseconds, the momentum transferred is the equivalent of being hit in the head by a ten-pound cannonball traveling at thirty miles per hour.<sup>36</sup>

Since its inception, American football has had a long-standing tradition of brutal violence and danger.<sup>37</sup> Starting in 1889, players from Princeton University started a nationwide trend of wearing their hair long to protect them from head injuries.<sup>38</sup> Near the turn of the century, some players wore leather straps around their skulls as “head harnesses.”<sup>39</sup> Other players wore hard leather nose protectors that wrapped around their forehead to protect their heads. Yet none of these devices worked and might have encouraged more dangerous play.<sup>40</sup> In 1905, after eighteen players died, many from head trauma, several university presidents called for the abolishment of football.<sup>41</sup> President

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AND THE BATTLE FOR TRUTH 5 (2013); *see also* Kevin A. Fritz, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L.J. 189, 191 (2002) (“Violence has been a common theme in professional sports throughout the twentieth century.”).

<sup>28</sup> FAINARU-WADA & FAINARU, *supra* note 27.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* In fact, in the fall of 2012, 23 of the 25 top-rated shows on broadcast television were NFL games. *Id.* at 5. This certainly makes for a lot of “ultimate reality show” fans.

<sup>31</sup> *Id.* at 138.

<sup>32</sup> *Id.*

<sup>33</sup> Connor Simpson, *Usain Bolt is Still the Fastest Man Alive*, THE WIRE (Aug. 11, 2013, 5:52 PM), <http://www.thewire.com/entertainment/2013/08/usain-bolt-still-fastest-man-alive/68210/>.

<sup>34</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 138.

<sup>35</sup> *Id.* The wide range of g-force impact is due to the difference in how hard and how many players hit each other. A g-force is either the force of gravity on a body or the force of acceleration elsewhere. *What is G-Force*, WISEGEEK, <http://www.wisegeek.org/what-is-g-force.htm> (last visited Feb. 22, 2015).

<sup>36</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 138.

<sup>37</sup> William B. Gould, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 FIU L. REV. 55 (2012).

<sup>38</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 134.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 134–35.

<sup>41</sup> *Id.* at 135.

Theodore Roosevelt stepped in to save the sport, and convened an emergency summit in the White House to enact rules to make the game less dangerous.<sup>42</sup> These rules included the legalization of the forward pass, and increased the yardage needed for a first down from five to ten yards, thus emphasizing speed over brute force.<sup>43</sup> This summit was also responsible for the creation of the National Collegiate Athletic Association (“NCAA”).<sup>44</sup>

Professional football dates back to 1892 in Pittsburgh, Pennsylvania, when former Yale star William “Pudgy” Heffelfinger was paid a notable sum of \$500 to play in a single game for the Allegheny Athletic Association. The NFL itself was not founded until September 17, 1920, when a group of men who represented eleven football franchises gathered in Canton, Ohio to formally organize a professional league.<sup>45</sup> The NFL almost immediately addressed the issue of head injuries with the introduction of a leather helmet in the 1920’s, an evolution from the early head harnesses.<sup>46</sup> In the 1930’s, teams started decorating the leather helmets with colorful logos, but the helmets still did not provide much protection and were flimsy and tore (let alone reeked of sweat and mildew).<sup>47</sup> Therefore, in 1939, Riddell, a Chicago company founded by a high school football coach, created a helmet with a hard plastic shell.<sup>48</sup> This provided more protection, and the NFL made helmets mandatory just four years later.<sup>49</sup> Helmets then evolved into a plastic model with a single face bar in the 1950s, using acrylonitrile butadiene styrene thermoplastic, a high-strength polymer.<sup>50</sup> The single face bar was replaced with the current cage-like “facemask” in the 1980s.<sup>51</sup> Unfortunately, neurosurgeons believe that the helmets provided false comfort for the players, which led to more daring play and injurious tackles where players lead by their head.<sup>52</sup> This change led

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<sup>42</sup> Bob Greene, *The President Who Saved Football*, CNN (Feb. 5, 2012), <http://www.cnn.com/2012/02/05/opinion/greene-super-bowl/>; see also FAINARU-WADA & FAINARU, *supra* note 27 at 135; Gould, *supra* note 37.

<sup>43</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 135.

<sup>44</sup> *Id.* The NCAA is a non-profit association, which regulates the athletes of the 1,281 member institutions, conferences, and affiliated groups and organizations. In addition, the NCAA organizes the athletic programs of many colleges and universities in the United States and Canada, and helps more than 460,000 college student-athletes compete annually in college sports. *Who We Are*, NCAA, <http://www.ncaa.org/about/who-we-are> (last visited Feb. 22, 2015).

<sup>45</sup> *NFL Founded in Canton*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/history/2005/1/1/nfl-founded-in-canton/> (last visited Feb. 22, 2015).

<sup>46</sup> Alan Schwarz, *Players Face Head-Injury Risk Before the N.F.L.*, N.Y. TIMES (Oct. 1, 2009), [http://www.nytimes.com/2009/10/02/sports/football/02dementia.html?\\_r=0](http://www.nytimes.com/2009/10/02/sports/football/02dementia.html?_r=0); see also FAINARU-WADA & FAINARU, *supra* note 27, at 135.

<sup>47</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 135.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Schwarz, *supra* note 46; see also FAINARU-WADA & FAINARU, *supra* note 27, at 135.

<sup>52</sup> Schwarz, *supra* note 46.

to more concussions and subconcussive blows.<sup>53</sup> Even the facemasks, which were intended to protect players, were used as weapons.<sup>54</sup> The NFL enacted a penalty in 1956 in an attempt to prevent players from using the single face bar to wrestle players to the ground, creating the term “facemasking.”<sup>55</sup>

Nevertheless, despite more than a hundred years of concern and focus on head injuries, and the creation of protective helmets, the NFL continually denied the link between concussions and cognitive decline. As late as 2007, the NFL circulated a pamphlet to players, team doctors and coaches that stated: “[c]urrent research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly.”<sup>56</sup> Conversely, neurologists have been publishing scholarly works on the risks of concussions for decades.<sup>57</sup> As early as 1952, the prestigious *New England Journal of Medicine* published a medical study addressing injuries in football, which stated that football players should stop playing after suffering more than three concussions.<sup>58</sup> This association of concussions with brain injury and long-term cognitive impairment hit mainstream press in 1982.<sup>59</sup> *The Wall Street Journal* published a front-page article regarding the cognitive impairments that stem from concussions, mostly caused by traffic accidents, and called concussions

<sup>53</sup> *Id.* The first program to provide an in-depth view of the violent nature of the NFL and a force in popularizing the league was a 30-minute documentary broadcast on CBS on October 30, 1960. It was narrated by mainstream news icon Walter Cronkite, and titled “The Violent World of Sam Huff,” the then-middle linebacker of the New York Football Giants. Bob Carter, *The Violent World*, ESPN (Sept. 7, 2005), [http://sports.espn.go.com/espn/classic/bio/news/story?page=Huff\\_Sam](http://sports.espn.go.com/espn/classic/bio/news/story?page=Huff_Sam); see also *Washington Redskins vs. New York Giants*, RARE SPORTSFILMS, <http://www.raresportsfilms.com/football/1960-Washington-Redskins-vs-New-York-Giants.html> (last visited Feb. 22, 2015). Following this, NFL FILMS was born in 1962, with the 28-minute production of the 1962 NFL Championship Game between the Green Bay Packers and New York Giants. FAINARU-WADA & FAINARU, *supra* note 27, at 319. Highlight reels of the intensity and violence of the game helped spur the NFL’s trail of immense popularity and success. *Id.* Subsequent NFL Films productions titled CRUNCH COURSE, STRIKE FORCE, MOMENT OF IMPACT and THE BEST OF THUNDER AND DESTRUCTION: NFL’S HARDEST HITS, continued to showcase the violence of the game. *Id.* at 320.

<sup>54</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 136. The danger of players using helmets as weapons still remains. In 2013, the NFL imposed a new rule prohibiting non-standard facemasks to reduce this threat. Michael David Smith, *NFL Thinks Some Face Masks Encourage Players to Use Their Heads*, NBC SPORTS (Aug. 14, 2013), <http://profootballtalk.nbcsports.com/2013/08/14/nfl-thinks-some-face-masks-encourage-players-to-use-their-heads/>.

<sup>55</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 136.

<sup>56</sup> Ta-Nehisi Coates, *The NFL’s Response to Brain Trauma: A Brief History*, THE ATLANTIC (Jan. 25, 2013), <http://www.theatlantic.com/entertainment/archive/2013/01/the-nfls-response-to-brain-trauma-a-brief-history/272520/>.

<sup>57</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 33.

<sup>58</sup> Augustus Thorndike, *Serious Recurrent Injuries of Athletes—Contraindications to Further Competitive Participation*, 247 NEW ENG. J. MED. 554, 555–56 (1952) (“Patients with cerebral concussion that has recurred more than three times or with more than momentary loss of consciousness at any one time should not be exposed to further body-contact trauma.”).

