

# FOOTBALL IS TAXING ON PLAYERS' BRAINS—SO WHY NOT TAX THE NFL? A SIMPLE SOLUTION TO THE HEADACHE OF CONCUSSION LITIGATION

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## I. INTRODUCTION

Rewind to the AFC championship game in 2009. Baltimore Ravens face the Pittsburgh Steelers. Fourth quarter with less than four minutes remaining: Ravens running back Willis McGahee catches a pass from Joe Flacco and starts upfield. He takes two steps before safety Ryan Clark's helmet slams into McGahee's face mask. Fans gasp as "McGahee's body jar[s] violently, [and] his neck sickeningly snap[s] back like a crash-test dummy." As McGahee lies motionless on the ground, Ray Lewis and other players take a knee and begin to pray. Silence blankets Heinz field. A team spokesman relieves worst-case fears, delivering the news that McGahee is neurologically intact and that he would stay overnight in a Pittsburgh hospital for observation.<sup>1</sup> McGahee later confirms that he suffered a concussion, saying

Everything is O.K. The M.R.I. and the CAT scan checked out good. I was scared, but I didn't know how serious it was. It was pretty intense. . . . I didn't even see him coming. . . . I blacked out. I woke up when they were taking my face mask off.<sup>2</sup>

McGahee was fortunate that he suffered only neck soreness and a brief period of unconsciousness, but not all athletes are as fortunate. In 2002, Mike Webster died at the age of fifty after a seventeen-year NFL<sup>3</sup> career.<sup>4</sup> An autopsy after his death showed that Webster suffered from chronic traumatic encephalopathy (CTE), a neurodegenerative disease caused by repeated head traumas.<sup>5</sup> The autopsy was not necessary to prove that Webster suffered from cognitive impairment though. Webster, a four-time Super Bowl winner, went from being "Iron Mike" to urinating in his own oven and squirting Super Glue on his rotting teeth.<sup>6</sup> The NFL

superstar bought a Taser gun to zap himself into unconsciousness just to get to sleep some nights.<sup>7</sup> He suffered from depression, memory loss, and crazy behavior.<sup>8</sup>

Mike Webster sought help in 1997, appearing in lawyer Bob Fitzsimmons' office, imploring "Please help me."<sup>9</sup> Fitzsimmons collected all of Webster's medical records and sent Webster for four separate medical evaluations, which all confirmed the same diagnosis: closed-head injury as a result of multiple concussions.<sup>10</sup> Fitzsimmons filed a disability claim with the NFL that awarded Webster about \$3,000 per month, the lowest level of disability.<sup>11</sup> Even after the NFL insisted its own doctor examine Webster, and that visit confirmed the diagnosis—closed-head injury, football-related—the NFL pension board voted unanimously for partial disability.<sup>12</sup>

An estimated 3.8 million sports and recreation related concussions occur each year, with football-related concussions leading the pack.<sup>13</sup> According to one study, the average college football player sustains a whopping "950 to 1,100 sub-concussive blows per season—hits that are enough to do cumulative damage to young brain tissue but not enough to cause immediate symptoms."<sup>14</sup> There are approximately 1,700 concussions sustained in the NFL each season.<sup>15</sup> The investigator explained, "After a certain number of hits, the damage starts to show."<sup>16</sup> According to studies conducted by the NFL's Committee on Mild Traumatic Brain Injury (MTBI), a "concussion in professional football involves a mean impact velocity of 9.3 m/second (20.8 mph) and a head velocity change of 7.222 m/second (16.1 mph)."<sup>17</sup> The Committee actualized the severity of this finding by comparing car accidents, stating car accidents typically "involve impact durations of less than 6 m/sec for head impacts."<sup>18</sup>

The NFL's own Committee recognized the severity of concussions, yet for years, the league denied the connection between football-related concussions and long-term neurological

injury.<sup>19</sup> Now, the NFL finds itself embroiled in massive litigation surrounding the long-term effects of concussions. More than 4,000 former players have sued the NFL alleging the league caused and contributed to the increased risks of latent brain injury by failing to disclose the risks of repeated MTBIs and by failing to take the appropriate steps to prevent and mitigate repeated traumatic head impacts and the latent brain injury.<sup>20</sup> While the former players want relief, litigation is not the answer. Litigation presents hurdles to both the plaintiff-players and the NFL that will be difficult to tackle and which make litigation ineffective to solve this massive dispute. The time has come for the NFL to step up to the line of scrimmage and take responsibility for its players.

This Note briefly describes the stories of Willis McGahee and Mike Webster to illustrate the wide-ranging consequences of football-related concussions. Part II offers a medical overview of concussions and the long-term cognitive effects they can cause. Part III discusses the basis for the controversy surrounding concussions and football generally; Part III also specifically outlines the current lawsuit between former NFL players and the NFL and its procedural history to date. Part IV analyzes the ineffectiveness of litigation as a remedy to the concussion dispute. Finally, Part V proposes a solution to the problem of compensating NFL retirees for concussion-related neurological injuries that is favorable to both the players and the NFL.

## **II. MEDICAL OVERVIEW OF CONCUSSIONS**

### **A. Concussion Defined**

A concussion is a type of traumatic brain injury (TBI), or “a blow or jolt to the head, or a penetrating head injury that disrupts the normal function of the brain.”<sup>21</sup> The American Association of Neurological Surgeons (AANS) defines a concussion as “a clinical syndrome characterized by an immediate and transient alteration in brain function, including an alteration of mental status and level of consciousness, resulting from mechanical force or trauma.”<sup>22</sup>

Concussions can occur from a “bump, blow, or jolt to the head,” or “from a blow to the body that causes the head and brain to move rapidly back and forth—literally causing the brain to bounce around or twist within the skull.”<sup>23</sup> The sudden movement of the brain causes stretching, damaging the cells and creating mild, moderate, or severe symptoms depending on the extent of damage to the brain.<sup>24</sup> Mild concussions can result in transient changes in mental state, while severe cases may cause prolonged periods of unconsciousness, coma, or death.<sup>25</sup>

### **B. Repeat Concussions**

Following a first concussion, an athlete is at increased risk for additional concussions.<sup>26</sup> Players who experience loss of consciousness are six times more likely to sustain a concussion than those who have never lost consciousness.<sup>27</sup> Moreover, “the risk of recurrent concussive injury may be the greatest within seven-to-ten days of an acute concussive injury.”<sup>28</sup> While the exact reasoning behind this finding is unknown, “the age and level of play may expose certain athletes to greater forces than those who do not sustain concussions.”<sup>29</sup> Furthermore, “once an athlete’s brain has sustained a single concussion it becomes more susceptible to injury.”<sup>30</sup>