<sup>59</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 33.

a “silent epidemic.”<sup>60</sup>

The neuropsychologist, Jeff Barth, who studied concussions resulting from traffic accidents, decided to expand his studies; in 1984, he conducted the first research on brain injuries and football players at the University of Virginia.<sup>61</sup> Barth expanded his research to Ivy League schools and the University of Pittsburgh, and found that out of the 2,350 players he studied, 195 sustained verifiable concussions.<sup>62</sup> This substantial number of concussions led Barth to publish a study in 1989, which provided neuropsychological assessment tools to be administered by football teams and sports medicine psychologists.<sup>63</sup> Joe Maroon, the Pittsburgh Steelers’ brain specialist and Chairman of the Department of Neurological Surgery at Allegheny General Hospital in Pittsburgh,<sup>64</sup> was aware of Barth’s research because he was a neurological consultant for the University of Pittsburgh Panthers.<sup>65</sup> After not being able to explain the guidelines for diagnosing a concussion to the Steelers’ Head Coach, Maroon decided he wanted to adapt Barth’s neuropsychological assessments for use by the NFL.<sup>66</sup> He enlisted the chief neuropsychologist at Allegheny General, Mark Lovell,<sup>67</sup> to design a neuropsychological test that could establish baseline data for the Steelers’ players and thus assess changes in their brain function after a concussion.<sup>68</sup> Lovell updated the Barth test and created a series of tests to measure memory, executive function, and other cognitive functions.<sup>69</sup>

In 1993, twenty-seven players from the Steelers volunteered to be cognitively assessed during football games after sustaining a concussion.<sup>70</sup> Maroon sought to determine the point when a player was ready to return after sustaining a concussion.<sup>71</sup> In 1994, Merrill Hoge, a former fullback for the Steelers and participant in Lovell and Maroon’s study, who had been traded to the Chicago Bears, came back to Maroon after he sustained two severe concussions.<sup>72</sup> Maroon retook his cognitive assessment test and was shocked to find that following Hoge’s two severe concussions, his scores were half of what they had been a year earlier.<sup>73</sup> Maroon feared the repercussions of additional

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<sup>60</sup> *Id.*; F.C. Klein, *Silent Epidemic: Head Injuries, Often Difficult to Diagnose, Get Rising Attention*, WALL ST. J., Nov. 24, 1982, at p.1.

<sup>61</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 34.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 35.

<sup>64</sup> *Id.* at 31.

<sup>65</sup> *Id.* at 35.

<sup>66</sup> *Id.* at 31–32.

<sup>67</sup> *Id.* at 35.

<sup>68</sup> *Id.* at 37.

<sup>69</sup> *Id.* at 38.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 39.

<sup>72</sup> *Id.* at 43.

<sup>73</sup> *Id.* at 44.



concussions and urged Hoge to retire at age 29, creating shockwaves in the NFL.<sup>74</sup> In that same year, three quarterbacks were knocked out by concussions on the same day: Troy Aikman, Chris Miller, and Vinny Testaverde.<sup>75</sup>

Subsequently, concussions began being discussed in mainstream media.<sup>76</sup> ESPN aired a groundbreaking documentary detailing the struggles of Hoge and other former players who had sustained serious brain injuries.<sup>77</sup> Concurrently, *The New York Times* published a story calling the concussion crisis “a tragedy.”<sup>78</sup> The NFL’s Director of Communication, Greg Aiello, responded to the media attention regarding concussions by telling reporters that the rate of concussions was unchanged since 1989—only one concussion was sustained every three or four games.<sup>79</sup> Maroon conducted his own studies, however, and estimated that two to four concussions occurred in *every* game.<sup>80</sup> The Commissioner of the NFL, Paul Tagliabue, declared on a panel regarding the future of sports that the concussion problem was a “pack journalism issue,” and repeated Aiello’s assertions that there was only one instance of a concussion every three to four games.<sup>81</sup>

Shortly after Tagliabue publicly denied concern over players sustaining concussions, he formed the Mild Traumatic Brain Injury committee (MTBI) to have the NFL study the issue itself.<sup>82</sup> In 1995, former celebrity agent Leigh Steinberg, who had witnessed the health demise of several of his professional football player clients (including famous quarterbacks Steve Young and Troy Aikman), called for a seminar to discuss the symptoms and dangers of concussions with a panel of medical experts.<sup>83</sup> Steinberg presented his findings to the NFL and asked the NFL to eliminate AstroTurf fields, further study helmets, and create an independent “medical referee” to determine whether players should return to play.<sup>84</sup> The NFL, however, did not respond.<sup>85</sup> While the NFL continued to stay quiet publicly, on October 28, 1999, the disability board for retired players, chaired by a representative of the NFL Commissioner and managed in part by NFL owners, granted total

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<sup>74</sup> *Id.* at 45.

<sup>75</sup> *Id.* at 70.

<sup>76</sup> *Id.* at 73.

<sup>77</sup> NFL GAMEDAY (ESPN Television Broadcast Oct. 23, 1994).

<sup>78</sup> Dave Anderson, *Sports of the Times; The N.F.L. is Asking for Tragedy*, N.Y. TIMES (Nov. 27, 1994), <http://www.nytimes.com/1994/11/27/sports/sports-of-the-times-the-nfl-is-asking-for-tragedy.html>.

<sup>79</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 74.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 75.

<sup>83</sup> *Id.* at 82.

<sup>84</sup> *Id.*

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

and complete disability benefits to former NFL star Mike Webster, who struggled with severe mental illness and showed signs of dementia.<sup>86</sup> The disability report declared that: “Mr. Webster’s disability arose while he was an Active Player,” with medical experts stating that “[Webster’s] disability is the result of head injuries suffered as a football player.”<sup>87</sup> This report was later called a “smoking gun” for the concussion litigation because it was the first time the NFL clearly acknowledged that football led to long-term brain injury.<sup>88</sup>

Starting in 2004, despite the statement made by the retirement board that Webster’s brain injuries resulted from football, the MTBI committee began publishing papers in the medical journal *Neurosurgery* that declared that there was no connection between long-term brain injury and football.<sup>89</sup> NFL players “did not demonstrate evidence of neurocognitive decline after multiple concussions . . . . [T]here was no evidence of worsening injury or chronic cumulative effects of multiple MTBIs in NFL players.”<sup>90</sup> In 2005, one paper stated: “[p]layers who are concussed and return to the same game have fewer initial signs and symptoms than those removed from play. Return to play does not involve a significant risk of a second injury either in the same game or during the season.”<sup>91</sup> The MTBI committee ultimately published sixteen papers, including one in 2005 discussing high school and college football players, whom they did not study, which concluded: “It might be safe for college/high school football players to be cleared to return to play on the same day as their injury.”<sup>92</sup>

These papers were published while independent and renowned neurologists were finding that concussions were dangerous to NFL players. In May 2000, Drs. Barry Jordan and Julian Bailes presented to the American Academy of Neurology the results of a survey of 1,090 former NFL players, stating that, “[w]hen compared to players who did not report any concussions, the group with one or more concussions reported significantly more neurological symptoms. These included problems with memory and concentration, confusion, speech or hearing difficulties, numbness or tingling in extremities, and headaches.”<sup>93</sup> A

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<sup>86</sup> *Id.* at 99–100; see Greg Garber, *A Tormented Soul*, ESPN (Jan. 24, 2005), <http://sports.espn.go.com/nfl/news/story?id=1972285>, for a discussion of Webster’s mental and physical struggles.

<sup>87</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 99.

<sup>88</sup> *Id.* at 100.

<sup>89</sup> *Id.* at 166.

<sup>90</sup> *Id.* at 174–75.

<sup>91</sup> Lauren Ezell, *Timeline: The NFL’s Concussion Crisis*, PBS FRONTLINE (Oct. 8, 2013), <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis>.

<sup>92</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 180–81.

<sup>93</sup> Ezell, *supra* note 91; see also American Academy of Neurology, *Concussions May Spell Later Trouble For Football Players*, SCIENCEDAILY (May 5, 2000), <http://www.sciencedaily>

turning point occurred in 2002, when Allegheny County Medical Examiner, Dr. Bennet Omalu, studied Mike Webster's brain posthumously and found that he had CTE, a brain disease not previously identified in football players.<sup>94</sup> Another paper was published in 2003 by Dr. Kevin Guskiewicz, a sports medicine researcher at the University of North Carolina, which stated that, "players with a history of previous concussions are more likely to have future concussive injuries than those with no history; 1 in 15 players with a concussion may have additional concussions in the same playing season; and previous concussions may be associated with slower recovery of neurological function."<sup>95</sup> Dr. Omalu ultimately published his paper on CTE in 2005,<sup>96</sup> the same year Drs. Guskiewicz and Bailes published another paper that concluded, "the onset of dementia-related syndromes may be initiated by repetitive cerebral concussions in professional football players."<sup>97</sup> In 2006, Omalu published a second report on CTE found in former NFL player Terry Long.<sup>98</sup>

Following this conflict between the NFL's papers and independent neurologists, the new NFL Commissioner, Roger Goodell, who was not a lawyer, unlike his predecessor Paul Tagliabue,<sup>99</sup> stated in February

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.com/releases/2000/05/000505064356.htm.

<sup>94</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 163. CTE was first discovered in boxers in the 1920s, but had not been linked to football players before it was discovered in Mike Webster's brain in 2002. The Center for the Study of Traumatic Encephalopathy describes it as:

[A] progressive degenerative disease of the brain found in athletes (and others) with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head. This trauma triggers progressive degeneration of the brain tissue, including the build-up of an abnormal protein called tau. These changes in the brain can begin months, years, or even decades after the last brain trauma or end of active athletic involvement. The brain degeneration is associated with memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and, eventually, progressive dementia.

*What is CTE?*, BU CTE CENTER, <http://www.bu.edu/cste/about/what-is-cte/> (last visited Feb. 22, 2015).

<sup>95</sup> Kevin M. Guskiewicz et al., *Cumulative Effects Associated With Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 JAMA 2549, 2549 (2003), available at [http://www.x2biosystems.com/files/JAMA\\_NCAA\\_Concussion\\_Study.pdf](http://www.x2biosystems.com/files/JAMA_NCAA_Concussion_Study.pdf); see also Ezell, *supra* note 91.

<sup>96</sup> Bennett I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128 (2005), [http://www.lurayduilawyer.com/uploads/1/2/0/1/12016444/\\_cte\\_part\\_i\\_neurosurgery\\_doc\\_from\\_garrett\\_webster\\_-\\_rogers-1.pdf](http://www.lurayduilawyer.com/uploads/1/2/0/1/12016444/_cte_part_i_neurosurgery_doc_from_garrett_webster_-_rogers-1.pdf); see also Ezell, *supra* note 91.

<sup>97</sup> Kevin M. Guskiewicz et al., *Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 719 (2005), [http://media.mgnetwork.com/ncn/pdf/101111\\_cognitive\\_impairment.pdf](http://media.mgnetwork.com/ncn/pdf/101111_cognitive_impairment.pdf); see also Ezell, *supra* note 91.

<sup>98</sup> Bennett I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 NEUROSURGERY 1086 (2006), [http://www.researchgate.net/publication/6656243\\_Chronic\\_traumatic\\_encephalopathy\\_in\\_a\\_national\\_football\\_league\\_player\\_part\\_II](http://www.researchgate.net/publication/6656243_Chronic_traumatic_encephalopathy_in_a_national_football_league_player_part_II); see also Ezell, *supra* note 91.

<sup>99</sup> SPORTS ENCYCLOPEDIA, PAUL TAGLIABUE, <http://www.sportsecyclopedia.com/nfl/comish/tagliabue.html> (last updated Oct. 2, 2014, 12:20 AM). Tagliabue graduated from New

2007 that he was concerned by players returning to play from concussions, but did not accept the premise that it commonly occurred.<sup>100</sup> He also asserted that the MTBI committee was proof of the league's commitment to concussion research and safety.<sup>101</sup> Following Goodell's comments regarding the NFL's commitment to safety, Dr. Elliot Pellman, the chairman of the MTBI committee who was found to have lied about his credentials,<sup>102</sup> stepped down and was replaced by actual neurologists, Drs. Ira Casson and David Viano.<sup>103</sup> Unfortunately, the new Chairmen followed in Dr. Pellman's footsteps and continued to deny the link between concussions and brain damage.<sup>104</sup> The MTBI committee criticized new research published by Drs. Bailes and Guskiewicz, which found that "[p]rofessional football players with a history of three or more concussions are at a significantly greater risk for having depressive episodes later in life compared with those players with no history of concussion."<sup>105</sup> Dr. Casson told *The New York Times* that the study was "virtually worthless,"<sup>106</sup> and eventually got the title "Dr. No" after an interview on *HBO Real Sports* where he only answered "no" to questions regarding whether there was a link between concussions and brain damage.<sup>107</sup>

In June 2007, it appeared that the NFL was attempting to understand the independent research by organizing a Concussion Summit bringing together the MTBI committee with independent neurologists.<sup>108</sup> Following this Summit, the NFL issued their first pamphlet to players, team doctors, and staff regarding concussions.<sup>109</sup> While this could have been a measure to inform players of the risks, the pamphlet stated that the impact of concussions is still inconclusive and "[c]urrent research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no

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York University Law School and worked at Covington & Burling prior to becoming NFL Commissioner. *Id.*; see also Ezell, *supra* note 91.

<sup>100</sup> Ezell, *supra* note 91

<sup>101</sup> *Id.*

<sup>102</sup> Duff Wilson, *Medical Adviser for Baseball Lists Exaggerated Credentials*, N.Y. TIMES (Mar. 30, 2005), [http://www.nytimes.com/2005/03/30/sports/baseball/30doctor.html?\\_r=0](http://www.nytimes.com/2005/03/30/sports/baseball/30doctor.html?_r=0).

<sup>103</sup> Ezell, *supra* note 91.

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

<sup>105</sup> Kevin M. Guskiewicz et al., *Recurrent Concussion and Risk of Depression in Retired Professional Football Players*, 39 OFFICIAL J. OF THE AM. COLL. OF SPORTS MED. 903 (2007), <http://www.nytimes.com/packages/pdf/sports/football/concussions-study-20070531.pdf>; see also Ezell, *supra* note 91.

<sup>106</sup> Alan Schwarz, *Concussions Tied to Depression in Ex-N.F.L. Players*, N.Y. TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/sports/football/31concussions.html>; see also Ezell, *supra* note 91.

<sup>107</sup> Ezell, *supra* note 91.

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

<sup>109</sup> *Id.*

magic number for how many concussions is too many.”<sup>110</sup> Meanwhile, CTE research continued, and in 2008, a new neurologist, Dr. Ann McKee, began studying the disease at Boston University.<sup>111</sup> To announce the new findings of CTE and to draw light to the disease and the dangers associated with incurring concussions in football, Dr. McKee and Boston University’s newly formed Center for the Study of Traumatic Encephalopathy held a press conference at the Super Bowl’s annual Media Day in Tampa.<sup>112</sup> While few attended McKee’s conference, she was invited to meet with the MTBI committee that following May.<sup>113</sup> The committee dismissed her, however, and a member of the committee later stated that McKee’s studies did not show the origins of the disease or its cause and effects.<sup>114</sup>

Nevertheless, research continued to be published about CTE and the risks of football. In September 2009, *The New York Times* published a front-page article reporting that an NFL-funded study found that former players are nineteen times more likely to have dementia, Alzheimer’s, or other memory-related diseases than the normal rate of men ages nineteen to forty-nine.<sup>115</sup> Despite funding the study, NFL spokesman Greg Aiello told *The New York Times* that the study “did not formally diagnose dementia, that it was subject to shortcomings of telephone surveys and that ‘there are thousands of retired players who do not have memory problems . . . . Memory disorders affect many people who never played football or other sports.’”<sup>116</sup> On October 28, 2009, Congress appeared to have had enough of the back and forth between the NFL and independent researchers, and the Committee on the Judiciary called a hearing at which Commissioner Goodell was called to testify.<sup>117</sup> The Chairman, Michigan Democrat John Conyers, commenced the hearing by stating:

Everyone that plays football at any level knows it is a dangerous sport. In fact, everyone that watches it knows it is a dangerous sport. There should be no surprise when a football player separates his shoulder, twists an ankle, busts a knee. But over the past several

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<sup>110</sup> *NFL Outlines for Players Steps Taken to Address Concussions*, NFL (Aug. 14, 2007), <http://www.nfl.com/news/story/09000d5d8017cc67/article/nfl-outlines-for-players-steps-taken-to-address-concussions>; see also Ezell, *supra* note 91.

<sup>111</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 259.

<sup>112</sup> *Id.* at 263; see also Ezell, *supra* note 91.

<sup>113</sup> Ezell, *supra* note 91.

<sup>114</sup> *Id.*

<sup>115</sup> Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES (Sept. 29, 2009), <http://www.nytimes.com/2009/09/30/sports/football/30dementia.html?pagewanted=all>; research quoted from David Weir et al., *Study of Retired NFL Players*, NAT’L FOOTBALL LEAGUE PLAYER CARE FOUND. (Sept. 10, 2009), <http://www.ns.umich.edu/Releases/2009/Sep09/FinalReport.pdf>; see also Ezell, *supra* note 91.

<sup>116</sup> Schwarz, *supra* note 115; see also Ezell, *supra* note 91.