### **C. Long-term effects of concussions**

In 2005, clinical studies revealed that multiple concussions cause cognitive and neuropsychiatric decline including depression and early-onset dementia.<sup>31</sup> Investigators examined the brain tissue of three deceased NFL players<sup>32</sup> who had suffered multiple concussions throughout their NFL careers.<sup>33</sup> Each of the deceased players had presented neurologic symptoms of decreased cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression prior to their premature deaths.<sup>34</sup> Based on the pathology of the brain tissue, the investigators concluded that CTE,<sup>35</sup> triggered by repeated concussions, was partially responsible for the players’ deaths.<sup>36</sup> Similarly, a 2005 clinical study,

which surveyed more than 2,550 former NFL athletes, uncovered that retired athletes who sustained three or more concussions in their NFL careers were five times more likely to receive a mild cognitive impairment diagnosis than NFL retirees with no history of concussions.<sup>37</sup>

In 2007, under pressure from both Congress and the media, the NFL convened its first league-wide Concussion Summit.<sup>38</sup> Independent researchers “were invited to present their findings to team medical staffs and National Football League Players Association (NFLPA) representatives.”<sup>39</sup> In spite of the previous scientific evidence connecting concussions and long-term brain damage, the NFL’s concussion pamphlet to players stated: “[T]here is no magic number for how many concussions is too many. . . . [C]urrent research has not shown that having more than one or two concussions leads to permanent problems.”<sup>40</sup>

Nevertheless, in 2008, Dr. Ann McKee’s examination of the brain tissue of deceased NFL players John Grimsely and Tom McHale revealed that both exhibited distinct signs of CTE.<sup>41</sup> Dr. McKee found that repeated concussions are directly linked to CTE, stating: “There is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma.”<sup>42</sup>

#### **D. Chronic Traumatic Encephalopathy**

Chronic Traumatic Encephalopathy (CTE) is a progressive neurodegenerative disease found in individuals, mostly athletes, who have a history of repetitive brain trauma, such as repeated concussions, as well as asymptomatic sub-concussive blows to the head.<sup>43</sup> The concussion or other head trauma “triggers progressive degeneration of the brain tissue, including the build-up of an abnormal protein” in the brain.<sup>44</sup> These changes in the brain can occur months or even decades after the last brain trauma<sup>45</sup> and often do not present until years after an NFL player’s retirement. CTE involves symptoms such as “memory loss, confusion, impaired judgment,

impulse control problems, aggression, depression, and eventually, progressive dementia”<sup>46</sup> and Parkinsonism.<sup>47</sup>

### **III. THE BASIS FOR LITIGATION: CONCUSSIONS AND FOOTBALL**

#### **A. Generally**

Due to the wide spectrum of symptoms and severities of concussions, diagnosis is difficult, and for football coaches at all levels, the “return-to-play decision” is the subject of growing controversy.<sup>48</sup> Athletes rarely self-report concussive symptoms, whether due to lack of knowledge of concussion symptoms or athletes’ desire to remain in the game.<sup>49</sup> “In American football, only 47% of players sustaining a concussion report their injury.”<sup>50</sup> Furthermore, “as many as 99[%] of athletes play through their concussions, and . . . at the NFL level, even when doctors do discover a concussion, they still allow more than 50[%] of athletes back into the same game.”<sup>51</sup> These results are concerning given the significant effects of recurrent concussions and the potential for long-term neurological consequences.<sup>52</sup>

#### **B. Foot-Dragging**

Despite the mounting evidence connecting sports-related concussions and long-term neurological effects, the NFL remained reluctant to acknowledge the connection—until Congress stepped in.<sup>53</sup> On October 28, 2009, Representative John Conyers (D-Mich) chaired a House Judiciary Committee hearing “where U.S. Congressmen, NFL executives, NFL players, NFL doctors, and several other interested parties joined ‘to debate over revelations that former NFL players may suffer from memory-related disorders at a much higher rate than the population at large.’”<sup>54</sup> Representatives at the hearing called for the NFL to release its injury data for independent review.<sup>55</sup> One representative “compared the NFL’s stance on concussions to tobacco companies’ denial that smoking causes lung cancer.”<sup>56</sup> Several researchers shared their findings

linking “repetitive concussive and subconcussive hits to the head” and degenerative brain disease.<sup>57</sup> Still, the NFL refused to acknowledge that there was a direct connection between playing football and brain disorders.<sup>58</sup> The NFL did, however, offer any player that allegedly suffers from dementia a free diagnostic or medical consultation.<sup>59</sup>

### **C. Concession**

Since the October 2009 hearing, the NFL has finally conceded that concussions can have long-term consequences.<sup>60</sup> Since 2007, the NFL and its players’ union have invested approximately \$7 million on health care expenses for NFL alumni suffering from dementia or Alzheimer’s.<sup>61</sup> In February 2013, reports surfaced announcing a partnership between the NFL and General Electric (GE) to begin “the development of imaging technology that [will] detect concussions and encourage the creation of materials to better protect the brain.”<sup>62</sup> The four-year initiative was slated to begin in March 2013 with at least \$50 million invested from the NFL and GE.<sup>63</sup> When asked about the initiative, Ken Guskiewicz, a member of the NFL’s Head, Neck, and Spine Committee, said: “Is this [the NFL’s] way of defending [itself] with this cloud over the sport? I’d be lying if I told you it had nothing to do with it. . . . They’ve got to protect their image right now; the headlines are not good headlines.”<sup>64</sup>

Also in February 2013, the NFL “announced that, beginning next season, independent neurological consultants will be on the sidelines at every game to help detect head injuries.”<sup>65</sup> Moreover, in March of this year, the “NFL owners approved a new rule that will penalize players for striking opponents with the crown of their helmets.”<sup>66</sup> Still, these efforts are too little, too late for players like Mike Webster and arise as a response to the vast concussion litigation currently entangling the NFL.

#### **D. Litigation**

The NFL's overdue willingness to recognize long-term brain injury did not "come soon enough to forestall that other great American sporting event: the lawsuit."<sup>67</sup> "As of February 22, 2013, there [were] 4,127 named player-plaintiffs in the 214 concussion-related lawsuits. Including the players' spouses, there are more than 5,500 plaintiffs, total."<sup>68</sup> In the amended master complaint, the plaintiffs allege that:

The NFL caused and contributed to the increased risks of latent brain injury . . . through its acts and omissions in failing to disclose the true risks of repeated traumatic head impacts in NFL football, and failing to take appropriate steps to prevent and mitigate repeated traumatic head impacts (including sub-concussive blows and concussions) and the latent brain injury.<sup>69</sup>

In addition to alleging failure to disclose the increased risks of latent brain injury, the plaintiffs claim the NFL "unilaterally created for itself the role of protecting players, informing players of safety concerns, and imposing unilaterally a wide variety of rules to protect players from injuries that were costly to the player, the game, and profits."<sup>70</sup> The plaintiffs allege they relied on the NFL as the NFL received and paid for advice from medical consultants regarding health risks associated with playing football;<sup>71</sup> thus, the NFL breached its "duty of reasonable care to keep NFL players informed of neurological risks, to inform NFL players truthfully, and not to mislead NFL players about the risks of permanent neurological damage that can occur from MTBI incurred while playing football."<sup>72</sup> Furthermore, the plaintiffs claim that for decades, the NFL has not only known, but has fraudulently concealed, that repeated blows to the head can cause "long-term brain injury, including but not limited to memory loss, dementia, depression, and CTE and its related symptoms."<sup>73</sup>

On August 30, 2012, the NFL and National Football League Properties (NFLP) filed their memorandum in support of their motion to dismiss the complaint discussed above.<sup>74</sup> The NFL's



and NFLP's motion to dismiss hinges on two arguments.<sup>75</sup> First, the defendants claim that Section 301 of the Labor Management Relations Act (LMRA) governs all collective bargaining agreements (CBA) affecting interstate commerce; therefore, Section 301 "preempt[s] any and all state-law claims such as the one brought by the [p]laintiffs in this case."<sup>76</sup> Second, the defendants allege that because the CBAs expressly delineate the NFL's obligations regarding the enforcement of health and safety-related rules, the plaintiffs' claim falls under the existing CBA; consequently, the clauses within the CBA should control.<sup>77</sup> Live legal proceedings kicked off on April 9, 2013 when a Pennsylvania federal judge heard oral arguments on the motion to dismiss.<sup>78</sup>

#### **IV. THE INEFFECTIVENESS OF LITIGATION AS A REMEDY**

##### **A. Countless Lawsuits**

Perhaps the most obvious problem with using litigation to solve the concussion issue for the NFL is the enormous number of players that could potentially file claims against the league. Ray and Mary Ann Easterling, along with six other players, filed the first concussion suit against the NFL on August 17, 2011.<sup>79</sup> By December 2011, more than a dozen suits had been filed around the country, and the plaintiffs kept rushing attorneys' offices.<sup>80</sup> As of February 2013, there were over 4,100 former NFL players suing the NFL for its fraudulent concealment of the long-term consequences of concussions and its failure to protect its players.<sup>81</sup> That is a whopping 68,333% increase in the number of concussion suits from August 2011 to February 2013—a mere eighteen months. And yet, the litigation could still metastasize and pose a fatal threat to professional football if the NFL chooses to endure a legal battle rather than seek a swift resolution.<sup>82</sup>

## **B. The Potential Demise of the NFL as We Know It**

While the plaintiffs have made allegations, they are merely those—allegations. If this dispute proceeds to court, the ugly particulars of the NFL’s intentional concealment of evidence of the long-term brain damage associated with concussions could ruin the NFL.<sup>83</sup> The mere allegations that the NFL covered up a fatal health risk to its players has caused weariness among the fans, and playing out in court the stories of the suicides of former players such as Dave Duerson, Andre Waters, and Junior Seau, all of whom suffered from concussion-related neurodegenerative, could alienate NFL fans altogether.<sup>84</sup>

Additionally, although the NFL generated approximately \$9.5 billion in 2011–2012,<sup>85</sup> “[i]f the court permits the plaintiff players to proceed in tort, the NFL could [face] the possibility of paying out ‘tobacco-like’ damages.”<sup>86</sup> While many sports analysts believe the NFL is financially strong enough to sustain even the growing number of lawsuits against it and their potential payouts, others imagine a chain reaction ultimately ending in the demise of football as we know it.<sup>87</sup> These scholars predict that former players will begin filing suits against high schools and colleges in addition to the professional leagues.<sup>88</sup> The educational institutions, which are inherently less lucrative than the NFL, may consider dropping football altogether rather than endure litigation and risk countless multimillion dollar judgments.<sup>89</sup> The schools that choose not to voluntarily drop football may be forced to eliminate the sport by insurance companies that inflate premiums or refuse to insure schools against football-related lawsuits.<sup>90</sup> As a result, many parents may have second thoughts about letting their children play football, and “the trickle down effect could potentially cause the NFL to lose its feeder system.”<sup>91</sup> Without players, the NFL would cease to exist. Although a dramatic chain of events, the reaction is possible, and it

could happen sooner rather than later if it spreads anywhere near as fast as the former player lawsuits against the NFL.

### **C. Proving Causation**

The largest hurdle for the plaintiffs seeking relief via litigation is proving causation. In order to prevail on their negligence claims, the plaintiffs must prove proximate causation.<sup>92</sup> Specifically, the players must prove that game-day sub-concussive and concussive hits and the NFL's failure to implement proper regulations proximately caused their long-term neurological deficits.<sup>93</sup>

Until the 1990s, medical science was not clear on the long-term risks associated with concussions.<sup>94</sup> Additionally, the issue of causation could be problematic in that "NFL players [will] have difficulty proving which collisions contributed to their later problems: the ones from pee-wee play, high school, college, or the pros?"<sup>95</sup> The NFL will likely point to a number of causes that might have contributed to the plaintiffs' cognitive decline.<sup>96</sup> For instance, Pittsburgh Steelers' trainer and NFL Committee member Dr. Joseph Maroon contends "that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players Webster, Long, and Waters."<sup>97</sup> Likewise, when NFL Commissioner Roger Goodell was asked about the evidence of CTE found in deceased NFL player Justin Strzelczyk's brain tissue, he replied: "[Strzelczyk] may have had a concussion swimming. . . . A concussion happens in a variety of different activities."<sup>98</sup>

In spite of the probable NFL argument that the plaintiffs cannot prove which concussive hits proximately caused their injuries, the players could still succeed on causation by arguing that the NFL's failure to warn must be only one cause of their injuries.<sup>99</sup> When multiple causes exist, "each of which is sufficient to cause a plaintiff harm, supplementation of the 'but-for' standard is

appropriate.”<sup>100</sup> Consequently, plaintiff players may concede that they sustained sub-concussive and concussive hits in contexts outside the NFL, but if they can prove that the NFL’s failure to warn aggravated their cognitive injuries, supplementation of the but-for standard is appropriate.<sup>101</sup>

#### **D. Quantifying Damages**

The potential damages available to the plaintiffs are difficult to predict prior to beginning the lengthy court battle that litigation entails. Damages will depend on which causes of action prevail and the extent of the injuries proven.<sup>102</sup> For example, “[s]uccess on a negligence claim without the accompanying fraud will likely preclude an award of more lucrative punitive damages.”<sup>103</sup>

Although previous suits involving football injuries may foreshadow the amount of damages a player could recover, most of these prior suits involved specific, traumatic events that caused easily identifiable career-ending injuries. In August 2000, Merrill Hoge received \$1.45 million for the remaining two years on his NFL contract and \$100,000 for pain and suffering after he incurred successive concussions playing for the Chicago Bears.<sup>104</sup> However, Hoge’s concussions were easily pinpointed to two specific NFL games in which he endured concussive hits, the second concussion occurring just six weeks after the first.<sup>105</sup>

Similarly, La Salle University football player Preston Plevretes sustained a concussion during a football practice.<sup>106</sup> After receiving clearance from the student health center, Plevretes suffered a second helmet-to-helmet collision during a game at Duquesne University, which caused him to lapse into a coma due to swelling of the brain.<sup>107</sup> Plevretes required surgery and now has difficulty walking and speaking, necessitating constant treatment.<sup>108</sup> Plevretes sued La

Salle University and the case settled for \$7.5 million.<sup>109</sup> However, like Hoge, Plevretes' cognitive injuries were easily traced to two specific games during which he suffered concussions.