<sup>117</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 278.

years, an increasing number of retired players have developed long-term memory and cognitive diseases such as dementia, Alzheimer's, depression, and chronic traumatic encephalopathy (CTE).<sup>118</sup>

Goodell declined to answer whether there was a link between football and brain damage, and simply declared that the NFL was committed to continuing research and taking steps to improve player safety.<sup>119</sup>

While still not admitting a link between concussions and long-term brain damage, the Congressional hearing appeared to be a turning point for the NFL. Drs. Casson and Viano resigned from the MTBI committee; and in a memorandum sent to the NFL teams, Goodell stressed that he wanted to find new committee members “who will bring to the committee independent sources of expertise and experience in the field of head injuries.”<sup>120</sup> The NFL renamed the committee to the “Head, Neck and Spine Committee” with Drs. H. Hunt Batjer and Richard Ellenbogen as co-chairs, and appointed former independent researcher Kevin Guskiewicz as a member.<sup>121</sup> Dr. Ellenbogen had helped pass the Zackery Lystedt Law,<sup>122</sup> which mandated the removal of youth athletes suspected of having a concussion from the game.<sup>123</sup> Finally, in December of 2009, in a stunning reversal of his prior facile denials, NFL spokesman Greg Aiello acknowledged that: “It’s quite obvious from the medical research that’s been done that concussions can lead to long-term problems.”<sup>124</sup> The NFL then announced stricter return-to-play guidelines, following a memorandum sent by Goodell to the thirty-two teams stating that a player who sustains a concussion should not return to play on the same day if he shows certain signs or symptoms. The symptoms he described included: an inability to remember assignments or plays, a gap in memory and persistent dizziness and headaches.<sup>125</sup>

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<sup>118</sup> *Legal Issues Relating to Football Head Injuries (Part I & II): Hearing Before the H. Comm. On the Judiciary*, 111<sup>th</sup> Cong. 111–82 (2009–10) (statement of John Conyers); see also Fainaru-Wada & Fainaru, *supra* note 27, at 278; Alan Schwarz, *N.F.L. Scolded Over Injuries to its Players*, N.Y. TIMES (Oct. 28, 2009), [http://www.nytimes.com/2009/10/29/sports/football/29hearing.html?\\_r=1&sc=7&sq=Alan%20Schwarz%20Congress&st=cse](http://www.nytimes.com/2009/10/29/sports/football/29hearing.html?_r=1&sc=7&sq=Alan%20Schwarz%20Congress&st=cse).

<sup>119</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 279; see also Ezell, *supra* note 91.

<sup>120</sup> *Goodell Announces Two Resignations*, ESPN (Nov. 24, 2009), <http://sports.espn.go.com/nfl/news/story?id=4687088>; see also Ezell, *supra* note 91.

<sup>121</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 288.

<sup>122</sup> See discussion *infra* Part V.

<sup>123</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 288.

<sup>124</sup> Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES (Dec. 20, 2009), <http://www.nytimes.com/2009/12/21/sports/football/21concussions.html?pagewanted=all>; see also Ezell, *supra* note 91.

<sup>125</sup> *Goodell Issues Memo Changing Return-To-Play Rules for Concussions*, NFL (July 26, 2012), <http://www.nfl.com/news/story/09000d5d814a9ecd/article/goodell-issues-memo-changing-returnto-play-rules-for-concussions>; see also Ezell, *supra* note 91.

In January and September of 2010, the NFL donated \$1 million and \$30 million, respectively, towards neurological research at Boston University and the National Institutes of Health.<sup>126</sup> In July 2010, in a moment many independent neurologists were waiting for, the NFL produced a locker room poster which warned: “concussions may lead to problems with memory and communication, personality changes, as well as depression and the early onset of dementia. Concussions and conditions resulting from repeated brain injury can change your life and your family’s life forever.”<sup>127</sup> After decades of research and numerous players sustaining concussions without proper safety procedures implemented both on and off the field, the NFL finally formally acknowledged the link between concussions and brain injury.

PART II: THE CLASS ACTION SUIT FILED BY FORMER PLAYERS AGAINST  
THE NFL

The Class Action suit was filed on June 7, 2012, against the NFL and helmet manufacturer Riddell.<sup>128</sup> The named class was comprised of “all retired or former NFL or professional players.”<sup>129</sup> The Plaintiffs alleged “fraud, fraudulent concealment, negligence, negligent omission, negligent misrepresentation and negligent hiring and retention against the NFL.”<sup>130</sup> The players asserted that since the NFL is in a superior position of knowledge and authority, they had a duty to protect the players.<sup>131</sup> Furthermore, the Plaintiffs alleged that the NFL knew that repeated head trauma could cause neurodegenerative disease, yet intentionally hid these long-term effects from players for decades.<sup>132</sup> The Plaintiffs also brought forth a claim for loss of consortium, as well as wrongful death and survival causes of action due to the debilitating brain diseases and conditions allegedly caused by the NFL’s direct and proximate conduct.<sup>133</sup> Additionally, the players sought a court-supervised NFL-funded medical monitoring program that would facilitate early diagnosis and treatment of neurodegenerative disorders.<sup>134</sup>

In response, the NFL filed a Motion to Dismiss alleging that Section 301 of the Labor Management Relations Act (LMRA) preempts

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<sup>126</sup> Ezell, *supra* note 91.

<sup>127</sup> *Id.*

<sup>128</sup> Plaintiff’s Complaint, *supra* note 2, at 4; *see also* Timothy Liam Epstein, *NFL Concussion Class Action Litigation* 467, 471 (Oct. 25, 2012) (unpublished article from the 2012 DRI Annual Meeting) (on file with author).

<sup>129</sup> Epstein, *supra* note 128.

<sup>130</sup> *Id.* at 472.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

the Plaintiffs from bringing their claims.<sup>135</sup> The NFL contends that the LMRA “preempts all state law claims—including tort claims—the resolution of which is substantially dependent upon or inextricably intertwined with an interpretation of the terms of a collective bargaining agreement, or that arise under a collective bargaining agreement.”<sup>136</sup> The NFL asserts that the claims brought by the Plaintiffs:

[N]ecessarily and substantially depend on an interpretation of the terms of the CBAs because a court cannot evaluate the purported duties owed by the NFL, the scope of the NFL’s purported duties, or whether the NFL acted ‘reasonably’ without first considering the obligations regarding player health and safety imposed by the CBAs.<sup>137</sup>

Therefore, the court does not have jurisdiction over these claims. Furthermore, the CBA<sup>138</sup> makes it clear that all disputes pertaining to employment terms and conditions must be resolved through an internal arbitration process.<sup>139</sup> Accordingly, the case “may only proceed pursuant to the grievance procedures set forth in the CBA.”<sup>140</sup> Thus, the NFL moved to dismiss the Complaint purely on the grounds that the claims were preempted from federal court and the duties owed by the NFL can only be determined through arbitration procedures mandated by the CBA.<sup>141</sup>

While the Motion to Dismiss did not address the merits of the Plaintiffs’ allegations, NFL spokesperson, Brian McCarthy, publicly spoke out about the NFL’s position.<sup>142</sup> He stated that the NFL has acted reasonably since it spent over \$1 billion on player pensions and medical disability benefits, and offered programs providing medical care to retirees.<sup>143</sup> Moreover, he stated that player safety has long been a priority for the NFL, exemplified by the health programs it offers to

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<sup>135</sup> Memorandum of Law of Defendants National Football League and NFL Properties LLC in Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds, *In re Nat’l Football Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Aug. 30, 2012), MDL No. 2323 [hereinafter Defendants Motion to Dismiss].

<sup>136</sup> *Id.* at 1.

<sup>137</sup> *Id.* at 26.

<sup>138</sup> COLLECTIVE BARGAINING AGREEMENT, NFL (Aug. 4, 2011), <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>139</sup> Defendants Motion to Dismiss, *supra* note 135, at 10. (“Since 1977, all CBAs have contained a broad arbitration clause providing that all disputes involving—the interpretation of, application of, or compliance with, any provision of the CBAs, player contracts, or any applicable provision of the Constitution—pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with agreed-to arbitration procedures.”).

<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.* at 10.

<sup>142</sup> Epstein, *supra* note 128, at 472.

<sup>143</sup> *Id.*



current and former players, including neurological evaluations.<sup>144</sup> Thus, he argued, these assertions directly rebut the Plaintiffs' arguments that the NFL was negligent and perpetrated fraud because the NFL did not act negligently nor with intent to harm or defraud players.

After an April 2013 hearing on the NFL's motion to dismiss, Senior United States District Judge Anita Brody ordered the parties to mediation.<sup>145</sup> A settlement was announced one week before the start of the 2013 season, with the NFL agreeing to pay \$765 million in damages, as well as legal fees estimated around \$200 million.<sup>146</sup> As discussed in the introduction,<sup>147</sup> the NFL agreed to pay damages to the players and their families based on the former players' cognitive injuries, as well as fund research studies and implement mandatory baseline exams for current players.<sup>148</sup> Some former players and critics saw this as a win for the NFL.<sup>149</sup> The NFL insurance company had warned that the NFL could face up to \$2.5 billion in damages if it lost.<sup>150</sup> In addition, the NFL did not want its reputation further damaged by a lengthy trial, and especially a discovery process that might have resulted in a finding that the NFL did not properly diagnose or treat concussions.<sup>151</sup> The former President of the NFL Players' Association, Kevin Mawae, publicly denounced the settlement and stated that \$765 million is "a small price to pay when the NFL is going to make \$27 billion in profits over the next 15 to 20 years."<sup>152</sup> However, it is reasonable to assume that the Plaintiffs recognized the difficulty to win their claim due to the high burden of proving fraud and negligence—their only causes of action. Moreover, despite the settlement amount appearing low in comparison to the NFL's revenue, many of the afflicted players desperately needed the financial and medical help and did not want to wait.<sup>153</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 348.