In the current NFL concussion litigation, it will be difficult to pinpoint exact moments that caused concussions and ultimate cognitive injuries among the 4,000 plus plaintiffs. Moreover, the extent of plaintiffs' injuries will vary from player to player. For example, how will the court decide the amount of damages for a player like Seau that committed suicide versus a player like John Mackey that died at age sixty-nine from severe dementia when concussion-related brain injury caused both events? Even if paying the damages is not an issue for the NFL, the court's challenge will be quantifying damages and awarding them in a uniform manner.

#### **E. The Preemption Issue**

Another potentially fatal obstacle to the plaintiffs' litigation is preemption. Throughout the past ten months of this litigation, the NFL and the former players have been debating whether the players' claims belong in court, or whether they are preempted.<sup>110</sup>

##### **1. The Preemption Standard**

The Supreme Court delineated the standard for preemption in *Allis-Chalmers Corp. v. Lueck*.<sup>111</sup> The Court held that when resolution of a state-law claim, such as a tort claim, "is substantially dependent upon analysis of the terms of a [CBA], that claim must either be treated as a [Section] 301 [of the Labor Management Relations Act] claim or dismissed as preempted by federal labor-contract law."<sup>112</sup> Additionally, the *Allis-Chalmers* Court emphasized that—pursuant to the grievance procedures delineated in the CBA, which typically require arbitration—it is the arbitrator's responsibility, not the court's, to interpret labor contracts like CBAs.<sup>113</sup>

In applying the Section 301 preemption doctrine, courts perform a two-step analysis to determine if the claim is sufficiently independent to survive Section 301 preemption.<sup>114</sup> First, a

state-law claim is preempted if it is based on a provision of the CBA, meaning that the CBA provision in question actually sets forth the right upon which the claim is based.<sup>115</sup> Second, Section 301 preempts a plaintiff's state-law claim when a state-law claim "is 'dependent upon an analysis' of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA."<sup>116</sup>

## **2. Parties' Arguments**

Preemption is the basis of the NFL's motion to dismiss the concussion litigation. The NFL asserts that the concussion litigation is nothing more than a labor dispute involving workplace and health and safety and as such, an arbitrator—not a judge—is the proper person to interpret the CBAs.<sup>117</sup> The league argues that:

If resolution of a claim requires the court to interpret various provisions of the CBA, then the claim is completely preempted. In other words, if [the judge] has to examine all of the past and current CBAs to determine what duties, if any, were owed to the players, then . . . the claims must be dismissed.<sup>118</sup>

During the April 9, 2013 oral arguments, the plaintiffs argued that the NFL's duty to protect its players by enacting rules and equipment standards—and its failure to achieve that duty—was not specifically described in the Collective Bargaining Agreement (CBA); therefore, the claims are not preempted by the CBA.<sup>119</sup> Instead, the NFL's duty "arises in the context of the NFL acting as the 'superintendent' for the sport of football, and being in the unique position of having access to information on the neurological risks of concussions."<sup>120</sup>

The NFL counterargued that it is impossible to garner "the scope of the NFL's duty (as well as the union's, the NFL member clubs', or its players' duties) without interpreting the CBA."<sup>121</sup> The NFL asserts that the former players' claims either plainly arise from the CBAs or are substantially dependent upon an analysis of the CBAs to determine the scope of the NFL's duty to its players.<sup>122</sup> The NFL's motion to dismiss "points to several provisions of the CBAs

needed for resolution of the concussion liability claims” including: “(i) player medical care, (ii) rule-making and player safety rule provisions, (iii), grievance procedures, and (iv) player benefit provisions.”<sup>123</sup> The NFL contends that because resolution of the plaintiffs’ claims, whether they be negligence or fraud based, substantially depends on an analysis of the terms of the CBAs, the claims are preempted by federal labor law. Furthermore, the NFL emphasizes that the plaintiff “players cannot just sidestep the preemption issue by reaching over the clubs to sue the league.”<sup>124</sup>

### **3. Precedent**

The court’s ruling hinges on its interpretation of the preemption doctrine outlined by past case law. In *Kline v. Security Guards, Inc.*,<sup>125</sup> unionized employees sued their employer for using audio and video surveillance equipment to illegally record them.<sup>126</sup> The employer argued that the employees’ state law claims were preempted due to the CBA.<sup>127</sup> The court denied this argument, holding that because the employer did not cite to any specific provisions requiring any interpretation of the CBA, resolution of the employees’ state claims was not dependent upon analysis of the CBA; thus, complete preemption was unwarranted.<sup>128</sup>

Similarly, in *McPherson v. Tennessee Football, Inc.*, New Orleans Saints player Adrian McPherson sued the Tennessee Titans for negligence when a mascot in a golf cart ran over him during halftime.<sup>129</sup> The court held that because the CBA contained no provisions “concerning its mascots or field safety for half-time activities,” the negligence claim arose independently of the CBA, and thus, was not preempted.<sup>130</sup> The *McPherson* court based its holding on the fact that there were no actual provisions of the CBA directly applicable to the relevant duty.<sup>131</sup>

In contrast to *Kline* and *McPherson*, numerous cases against the NFL have been preempted. In *Jeffers v. D’Alessandro*, former NFL player Patrick Jeffers sued the Carolina

Panthers' team physician and affiliated clinic for medical malpractice and the team for negligent retention, intentional misconduct, and breach of implied warranty.<sup>132</sup> Jeffers' claimed that the physician performed additional, unauthorized procedures that went beyond Jeffers' informed consent.<sup>133</sup> The *Jeffers* court held that the former player's claims involved interpretation of the CBA because the claims involved the application of the provision in the CBA that each Club retain a team orthopedic physician.<sup>134</sup> As a result, the court found that Jeffers' claims were preempted, and it ordered arbitration.<sup>135</sup>

Like *Jeffers*, the court in *Williams v. National Football League* held that the LMRA preempted the plaintiff players' claims for negligence, fraud, constructive fraud, and negligent misrepresentation.<sup>136</sup> In that case, two players were suspended for testing positive for banned substances pursuant to a policy expressly incorporated in the CBA.<sup>137</sup> The players alleged *inter alia* that the football league failed to disclose to players that a certain dietary supplement contained the banned substance despite the league's knowledge.<sup>138</sup> In reaching its holding, the *Williams* court relied on the fact that the negligence claims were "inextricably intertwined with consideration of the terms of the [policy]."<sup>139</sup> The court found that the misrepresentation claims also were preempted because the plaintiffs could not "demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA and the Policy."<sup>140</sup> The determination of whether the players could "show that they reasonably relied on the lack of a warning that StarCaps contained bumetanide [could not] be ascertained apart from the terms of the Policy."<sup>141</sup>

#### **4. Potential Outcomes**

As applied to the NFL concussion litigation, "[t]he questions of whether a duty existed, the scope of that duty, and the measure of the standard of care the NFL was required to exercise



in monitoring player health and safety are all [critical] for the plaintiffs to prove their negligence claims.”<sup>142</sup> If the court finds that these questions are inextricably intertwined with the CBA, then the court will likely grant the NFL’s motion to dismiss under the theory of preemption.