<sup>146</sup> *Id.*

<sup>147</sup> See discussion *supra* pp.1–2.

<sup>148</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 348; see also Fainaru-Wada et al., *supra* note 8.

<sup>149</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 348.

<sup>150</sup> *Id.* Reports have come out that the players sought \$2 billion in damages. Doug Farrar, *Report: Ex-NFL Players Wanted \$2 Billion in Concussion Lawsuit Settlement*, SPORTS ILLUSTRATED (Sept. 1, 2013), <http://nfl.si.com/2013/09/01/report-former-players-wanted-2-billion-in-concussion-settlements-nfl-offered-a-pittance-in-return/>.

<sup>151</sup> Farrar, *supra* note 150.

<sup>152</sup> Mike Florio, *Mawae Speaks Out Against Concussion Settlement*, NBC SPORTS (Aug. 29, 2013), <http://profootballtalk.nbcsports.com/2013/08/29/mawae-speaks-out-against-concussion-settlement/>; see also FAINARU-WADA & FAINARU, *supra* note 27, at 349.

<sup>153</sup> Florio, *supra* note 152; see also Belson, *supra* note 4.

## PART III: THE NFL'S LEGAL DUTY TO PROTECT ITS PLAYERS DUE TO FOSTERING CONDITIONS OF PHYSICAL HARM

While the NFL may not endure a crushing blow to its reputation or finances if the settlement is granted final approval, the legal issues brought forth by the litigation should still be analyzed. As noted above,<sup>154</sup> the players in the Class Action suit alleged that the NFL engaged in: “fraud, fraudulent concealment, negligence, negligent omission, negligent misrepresentation and negligent hiring and retention;”<sup>155</sup> yet they never brought forth the claim that the NFL fostered conditions of unreasonable risk. The Complaint even mentioned that without court-approved medical monitoring, the players will “continue to face an *unreasonable risk* of continued injury and disability,” but never discussed the legal theory involved.<sup>156</sup> This Note seeks to examine whether the NFL had a duty to exercise reasonable care for its players, and, if so, whether the league shirked that duty by fostering conditions of unreasonable risk. Even though the players never asserted this argument, it has significant implications for all similar leagues and institutions.

As discussed in the introduction,<sup>157</sup> the Plaintiffs’ allegation of general negligence by the NFL is not particularly strong because negligence requires causation.<sup>158</sup> Noted legal scholar, William Prosser, defines this causation as “[a] reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as ‘logical cause,’ or ‘proximate cause,’ and which includes the notion of cause in fact.”<sup>159</sup> As members of the MTBI committee asserted, there is no causal relationship between concussions and football.<sup>160</sup> Scientists cannot actually show a direct relation between professional football and the long-term cognitive impairment because there may be extraneous factors, such as steroids, concussions from youth leagues or high school or college, and genetics.<sup>161</sup> The inability to prove the direct causation significantly weakens the Plaintiffs’ arguments.

In addition, the Plaintiffs’ assertion of fraud is hard to sustain because it is difficult to prove the requisite intent. The Restatement of Torts defines the existence of fraudulent concealment as: when “[o]ne party to a business transaction who by concealment or other action *intentionally* prevents the other from acquiring material information is

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<sup>154</sup> See discussion, *supra* Part II.

<sup>155</sup> Epstein, *supra* note 128, at 472.

<sup>156</sup> Plaintiff’s Complaint, *supra* note 2, at 57 (emphasis added).

<sup>157</sup> See discussion, *supra* Part I.

<sup>158</sup> KEETON ET AL., *supra* note 14, at §§ 164, 165.

<sup>159</sup> *Id.* at § 165.

<sup>160</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 343.

<sup>161</sup> *Id.*

subject to the same liability to the other as though he had stated the nonexistence of the matter which the other was thus prevented from discovering.”<sup>162</sup> While the NFL did not explicitly agree with independent medical publications, it cannot be shown that the league intentionally hid the science, since the contradictory findings were published in national journals, and the Plaintiffs were both financially able themselves and well-represented (directly and through their Players Association)<sup>163</sup> to access this information. Therefore, while the NFL was, or certainly should have been, aware of the risks of damage to the players from these studies and articles, that by itself is not enough to prove that they intentionally committed fraud.

The Plaintiffs should have brought forth the stronger argument that the NFL fostered conditions of unreasonable risk. The first step in establishing this cause of action is to prove that the NFL owed the players a duty to exercise reasonable care. There is no direct employer-employee relationship between the NFL and its players because the players are managed and directed by the teams themselves and not the NFL.<sup>164</sup> Thus, the NFL is a third-party to the player-team relationship, and, arguably, owes no duty to players because there is no special relationship between them.<sup>165</sup> However, as the Plaintiffs duly noted, the CBA does not act as a blanket waiver of all liability; and if the NFL is found to owe a duty to its players, it can still incur liability as a result of tortious conduct.<sup>166</sup> According to Prosser, whether a third-party owes a duty of reasonable care is “a question of whether the defendant is under any obligation for the benefit of the particular plaintiff.”<sup>167</sup> A strong argument can be made that the NFL owes a duty of reasonable care to its players because the NFL knows that the players rely on the NFL for their safety and benefit—and the NFL accepts the validity of that reliance by being the rule-making body that controls the scope of acceptable conduct of play, and by hiring, training, and managing the referees that enforces those rules.

The Restatement of Torts § 43 echoes Prosser’s theory of duty.<sup>168</sup> The Restatement states that third parties can have a duty to exercise reasonable care based on an undertaking to another,<sup>169</sup> similar to

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<sup>162</sup> RESTATEMENT (FIRST) OF TORTS § 550 (1938) (emphasis added).

<sup>163</sup> The NFL Player’s Association is the union that represents all NFL players in matters concerning wages, hours and working conditions, and protects their rights as professional football players. The Player’s Association also negotiates and monitors retirement and insurance benefits. *About the NFLPA*, NFLPA, <https://nflpa.com/about> (last visited Feb. 27, 2015).

<sup>164</sup> COLLECTIVE BARGAINING AGREEMENT, *supra* note 138.

<sup>165</sup> Joseph M. Hanna, *Concussion May Prove to be a Major Headache for the NFL*, 84-OCT N.Y. ST. B.J. 10, 13–14 (Oct. 2012).

<sup>166</sup> *Id.*

<sup>167</sup> KEETON ET AL., *supra* note 14, at § 53.

<sup>168</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 43 (2012).

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

Prosser's theory stating that a third-party owes a duty when the defendant is under the benefit of the plaintiff.<sup>170</sup> The Restatement section states:

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:

- (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking;
- (b) the actor has undertaken to perform a duty owed by the other to the third person, or;
- (c) the person to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.<sup>171</sup>

The NFL has undertaken the duty to make and enforce the rules of the league and the players are the third party to whom they owe the duty of reasonable care under factors (a), (b), and (c). The NFL's failure to change the rules or inform the players increases the risk to which they are exposed; the NFL undertook the duty of protecting the players as the supervisory authority; and the players rely on the NFL to exercise reasonable care and keep them safe. Thus, under the Restatement's definition, the NFL owes a duty to exercise reasonable care to its players. As legal scholar, Dan Dobbs, states in *The Law of Torts*, when the defendant creates, maintains, or continues a risk of physical harm, he or she has a duty to exercise reasonable care and avoid negligent conduct that risks harm to others.<sup>172</sup>

Another approach that supports the assertion that the NFL owes a duty to exercise reasonable care to the players is set forth in the decision of the District Court for the Northern District Court of California in *Vu v. Singer Co.*<sup>173</sup> This decision, affirmed by the Ninth Circuit, delineated eight factors that courts should consider in determining whether a third party owes a duty to exercise reasonable care.<sup>174</sup> The factors are:

- (1) [F]oreseeability of harm to plaintiff;
- (2) degree of certainty that plaintiff suffered injury;
- (3) closeness of connection between defendant's conduct and injury suffered;
- [(4)] moral blame attached to defendant's conduct;
- (5) policy of preventing future harm;
- (6) extent of burden to defendant and the consequences to the

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<sup>170</sup> KEETON ET AL., *supra* note 14, at § 53..

<sup>171</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 43 (2012).

<sup>172</sup> DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 251 (2d ed. 2011).

<sup>173</sup> *Vu v. Singer Co.*, 538 F. Supp. 26 (N.D. Cal. 1981), *aff'd*, 706 F.2d 1027 (9th Cir. 1983).

<sup>174</sup> *Id.* at 29.

community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved.<sup>175</sup>

Using these factors, any trier of fact should easily conclude that the NFL had a duty to exercise reasonable care to the players. The publicly available record establishes that: (a) the NFL knew, or should have foreseen, the risk of harm, based upon highly credible scientific studies; (b) the NFL knew, or should have foreseen, that players would suffer injury; (c) the NFL's conduct could mitigate the harm; and (d) the cost to the NFL of both warning the players and changing the rules would have been minimal (both in absolute terms and as compared to the cash flows involved). Once the NFL knew with a degree of certainty that the players were susceptible to severe long-term brain injuries under the present conditions, it clearly had a duty to exercise reasonable care.

Having established that the NFL owed a duty to exercise reasonable care to the players—despite being a third-party—the question then becomes whether the NFL cultivated conditions of unreasonable risk. Arguably, it maintained a risk of physical harm to its players, and should have established policies to prevent future harm. The Third Restatement of Torts § 18 on Physical and Emotional Harm defines what constitutes a failure to exercise reasonable care.<sup>176</sup> It states that a defendant whose conduct fosters a risk of physical harm fails to exercise reasonable care by not warning of the danger if: (1) the defendant knows or has reason to know that: (a) the risk exists, and (b) those encountering the risk are unaware of it; and (2) a warning would effectively reduce the risk of harm.<sup>177</sup> The Restatement further elaborates that “[e]ven if the defendant adequately warns of the risk that the defendant’s conduct creates, the defendant can fail to exercise reasonable care by failing to adopt further precautions to protect against the risk if it is foreseeable that despite the warning some risk of harm remains.”<sup>178</sup>

With the standards of exercising reasonable care in mind, the definition of unreasonable risk is now important to determine whether the NFL failed to exercise reasonable care. Prosser determined that “unreasonable risk” occurs when the risk of harm to another is sufficiently great that a reasonable person would anticipate it, and if anticipated, the person must guard against it.<sup>179</sup> Stated in plain language,

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<sup>175</sup> *Id.*

<sup>176</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 18 (2012).

<sup>177</sup> *Id.* While the NFL warning the players about the risks of the game might not have prevented the players from playing, they would be fully informed and could make their own decision.

<sup>178</sup> *Id.*

<sup>179</sup> KEETON ET AL., *supra* note 14 § 30.

“society may require of a person not to be awkward or a fool.”<sup>180</sup> While not using the terms “awkward” or “a fool,” courts have come up with their own standard of unreasonable risk. The settled law in New York regarding unreasonable risks for student athletes is that the board of education and its employees and agents must exercise reasonable care to protect student athletes from concealed or unreasonably increased risks.<sup>181</sup>

A key element of reasonableness is whether the injured player can be held to have assumed the risk of injury by voluntarily joining the team. The limits to that defense are clearly set forth by the New York appellate court in *Zmitrowitz v. Roman Catholic Diocese of Syracuse*:

[T]he doctrine of primary assumption of risk will not act as a complete bar to recovery where the injury is attributable to the existence of an enhanced risk not ordinarily incident to participation in the athletic activity. Like any other participant in a sport or recreational activity, a student athlete will not be deemed to have assumed unreasonably increased risks.<sup>182</sup>

In that case, the rule was applied to a claim brought by a student who was playing catcher without a facemask and was hit with a baseball.<sup>183</sup> The coaches were found to create a condition of unreasonable risk due to their knowledge of the risk of not wearing protective equipment.<sup>184</sup> Another New York appellate court denied a motion to dismiss by a cheerleading coach because the court found the coach created a condition of unreasonable risk by allowing a student to perform an inherently dangerous stunt without supervision and in unsafe wind conditions.<sup>185</sup> In a case involving high school students participating in a violent version of touch football, the Supreme Court of Pennsylvania found that the players did not assume a risk of harm since they neither knew the existence of the risk nor appreciated its unreasonable character.<sup>186</sup> While the students knew that touch football could be dangerous, they did not assume the risk of harm because they were not explicitly informed of the enhanced dangers of touch football, without the use of proper padding.<sup>187</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *Zmitrowitz v. Roman Catholic Diocese of Syracuse*, 274 A.D.2d 613 (App. Div. 2000).

<sup>182</sup> *Id.* at 615 (internal citations and quotations omitted).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Driever v. Spackenkill Union Free Sch. Dist.*, 20 A.D.3d 384, 385 (App. Div. 2005); *see also* *Ross v. N.Y. Quarterly Meeting of Religious Soc’y of Friends*, 32 A.D.3d 251, 253 (App. Div. 2006) (Motion to dismiss denied for students’ injury claim regarding sliding on mats in softball with sneakers which the coach knew created an unreasonable risk.).

<sup>186</sup> *Rutter v. Ne. Beaver Cnty. Sch. Dist.*, 496 Pa. 590, 601 (1981).

<sup>187</sup> *Id.*

Finally, the Ninth Circuit Court of Appeals has conclusively addressed the last essential element of the factual inquiry: the degree of actual knowledge that is required. In *Lawson v. United States*, a ship repair contractor sued the United States, the vessel owner, for injuries sustained while performing repair work.<sup>188</sup> The contractor alleged that the injuries he sustained were caused by the vessel owner allowing dangerous conditions to remain, despite having actual and constructive notice of the condition.<sup>189</sup> The district court found that, “the presence of the slippery fuel oil on the pipes where the [contractor] was required to work and the absence of safety ropes, guard rails, planked walkways or platforms constituted a dangerous condition necessarily involving a substantially unreasonable risk of serious bodily harm.” The Ninth Circuit affirmed the district court’s finding and held that “actual knowledge of the dangerous condition by appellant’s officers and employees consisted of actual personal knowledge of the existence of the condition and the knowledge of its dangerous character. Moreover, they had reason to know of its dangerous character by the exercise of ordinary prudence.”<sup>190</sup> Therefore, the injured players would not have to show that the NFL actually knew it was creating harm, only that the NFL knew or should have known of the “existence of the condition and the knowledge of its dangerous character . . . by the exercise of ordinary prudence.”<sup>191</sup>

This doctrine can clearly be applied to the NFL. Any argument that the players assumed the risk of their brain injuries falls within the *Lawson* holding. The players relied on the NFL to keep them safe, yet the NFL continued to maintain a condition of unreasonable harm after it knew players were subject to long-term brain injury. The NFL was aware of the risk due to the scientific studies being published; yet it did not warn the players or take preventative measures. The NFL rules that now mandate protocols for team doctors to stop players from going back on the field after concussions, and the updated rules preventing dangerous hits, should have been implemented long before. The knowledge and creation of this risk is what gave rise to the NFL’s legal liability and their obligation to minimize and mitigate the harm to players.

#### PART IV: IMPACT OF CONCUSSION LITIGATION ON THE NFL

Despite not bringing forth the allegation of unreasonable risk, and potentially settling rather than going to trial, the litigation brought by the Plaintiffs created awareness about the concussion crisis and

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<sup>188</sup> *Lawson v. U.S.*, 605 F.2d 448 (9th Cir. 1979).

<sup>189</sup> *Id.* at 450.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

impacted the game. The NFL has actively taken measures to prevent injuries and ensure safety.<sup>192</sup> Former United States District Judge Layn Phillips, the court-appointed mediator for the dispute, stated: “[The settlement] is a historic agreement, one that will make sure that former NFL players who need and deserve compensation will receive it, and that will promote safety for players at all levels of football.”<sup>193</sup> This sentiment was echoed by Kevin Turner, a former NFL running back for the New England Patriots and Philadelphia Eagles, and a Plaintiff in the Class Action suit currently suffering from ALS, who declared, “[t]he benefits in this agreement will make a difference not only for me and my family, but also for thousands of my football brothers who either need help today or may need help someday in the future.”<sup>194</sup>

In response to the settlement and lawsuits brought against the league, there have been changes to the rules of the game and medical protocols to ensure proper treatment of head trauma sustained on the field.<sup>195</sup> In 2006, the NFL began imposing fines and suspensions for illegal hits.<sup>196</sup> In 2010, a rule was enacted to move kickoffs up five yards, to the 35-yard line, to ensure more touchbacks and fewer high-impact collisions between players.<sup>197</sup> Kickoffs are notoriously the most dangerous play in football, leading to what is essentially a 22-car pile-up.<sup>198</sup> This rule change dropped the number of concussions on kickoffs by forty-three percent.<sup>199</sup> More recently, and presumably in direct response to the concussion settlement, the NFL enacted a rule to ban ball carriers from initiating contact with the top of their helmets in the open field.<sup>200</sup> The purpose of the rule is to protect running backs and tacklers by penalizing offensive players who use their helmets like weapons and create a risk of head trauma.<sup>201</sup> Yet another rule was enacted to prevent players from hitting a defenseless player in the head or neck.<sup>202</sup> This rule is designed primarily for receivers who catch balls in vulnerable positions and allows players extra time to get up and be able to defend themselves and avoid extra risk of injury.<sup>203</sup> The “no

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<sup>192</sup> Bill Bradley, *Roger Goodell Discusses Health, Safety Issues With NFL Media*, NFLEVOLUTION.COM (Sept. 26, 2013), <http://www.nflevolution.com/article/roger-goodell-discusses-health,-safety-issues-with-nfl-media?ref=0ap2000000251062>.