Like the negligence claims, the fraud-based claims, the NFL argues, are also preempted by the need to interpret the CBAs.<sup>143</sup> In order to succeed on the merits for their fraud claim, the former players must prove “justifiable reliance on the misrepresentation” as an element.<sup>144</sup> The NFL retirees claim “that they justifiably and reasonably relied on the NFL’s omissions and misrepresentations about ‘the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive injury.’”<sup>145</sup> Like in *Williams*, the crux of the NFL’s preemption argument is that the court cannot determine whether the plaintiffs justifiably relied on information provided by the NFL without interpreting the CBAs’ health and safety provisions.<sup>146</sup> Further, the NFL argues that preemption bars the plaintiffs’ claims of post-retirement fraudulent concealment because these claims hinge on a duty to disclose, the assessment of which requires an interpretation of the CBAs’ numerous post-retirement benefit provisions.<sup>147</sup>

Although the court has not yet granted the NFL’s motion to dismiss on the basis of preemption, the defense is a solid one. The best case for the plaintiffs is that the court finds that despite general health and safety provisions of the CBA, the NFL voluntarily assumed a duty to specifically monitor concussions; therefore, the tort claims arise independently of the CBA.<sup>148</sup> On the contrary, the court could determine that the CBAs impose a duty on the NFL to monitor concussions through the general health and safety provisions, in which case the claims arise from the CBA and are preempted.<sup>149</sup> The potential battle for the plaintiff players is that the court cannot determine the degree of care owed to the players without first analyzing the various

general health and safety provisions of the CBA.<sup>150</sup> Because the negligence claims require that the plaintiffs prove the NFL owed them a duty of care, establishing prima facie evidence of this duty may prove problematic without relying on aspects of the CBA. Similarly, because an essential element of the fraud-based claims is “justifiable reliance on the misrepresentation,” the plaintiffs may struggle to show that they reasonably relied on the NFL’s misrepresentations regarding the risks associated with concussions without relying on the CBA to prove the NFL had a duty to disclose.<sup>151</sup>

## V. PROPOSED SOLUTIONS

The legal uncertainties for both sides should be motivation enough to achieve a settlement sooner rather than later. The evidence connecting concussions and brain injury is mounting. In December 2012, researchers at Boston University reported its latest findings—thirty-three cases of CTE in former NFL players, fifteen previously unpublicized.<sup>152</sup> On January 10, 2013, “the National Institutes of Health added Seau, the former star San Diego linebacker who killed himself in May, to the CTE list, and his family joined the litigation.”<sup>153</sup>

The NFL has recognized that there is a problem. Its conciliatory efforts are now aimed at promoting medical research and protecting player safety. The 2011 collective bargaining agreement allocated \$100 million over ten years to Harvard Medical School to support research.<sup>154</sup> In September 2012, the NFL and its team owners made their largest charitable donation ever: an additional \$30 million to the NIH to conduct research on concussions and CTE.<sup>155</sup> But what about the damage that has already been done? The NFL still had a duty to promote the health and safety of its players, and it failed thousands of them. Consequently, an alternative solution to this problem is needed and litigation is not the answer.

## **A. The NFL's Current Assistance Programs**

The NFL pays out \$60 million per year in pensions and post-career disability benefits to retirees, but the majority of these benefits go to players that retired after 1977.<sup>156</sup> A group of NFL retirees created the Gridiron Greats Assistance Fund, an online auction, to raise money for former NFL players in need.<sup>157</sup> Compensating these players should not be, however, left up to former players to sell their championship rings and other memorabilia, but instead, the NFL should take accountability.<sup>158</sup>

In March 2011, the NFL introduced a new benefit for its former players, Long Term Care Insurance, which provides assistance for persons suffering from severe cognitive impairment requiring continual supervision or whom are unable to perform the activities of daily living such as bathing, dressing, or feeding.<sup>159</sup> The Long Term Care policy provides a \$219,000 maximum benefit and a maximum daily benefit of \$150.<sup>160</sup> The Long Term Care policy, however, is only available to retirees that are vested in the NFL Retirement Plan and are between the ages of 50 and 75 years old.<sup>161</sup>

Another assistance plan, the 88 Plan, assists players who are vested under the NFL Retirement Plan and who have amyotrophic lateral sclerosis (ALS), Parkinson's diseases, and/or dementia.<sup>162</sup> The 88 Plan offers assistance up to \$100,000 per year for medical and custodial care for eligible players, including institutional charges, physician services, and prescription medicine.<sup>163</sup> Since its creation in 2007, the 88 Plan has distributed more than \$16 million to former players and their families.<sup>164</sup>

On March 18, 2013, the NFL and a group of retired NFL players including Lem Barney, one of the creators of the Gridiron Greats Assistance Fund, announced formation of a \$42 million "common good fund" to benefit all former players.<sup>165</sup> However, the fund did not stem

from the NFL voluntarily taking responsibility, but rather came as part of a settlement of a class-action suit filed by players seeking compensation for the use of their images in NFL Films.<sup>166</sup> Under the terms of the agreement, the NFL will contribute the funds, which will provide housing, medical care, and other services for players in need.<sup>167</sup> The availability of these funds extends to any player that has appeared in at least one NFL game.<sup>168</sup>

## **B. Create a Traumatic Brain Injury Relief Fund**

All of these assistance programs are a step in the right direction and can provide guidance to the NFL in resolving the concussion claims in a manner other than litigation. The common good fund spawned from a settlement of a class-action suit. The NFL should learn its lesson, and before it dumps more money into litigation, proactively create a fund for the NFL victims of CTE and cognitive impairment related to concussions.

### **1. The September 11th Victim Compensation Fund as a Guide**

The NFL should model its own relief fund after the September 11th Victim Compensation Fund (VCF). The government program, funded by taxpayers, provides compensation for any individual (or personal representative of a decedent) that suffered physical harm or was killed as a result of the terrorist attacks on September 11, 2001.<sup>169</sup> The VCF compensates victims for economic loss (any loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, and loss of business or employment opportunity) plus non-economic loss minus collateral source payments.<sup>170</sup> Additionally, the VCF provides victims two years from the date on which they knew or should have known that they suffered physical harm as a result of the 9/11 attacks.<sup>171</sup> The fund allows a victim to amend his claim if his condition has substantially worsened resulting in damages that

were not previously compensated.<sup>172</sup> To ensure that all eligible victims receive compensation, the VCF makes a partial payment of the full award to each claimant as a first award.<sup>173</sup>

The VCF lists presumptively covered conditions that have been certified for treatment under the World Trade Center Health Program.<sup>174</sup> An injured individual need not “prove” his condition is a result of the terrorist attacks or debris removal, but is eligible simply if his condition is one that has been certified for treatment under the WTC Health Program after July 1, 2011.<sup>175</sup> The VCF does not require participants to have an attorney.<sup>176</sup>

The proposed Traumatic Brain Injury (TBI) Relief Fund, like the VCF, should allow former NFL players (or personal representatives of deceased players) to submit claim forms listing their injuries, whether a concussion, depression, dementia, or other TBI-related ailment. Injured NFL players should qualify for eligibility merely by providing medical documentation of a presumptive condition certified by the league for treatment. Like the VCF, the TBI Relief Fund should compensate injured NFL retirees for economic loss (any loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, and loss of business or employment opportunity) plus non-economic loss minus collateral source payments. The Fund should provide relief based on the degree of injury and resulting impairment to the former player. Furthermore, similar to the VCF, to address the latent nature of many of these neurological injuries, a player should be permitted to amend his claim if his condition substantially worsens resulting in damages that were not previously compensated.

## **2. Tax the NFL**

Congress has already stepped in once to propel the NFL to act with regards to football-related concussions.<sup>177</sup> Why not step in now and mandate the \$9 billion-per-year industry to

create a relief fund for NFL retirees experiencing neurodegenerative effects from concussions?  
The solution? Start taxing the NFL.

At least one government official, Senator Tom Coburn (R-OK) agrees with this solution.<sup>178</sup> Currently the NFL is taxed as a charitable organization.<sup>179</sup> Although the NFL may engage in occasional charitable acts, it is a profitable organization and should be taxed accordingly.<sup>180</sup> Taxpayers are losing around \$91 million-per-year courtesy of the NFL's tax-exempt status as a 501(c)(6) charitable organization—a classification used by trade and industry organizations—that assumes the NFL is promoting the general value of the sport of football.<sup>181</sup> Senator Coburn proposed an amendment to the Marketplace Fairness Act that would end the practice of allowing professional sports leagues like the NFL to qualify as tax-exempt organizations.<sup>182</sup>

While Coburn's amendment contends that the leagues are not non-profits promoting their sports, but rather businesses interested solely in the promotion of their business,<sup>183</sup> another argument to strip the tax-exempt status is to generate money for the proposed TBI Relief Fund for former players. NFL teams pay membership dues amounting to approximately \$6 million per team, but they are permitted to write the dues off for tax purposes as donations to a charitable organization.<sup>184</sup> “[T]he NFL, which collected \$192 million in revenue largely through membership dues in 2009, then pours much of that money back into a stadium fund that allows owners to access interest-free loans as long as they secure taxpayer financing for either new stadiums or improvements to existing facilities.”<sup>185</sup> So, the NFL's dues go almost entirely toward the enrichment of the franchise owners even as they are exempt from federal taxation,<sup>186</sup> and taxpayers end up footing the bill for new stadiums and stadium improvements.<sup>187</sup>

Rather than enriching the franchise owners, the \$192 million collected from membership dues should go to assisting the players that *are* the league. The NFL's membership dues should either remain tax-exempt and be funneled into a relief fund for former players, or the government should remove the NFL's tax-exempt status and create a fund with the tax dollars to aid NFL retirees with long-term effects of concussions.

### **CONCLUSION**

After years of scientific research, investigators can now conclusively declare a connection between football-related concussions and long-term brain damage. The NFL can no longer deny such connection and has finally taken baby steps to address the issue. However, the NFL players suffering from these injuries deserve more than just baby steps. Former players, like Ray Easterling and over 4,100 more, have turned to litigation in search of the financial relief they deserve from the NFL. But litigation is not the answer. Litigation poses obstacles to both parties including, but not limited to, countless lawsuits, difficulty proving causation, and threat of preemption. Perhaps most significant, litigation threatens to destroy American football as we know it.

The better solution for the former players and the NFL is to create a relief fund to compensate victims with football-related neurodegenerative injuries. Compensation for concussion-related brain injuries would provide relief to former players and their families without subjecting either side to the headache of litigation. The NFL should model its TBI Relief Fund after the VCF to promote a uniform and fair process for compensation. To generate money to compose the Fund, the government should strip the NFL of its tax-exempt status and create the fund from the federal tax dollars paid by the NFL. Alternatively, the government could allow

the NFL to remain a tax-exempt charitable organization, but require that NFL membership dues be funneled into the relief fund rather than enriching the NFL franchise owners.

These proposals are in no way a comprehensive solution to the problems facing former NFL players and the NFL in regards to football-related concussions, but they would provide a quicker and likely more gainful resolution for both the players and the NFL. The bottom line is that litigation has the potential to last years, all the while consuming money of the NFL that could instead be used to compensate former players for their injuries. Why not avoid the headache of litigation and meet at the 50-yard line? Creation of a relief fund seems a much more time and money efficient way to resolve this headache for all parties involved.



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<sup>1</sup> Mike Wise, *Violence at a Price*, WASH. POST, Jan. 19, 2009, [http://articles.washingtonpost.com/2009-01-19/opinions/36910197\\_1\\_afc-championship-mcgahee-steelers-ravens](http://articles.washingtonpost.com/2009-01-19/opinions/36910197_1_afc-championship-mcgahee-steelers-ravens).

<sup>2</sup> *Full Recovery Is Expected for McGahee*, N.Y. TIMES, Jan. 19, 2009, at B16, available at [http://www.nytimes.com/2009/01/20/sports/football/20mcgahee.html?ref=willismcgahee&\\_r=0](http://www.nytimes.com/2009/01/20/sports/football/20mcgahee.html?ref=willismcgahee&_r=0).

<sup>3</sup> “NFL” is used as the common abbreviation for National Football League.

<sup>4</sup> Jeanne Marie Laskas, *Game Brain*, GQ, at 1 (Oct. 2009), available at <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions>.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 2.

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

<sup>11</sup> *Id.*

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

<sup>13</sup> Jeffrey Kluger, *Headbanger Nation*, TIME, Feb. 3, 2011,

[http://www.time.com/time/specials/packages/article/0,28804,2043395\\_2043506\\_2043494,00.html](http://www.time.com/time/specials/packages/article/0,28804,2043395_2043506_2043494,00.html).

<sup>14</sup> *Id.*

<sup>15</sup> Kristina M. Gerardi, *Tackles That Rattle the Brain*, 18 SPORTS LAW. J. 181, 191 (2011).

<sup>16</sup> Kluger, *supra* note 13.

<sup>17</sup> Elliot J. Pellman & David C. Viano, *Concussion in Professional Football: Summary of the Research Conducted by the National Football League’s Committee on Mild Traumatic Brain Injury*, 21 NEUROSURGICAL FOCUS 1, 2 (2006), available at [http://www.medscape.com/viewarticle/553967\\_2](http://www.medscape.com/viewarticle/553967_2).

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

<sup>19</sup> *See supra* notes 33–35, 46–51 and accompanying text.

<sup>20</sup> *See supra* notes 62–66 and accompanying text.

<sup>21</sup> Plaintiffs’ Master Administrative Class Action Complaint for Medical Monitoring and Original Class Action Complaint for Plaintiffs Allen, Kowalewski, Little, Wooden, & Fellows at 52, *In re NFL Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2012 WL 2054482 (E.D. Pa. June 7, 2012) [hereinafter *Complaint*].