<sup>193</sup> Fainaru-Wada et al., *supra* note 8.

<sup>194</sup> *Id.*

<sup>195</sup> Belson, *supra* note 4.

<sup>196</sup> Epstein, *supra* note 128, at 471.

<sup>197</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 344.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Tuck Rule Gone, Helmet Rule Approved*, ESPN (Mar. 20, 2013), [http://espn.go.com/nfl/story/\\_/id/9075058/nfl-owners-end-tuck-rule-approve-helmet-penalty](http://espn.go.com/nfl/story/_/id/9075058/nfl-owners-end-tuck-rule-approve-helmet-penalty).

<sup>201</sup> *Id.*

<sup>202</sup> *New NFL Rules Designed to Limit Head Injuries*, NFL (July 26, 2012), <http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries>.

<sup>203</sup> *Id.*



horse-collar” tackling rule also penalizes players who pull down ball carriers only by the inside of their shoulder pads. Such collaring often created the backward fall of a player that increased the risk of the head snapping back and possibly hitting the ground.<sup>204</sup>

Most notably, in a press release sent by the NFL to players and staff in 2007, players were informed of the symptoms of a concussion and told to not return to a game if they sustained a concussion.<sup>205</sup> Kevin Turner has been open about the improvements he has seen in the NFL.<sup>206</sup> He remarked:

Now, you see doctors, trainers and coaches who have the knowledge about concussions and head injuries treating them different than when I played . . . . It’s the most beloved game in the country, and they’re making it safer now. Now, a guy wobbles back to the sidelines, and it’s likely he’s done for the day. But they’ll examine him now. Refs are looking now. Trainers, doctors are looking.<sup>207</sup>

These new rules and procedures have been implemented to protect current and future players.<sup>208</sup> Despite having reached a potential settlement, NFL Commissioner Goodell has been candid about the NFL’s increased commitment to safety and has stated that this commitment will not end.<sup>209</sup> In an interview following the announcement of the proposed settlement of the Class Action suit, Goodell asserted that despite the concussion litigation coming to a close, the NFL will not slow down its increased efforts and enforcement of safety precautions.<sup>210</sup> Goodell stated, “we took on these initiatives to make the game safer and we’re going to continue that, whether it’s making sure the rules take those dangerous techniques out of the game or whether it’s improvements in equipment or pioneering research.”<sup>211</sup> This sentiment has been echoed by Dean Blandio, the NFL’s Vice President of Officiating, who declared, “[t]he emphasis on these rules will continue. . . . We’re not backing off on the player safety part of it.

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<sup>204</sup> *NFL Rule Changes for 2006*, SCOUT (Aug. 12, 2006), <http://profootball.scout.com/2/556118.html>.

<sup>205</sup> *NFL Outlines for Players Steps Taken to Address Concussions*, NFL.COM (July 26, 2012, 8:55 PM), <http://www.nfl.com/news/story/09000d5d8017cc67/article/nfl-outlines-for-players-steps-taken-to-address-concussions>.

<sup>206</sup> Peter King, *Fighting for Themselves, Fighting for the Game*, SPORTS ILLUSTRATED (Sept. 2, 2013), <http://mmqb.si.com/2013/09/02/kevin-turner-concussions-monday-morning-quarterback/2/>.

<sup>207</sup> *Id.*

<sup>208</sup> Judy Battista, *Roger Goodell Discusses NFL’s Season Structure, Player Safety*, NFL (Sept. 27, 2013), <http://www.nfl.com/news/story/0ap2000000251026/article/roger-goodell-discusses-nfls-season-structure-player-safety>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

That's the priority. We have to keep them safe."<sup>212</sup>

Hopefully, the NFL will continue its commitment to player safety, and not just in theory. In 2010, Pittsburgh Steelers linebacker James Harrison was fined \$75,000 and suspended for one game for delivering an illegal helmet-to-helmet hit against Cleveland Browns receiver Mohamed Massaquoi.<sup>213</sup> Subsequently, however, the NFL sold pictures of the hit on its online store,<sup>214</sup> undercutting its own message by promoting the very act it is trying to prevent.

To its credit, since 2006, when the first case of CTE was exposed, the NFL discontinued the popular television segments "Jacked Up!" and "the Pounder Index," which showcased the biggest hits of the previous week.<sup>215</sup> The *Monday Night Football* image of two helmets crashing together and exploding has also been abandoned.<sup>216</sup> Additionally, the NFL has created an interactive website, *nflevoation.com*, which highlights the changes in rules and equipment through the decades.<sup>217</sup> In 2012, during Super Bowl XLVI, the pinnacle game of the season, with advertisements costing \$4 million for a 30-second slot,<sup>218</sup> the NFL aired its own commercial, voiced by Ray Lewis, a notoriously hard-hitting linebacker for the Baltimore Ravens.<sup>219</sup> While images of the NFL throughout the years displayed on the commercial, Lewis' voice-over discussed the NFL's efforts to make the rules and equipment safer.<sup>220</sup> At the end of the commercial, Lewis declares: "[h]ere's to making the next century safer and more exciting. Forever forward. Forever football."<sup>221</sup>

It is fair to conclude that the NFL is changing in response to this litigation. In 2013, it spent tens of millions of dollars to become the main sponsor of cognitive research.<sup>222</sup> This amount has been spread across leading physicians and institutions throughout the country with

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<sup>212</sup> Judy Battista, *NFL Won't Drop Player Safety After Concussion Lawsuit Settlement*, NFL (Sept. 3, 2013), <http://www.nfl.com/news/story/0ap1000000237695/article/nfl-wont-drop-player-safety-after-concussion-lawsuit-settlement>.

<sup>213</sup> Gregg Rosenthal, *League is Selling Photo of James Harrison's Illegal Hit*, NBC SPORTS (Oct. 19, 2010), <http://profootballtalk.nbcsports.com/2010/10/19/league-is-selling-photo-of-james-harrisons-illegal-hit/>; see also Adam Schefter, *James Harrison Suspended 1 Game*, ESPN (Dec. 14, 2011), [http://espn.go.com/nfl/story/\\_/id/7348112/pittsburgh-steelers-james-harrison-banned-1-game-hit-cleveland-browns-colt-mccoy](http://espn.go.com/nfl/story/_/id/7348112/pittsburgh-steelers-james-harrison-banned-1-game-hit-cleveland-browns-colt-mccoy).

<sup>214</sup> Rosenthal, *supra* note 213.

<sup>215</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 322.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 323; see [www.nflevoation.com](http://www.nflevoation.com) to browse regulation changes by the decade.

<sup>218</sup> Alex Konrad, *Even With Record Prices, Expect A \$10 Million Super Bowl Ad Soon*, FORBES (Feb. 2, 2013), <http://www.forbes.com/sites/alexkonrad/2013/02/02/even-with-record-prices-10-million-spot/>.

<sup>219</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 323; the commercial is available at: <https://www.youtube.com/watch?v=CPr4-P19NtE>.

<sup>220</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 323.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 346.

nearly every prominent scientific group involved.<sup>223</sup> The NFL is now actively fulfilling its duty to take reasonable care of its players.

PART V: IMPACT OF CONCUSSION LITIGATION ON AMATEUR FOOTBALL  
AND OTHER LEAGUES

Following the proposed settlement for the Class Action suit, a doctor for the Sports Concussion Institute, Vernon Williams, declared that concussions are not just an NFL issue but an issue that effects: “Policy makers, legislators, the health care industry, sports leagues, basic scientists, clinical practitioners, reporters, parents, athletes and a host of others . . . and all for good reason.”<sup>224</sup> Leigh Steinberg echoed Dr. Williams’ statement, “[the concussion litigation] has been a ticking time bomb, and we’ve just seen the tip of the iceberg.”<sup>225</sup> Thus, while the NFL may settle this suit and continues to take increased safety precautions, the NCAA and youth leagues are seen to be the next frontier for concussion litigation and enhanced safety.<sup>226</sup>

A mere six days following the announcement of the NFL concussion proposed settlement, three former NCAA players in Chattanooga, Tennessee, filed a class action lawsuit, with more ex-players expected to join.<sup>227</sup> Former NCAA players in Arlington, Illinois, had already filed a similar suit in 2011.<sup>228</sup> The arguments asserted by the players in these lawsuits resemble more closely to those recommended by this Note than to arguments actually asserted on behalf of the NFL players. The NCAA players alleged that the league failed in its duty to protect its athletes.<sup>229</sup> The lawsuits contend that: (a) the NCAA’s failure to inform and protect players caused the players to suffer dramatic consequences;<sup>230</sup> and (b) the NCAA shirked its duty to the players by not implementing safety protocols and not educating them on the long-term effects of concussion-related brain trauma.<sup>231</sup> These lawsuits asserted that the NCAA has been aware of the dangers

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<sup>223</sup> *Id.*

<sup>224</sup> Thom Loverro, *NFL’s Concussions Settlement Deal is a Long Way From the End of the Story*, THE GUARDIAN (Oct. 7, 2013), <http://www.theguardian.com/sport/2013/oct/07/nfl-concussions-lawsuit-deal-not-end>.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Rachel Axon, *Could There Be a Settlement in NCAA Concussion Lawsuit?*, USA TODAY (Aug. 19, 2013), <http://www.usatoday.com/story/sports/ncaaf/2013/08/19/concussion-lawsuit-settlement-adrian-arrington/2671617/>.