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

<sup>23</sup> *Heads Up: Concussions in Football*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/concussion/HeadsUp/pdf/Football\\_Fact\\_Sheet\\_Coaches-a.pdf](http://www.cdc.gov/concussion/HeadsUp/pdf/Football_Fact_Sheet_Coaches-a.pdf) (last visited Mar. 25, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> *Complaint, supra* note 21, at 52.

<sup>26</sup> William P. Meehan III & Richard G. Bachur, *Sport-Related Concussion*, 123 PEDIATRICS 114, 117 (2009).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.*

<sup>31</sup> Joseph M. Hanna, *Concussions May Prove To Be a Major Headache for the NFL*, 84 N.Y. ST. B. J. 10, 11 (2012).

<sup>32</sup> Examiners studied the brain tissue of Mike Webster, Terry Long, and Andre Walters. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See infra* Part II.D.

<sup>36</sup> Hanna, *supra* note at 31, at 11–12.

<sup>37</sup> Hanna, *supra* note at 31, at 12.

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

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

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.* (emphasis omitted).

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- <sup>43</sup> *What Is CTE?*, BOSTON UNIVERSITY CENTER FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY, <http://www.bu.edu/cste/about/what-is-cte/> (last visited Mar. 28, 2013).
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> Hanna, *supra* note 31, at 12.
- <sup>48</sup> Meehan & Bachur, *supra* note 26, at 116–17.
- <sup>49</sup> *Id.* at 115.
- <sup>50</sup> *Id.*
- <sup>51</sup> Arash Markazi, *Dangerous Games: Doctors Show Link Between Concussions and Dementia*, SPORTS ILLUSTRATED, Apr. 23, 2007, [http://sportsillustrated.cnn.com/2007/writers/arash\\_markazi/04/23/concussion.summit/index.html](http://sportsillustrated.cnn.com/2007/writers/arash_markazi/04/23/concussion.summit/index.html).
- <sup>52</sup> *See supra* Part II.B–D.
- <sup>53</sup> *See* Kristina M. Gerardi, *Tackles That Rattle the Brain*, 18 SPORTS LAW. J. 181, 210 (2011).
- <sup>54</sup> Alexander C. Hart, *NFL Head Injuries a Hot Topic in Congress*, L.A. TIMES, October 29, 2009, <http://articles.latimes.com/2009/oct/29/sports/sp-football-congress29>.
- <sup>55</sup> *Id.*
- <sup>56</sup> Sean Gregory, *The Problem with Football: How to Make It Safer*, TIME, Jan. 28, 2010, <http://www.time.com/time/magazine/article/0,9171,1957459-1,00.html>.
- <sup>57</sup> *See* Gerardi, *supra* note 53, at 212–13.
- <sup>58</sup> Hart, *supra* note 54.
- <sup>59</sup> Jamie Talan, *NFL Conducts Its Own Survey on Dementia: Reports More Memory Problems in Retired Football Players*, 9 NEUROLOGY TODAY 13, 14 (2009).
- <sup>60</sup> Gregory, *supra* note 56.
- <sup>61</sup> *Id.* The NFL created the “88 Plan,” named for John Mackey’s jersey number, in 2007 to reimburse families of former NFL players suffering from dementia up to \$88,000 a year for medical expenses. Gerardi, *supra* note 53, at 217. John Mackey, an NFL retiree and Super Bowl winner, suffered from severe dementia and lived in an assisted care facility before his death in 2011. David Steele, *John Mackey’s Price for Playing Football Was Neither Fair nor Just*, SPORTING NEWS (July 7, 2011, 11:41 AM), <http://aol.sportingnews.com/nfl/story/2011-07-07/john-mackeys-price-for-playing-football-was-neither-fair-or-just>. When Mackey’s wife, Sylvia, struggled to pay his medical bills, she pleaded with the NFL for help and consequently, the 88 Plan was born. *Id.*
- <sup>62</sup> Judy Battista, *N.F.L. Joins with G.E. in Effort to Detect Concussions*, N.Y. TIMES, Feb. 3, 2013, at SP6, available at [http://www.nytimes.com/2013/02/03/sports/football/nfl-and-ge-team-up-in-effort-to-detect-concussions.html?\\_r=0](http://www.nytimes.com/2013/02/03/sports/football/nfl-and-ge-team-up-in-effort-to-detect-concussions.html?_r=0).
- <sup>63</sup> *Id.*
- <sup>64</sup> Kareem Copeland, *Report: NFL Partners with GE for Concussion Research*, NFL.COM (Feb. 3, 2013, 9:22 AM), <http://www.nfl.com/news/story/0ap1000000134554/article/report-nfl-partners-with-ge-for-concussion-research>.
- <sup>65</sup> Battista, *supra* note 62, at SP6.
- <sup>66</sup> Jason M. Breslow, *With Eye on Concussions, NFL Adopts New Rule on Helmet Hits*, PUB. BROAD. SERV. (Mar. 22, 2013, 4:12 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/with-eye-on-concussions-nfl-adopts-new-rule-on-helmet-hits/>.
- <sup>67</sup> Paul M. Barrett, *Will Brain Injury Lawsuits Doom or Save the NFL?*, BLOOMBERG BUSINESSWEEK, Jan. 31, 2013, <http://www.businessweek.com/articles/2013-01-31/will-brain-injury-lawsuits-doom-or-save-the-nfl#p1>.
- <sup>68</sup> Paul D. Anderson, *Plaintiffs/Former Players*, NFL CONCUSSION LITIG., [http://nflconclusionlitigation.com/?page\\_id=274](http://nflconclusionlitigation.com/?page_id=274) (last visited Mar. 28, 2013).
- <sup>69</sup> *Complaint*, *supra* note 21, at 13.
- <sup>70</sup> *Id.* at 64.
- <sup>71</sup> *Id.* at 65, 67.
- <sup>72</sup> *See id.* at 77.
- <sup>73</sup> *Id.* at 86, 125–96.
- <sup>74</sup> Darren Heitner & Benjamin Haynes, *NFL Concussion Litigation: Breaking Down the NFL’s Persuasive Motion to Dismiss the Amended Master Complaint*, FORBES (Sept. 2, 2012, 3:29 PM), <http://www.forbes.com/sites/darrenheitner/2012/09/02/nfl-concussion-litigation-breaking-down-the-nfls-persuasive-motion-to-dismiss-the-amended-master-complaint/>.
- <sup>75</sup> *Id.*

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

<sup>77</sup> *Id.*

<sup>78</sup> As of April 30, 2013, the submission date of this Note, the court had not issued a ruling. *Concussion Hearing Held in Philly*, ESPN.COM, Apr. 9, 2013, [http://espn.go.com/nfl/story/\\_/id/9151540/court-hears-arguments-nfl-concussions](http://espn.go.com/nfl/story/_/id/9151540/court-hears-arguments-nfl-concussions).

<sup>79</sup> Barrett, *supra* note 67.

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

<sup>81</sup> See Anderson, *supra* note 68.

<sup>82</sup> Barrett, *supra* note 67.