<sup>228</sup> Jon Solomon, *Who Takes the Lead on NCAA Concussion Lawsuits? Lawyers Heatedly Jockey for Legal Position*, ALL ALABAMA (Sept. 10, 2013), [http://www.al.com/sports/index.ssf/2013/09/who\\_takes\\_the\\_lead\\_on\\_ncaa\\_con.html](http://www.al.com/sports/index.ssf/2013/09/who_takes_the_lead_on_ncaa_con.html).

<sup>229</sup> *Id.*

<sup>230</sup> Loverro, *supra* note 224.

<sup>231</sup> Travis Waldron, *Court Documents Detail NCAA’s Unwillingness To Act On Concussion Prevention And Treatment*, THINKPROGRESS (July 22, 2013), <http://thinkprogress.org/sports/2013/07/22/2334231/ncaa-concussions-lawsuit/>.

of concussions since 1933 and ignored protocols adopted by national trainers and promoted by doctors and researchers.<sup>232</sup> The lawsuits further alleged that the NCAA required schools to develop their own Concussion Management Plans without standardizing protocols for the treatment and evaluation of players suspected to have suffered a concussion.<sup>233</sup> The lawsuits cited a survey conducted by athletic trainers in 2010, which showed that only 66 percent of schools perform baseline testing that assess concussion symptoms, less than 50 percent require a physician to see athletes who suffer a concussion before allowing them to return to play, and nearly half of the schools said they would allow a concussed athlete to return to play the same day an injury occurred.<sup>234</sup>

Prominent neurologists have also discussed the importance of reforming football youth leagues.<sup>235</sup> Fritz Romeus, director of the Seeing Stars Foundation, a foundation of neurologists seeking to improve the health of athletes, asserted that:

[Safety and concussion awareness] has to start with youth sports. If you want to change the culture of the game, you don't do it at the NFL level. Those players already grew up with a different way of playing the game, a gladiator mentality. You have to show a new generation how to play the game safer.<sup>236</sup>

High school students need to be aware of the risk of concussions, especially since ten high school players a year have died or sustained serious injuries due to incurring another concussion before the first one has healed.<sup>237</sup> In 2009, according to the National Athletic Trainers' Association, fifty-eight percent of high schools still do not have access to athletic trainers.<sup>238</sup> Without having trainers to assess injuries or inform students of the long-term and short-term risks of concussions, high school students are being put directly in harm's way.

Since 2009, precautions have increased for players under the age of eighteen and state legislatures have gotten involved. On May 16, 2009, Washington State passed the "Lystedt Law," in which athletes under the age of eighteen suspected of sustaining a concussion are removed from practice or a game and are not allowed to return to play until cleared by a medical professional.<sup>239</sup> In addition, the law requires

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<sup>232</sup> *Id.*

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

<sup>234</sup> *Id.*

<sup>235</sup> Loverro, *supra* note 224.

<sup>236</sup> *Id.*

<sup>237</sup> Schwarz, *supra* note 46.

<sup>238</sup> *Id.*

<sup>239</sup> Joe Frollo, *Three Years Later, Lystedt Law Protects Young Athletes in 34 States and D.C.*, USA FOOTBALL (May 10, 2012), <http://usafootball.com/news/featured-articles/three-years-later-lystedt-law-protects-young-athletes-34-states-and-dc>.

athletes, parents, and coaches to be educated every year about the dangers of concussions.<sup>240</sup> The law stemmed from the injuries sustained by Zackery Lystedt.<sup>241</sup> When Zackery was just thirteen years old, he sustained a concussion during a middle school football game, and after returning to play a mere fifteen minutes later, sustained a second concussion.<sup>242</sup> Since he did not properly heal from the first concussion, he incurred severe brain damage from the second, and was in and out of a coma for three months.<sup>243</sup> He was unable to move for over a year and had to re-learn how to speak, move, eat, and drink.<sup>244</sup> The Lystedt family sought to prevent these injuries from occurring for other youth players and pushed to get the law passed.<sup>245</sup> As of May 2012, thirty-four states and the District of Columbia had adopted the Lystedt law.<sup>246</sup> In July 2014, Mississippi became the forty-eighth state to enact the Lystedt law, and all fifty states have enacted some form of youth sports concussion safety law.<sup>247</sup>

While improvements have slowly been made for the youth leagues and the NCAA, the resolution of the NFL Class Action suit should serve as a model for these leagues. As long as these leagues are the rule-making bodies and enforcer of the rules through the employment of referees,<sup>248</sup> these leagues have the same duty to their players to exercise reasonable care and to not foster conditions of unreasonable risk as the NFL. As Representative Mike Quigley, of Illinois, stated after the NFL Congressional Hearings in 2009, “the norms of the N.F.L., for better or worse, become the norms of high school football players.”<sup>249</sup> These leagues should follow the preventive measures the NFL has taken by banning dangerous hits and instituting mandatory concussion protocols. These leagues should also follow the research that the NFL will conduct, stemming from the settlement.<sup>250</sup> Additionally, the settlement calls for baseline medical treatments;<sup>251</sup> the NCAA should follow these

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<sup>240</sup> *Id.*

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

<sup>242</sup> *Id.*

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

<sup>244</sup> Frolo, *supra* note 239.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Lindsey Barton Straus, *Concussion Safety Laws in Place In Every State*, MOMS TEAM (July 11, 2015), <http://www.momsteam.com/health-safety/every-state-has-youth-sports-concussion-safety-law>.

<sup>248</sup> The NCAA makes the rules for all its member colleges, but the individual conferences (e.g., the SEC, PAC-10 and Ivy League) hire their own referees. Dennis Dodd, *It's Officially Time to Do Away with Conferences Having Own Officials*, CBS SPORTS (Oct. 23, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24128607/its-officially-time-to-do-away-with-conferences-having-own-officials>.

<sup>249</sup> Schwarz, *supra* note 118.

<sup>250</sup> Belson, *supra* note 4.

<sup>251</sup> *Id.*

new procedures both on and off the field. There should be increased educational programs for team doctors and players, and increased research devoted to studying the effects of concussions, as well as the creation of baseline medical procedures. The former NCAA players in their Class Action suit even state that they seek changes to the NCAA's guidelines.<sup>252</sup> The players also requested the creation of a medical monitoring program to track the health of athletes after they leave college, which is a practice already in place for the NFL.<sup>253</sup>

With three million kids between the ages of six and fourteen playing tackle football, 1.1 million high school football players, and 68,000 college football players, the NFL and its research impacts medical personnel who make decisions involving the lives of millions of players.<sup>254</sup> This Note argues that its failure to take these steps creates liability that can emerge from fostering conditions of unreasonable risk, and therefore, these leagues should feel obligated to not conceal the risks of concussions and to enforce rules and procedures needed to make the game safer. Thus, the potential settlement poses as a model for the NCAA and youth leagues to change their guidelines and increase the quality and quantity of research being conducted on current and former amateur athletes, while also following the improved research conducted by the NFL.

#### CONCLUSION

While the Class Action suit will likely settle, the impact of the NFL concussion litigation remains. The lawsuit exposed the NFL's duty to protect the players through fostering the risk of injury by not revealing information or implementing procedures that would ensure their safety. The NFL's neglect to fulfill this duty and the attention garnered by the Class Action suit have already changed the face of professional football. The pressure will continue to mount for the NFL, the NCAA, and high school leagues to take more precautions. However, the NCAA and high school leagues can use the precautions the NFL has already taken and the new regulations stemming from the settlement as a model to implement similar rules.

Improvements by the NFL have been made, and as Kevin Turner stated, "[h]opefully, after 10 years, after maybe one more generation of players understands it's okay to say you have a concussion, players will learn a different game. Tackling with your head up, with your shoulders, not lowering your head."<sup>255</sup> Until the day when players in all levels of football are taught to play in the safest manner possible,

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<sup>252</sup> Axon, *supra* note 227.

<sup>253</sup> *Id.*

<sup>254</sup> FAINARU-WADA & FAINARU, *supra* note 27, at 211.

<sup>255</sup> King, *supra* note 206.

players have to rely on the NFL and other sports institutions to ensure doctors properly treat concussions and enact procedures, both on and off of the field, to keep them safe. The medical and societal focus on concussions and severe brain injury has to remain. It is the duty of leagues and institutions to take the necessary steps to ensure that they are not fostering conditions of unreasonable risk for their players.

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