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

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

<sup>85</sup> Cork Gaines, *Sports Chart of the Day: NFL Revenue Is Nearly 25% More Than MLB*, BUS. INSIDER (Oct. 9, 2012, 2:41 PM), <http://www.businessinsider.com/sports-chart-of-the-day-nfl-revenue-still-dwarfs-other-major-sports-2012-10>.

<sup>86</sup> Rick Meyer, Note, *Will the NFL Feel the Long-Term Effects of Concussions or Can It Avoid the Big Hit?*, NFL CONCUSSION LITIG., at 19, available at <http://nflconcussionlitigation.com/wp-content/uploads/2012/08/MeyerConcussionPaper-copy.pdf>.

<sup>87</sup> Will Oremus, *After Further Review: Why Concussion Lawsuits Won't Bring an End to Football*, SLATE (May 10, 2012, 1:17 PM), [http://www.slate.com/articles/sports/sports\\_nut/2012/05/the\\_end\\_of\\_football\\_why\\_concussion\\_lawsuits\\_won\\_t\\_bring\\_down\\_the\\_game\\_.html](http://www.slate.com/articles/sports/sports_nut/2012/05/the_end_of_football_why_concussion_lawsuits_won_t_bring_down_the_game_.html).

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

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

<sup>90</sup> *Id.*

<sup>91</sup> Meyer, *supra* note 86, at 19.

<sup>92</sup> See Spencer Anderson, *NCAA Institutions and a Duty to Warn Football Student-Athletes: A Look into the Arrington v. NCAA Case*, NFL CONCUSSION LITIG., at 39, available at <http://nflconcussionlitigation.com/wp-content/uploads/2012/08/NCAA-Institutions-and-a-Duty-to-Warn-copy1.pdf>.

<sup>93</sup> See Hanna, *supra* note 31, at 14.

<sup>94</sup> Barrett, *supra* note 67.

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

<sup>96</sup> Hanna, *supra* note 31, at 14.

<sup>97</sup> See Les Carpenter, *Compromise Reigns at Summit on Concussions*, WASH. POST, June 20, 2007, at E01.

<sup>98</sup> See Alan Schwarz, *12 Athletes Leaving Brains to Concussion Study*, N.Y. TIMES, Sept. 24, 2008, at D1.

<sup>99</sup> An actor's tortious conduct need only be one of the causes of another's harm. RESTATEMENT (THIRD) OF TORTS § 26, cmt. c (2002) (emphasis added). See, e.g., Peterson v. Gray, 628 A.2d 244, 246 (N.H. 1993) (holding a defendant's tortious conduct must be a cause of harm, not "the" cause); Dedes v. Asch, 521 N.W.2d 488, 490-92 (Mich. 1994) (rejecting argument that statutory language, "the proximate cause," meant that defendant's conduct must be the only cause of harm). See also Hanna, *supra* note 31, at 20 n.48.

<sup>100</sup> Hanna, *supra* note 31, at 20 n.49 (citing RESTATEMENT (THIRD) OF TORTS § 27 (2005)).

<sup>101</sup> *Id.* at 14.

<sup>102</sup> John Culhane, *Concussions and Cigarettes*, SLATE (July 26, 2011, 1:19 PM), [http://www.slate.com/articles/sports/sports\\_nut/2011/07/concussions\\_and\\_cigarettes.html](http://www.slate.com/articles/sports/sports_nut/2011/07/concussions_and_cigarettes.html).

<sup>103</sup> David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers Over Concussion Risks in Maxwell v. NFL*, 16 MICH. ST. U. J. MED. & L. 265, 291 (2012).

<sup>104</sup> David J. Kain, Note, "It's Just a Concussion." *The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697, 717 (2009).

<sup>105</sup> *Id.* at 714.

<sup>106</sup> Andrew B. Carrabis, Note, *Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications*, 2 HARV. J. SPORTS & ENT. L. 371, 381 (2011).

<sup>107</sup> *Id.*

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

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

<sup>110</sup> Paul D. Anderson Consulting, LLC, *The NFL, Again, Seeks to Kick the Players' Claims Out of Court*, NFL CONCUSSION LITIG. (Dec. 18, 2012), <http://nflconcussionlitigation.com> [hereinafter *NFL, Again*].

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<sup>111</sup> 471 U.S. 202 (1985).  
<sup>112</sup> *Id.* at 220.  
<sup>113</sup> *Id.* at 219–20.  
<sup>114</sup> *Williams v. Nat’l Football League*, 582 F.3d 863, 874 (8th Cir. 2009).  
<sup>115</sup> *Id.*  
<sup>116</sup> *Id.*  
<sup>117</sup> *NFL, Again, supra* note 110.  
<sup>118</sup> *Id.*  
<sup>119</sup> Paul D. Anderson Consulting, LLC, *Exclusive: Concussion Kickoff—Oral Arguments Held in NFL Concussion Litigation*, NFL CONCUSSION LITIG. (Apr. 10, 2013), <http://nflconcussionlitigation.com> [hereinafter *Concussion Kickoff*].  
<sup>120</sup> *Id.*  
<sup>121</sup> *Id.*  
<sup>122</sup> *Id.*  
<sup>123</sup> Master Motion to Dismiss Brief at 5–9, *In re National Football League Players’ Concussion Litigation*, No. 2:12-md-02323-AB (E.D. Pa. Aug. 30, 2012) [hereinafter *Motion to Dismiss*].  
<sup>124</sup> *Concussion Kickoff, supra* note 119.  
<sup>125</sup> 386 F.3d 246 (3d Cir. 2004).  
<sup>126</sup> *Id.*  
<sup>127</sup> *Id.*  
<sup>128</sup> *Id.*  
<sup>129</sup> No. 3:07-0002, 2007 WL 5445124 (M.D. Tenn. May 31, 2007).  
<sup>130</sup> *Id.* at \*16.  
<sup>131</sup> *See Duerson v. Nat’l Football League, Inc.*, No. 12C2513, 2012 WL 1658353, at \*5 (N.D. Ill. May 11, 2012).  
<sup>132</sup> 681 S.E.2d 405, 407–08 (Ct. App. N.C. 2009).  
<sup>133</sup> *Id.* at 408.  
<sup>134</sup> *Id.* at 415.  
<sup>135</sup> *Id.*  
<sup>136</sup> *Williams v. Nat’l Football League*, 582 F.3d 863 (8th Cir. 2009).  
<sup>137</sup> *Id.* at 868–69.  
<sup>138</sup> *Id.* at 871.  
<sup>139</sup> *Id.* at 881.  
<sup>140</sup> *Id.* at 881–82.  
<sup>141</sup> *Id.*  
<sup>142</sup> Clark Belote, *Football and Torts: Two American Traditions and the NFL Concussion Litigation*, Note, NFL CONCUSSION LITIG., at 32, [http://nflconcussionlitigation.com/wp-content/uploads/2012/08/FOOTBALL\\_AND\\_TORTS\\_2013-copy.pdf](http://nflconcussionlitigation.com/wp-content/uploads/2012/08/FOOTBALL_AND_TORTS_2013-copy.pdf).  
<sup>143</sup> *Id.*  
<sup>144</sup> *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994).  
<sup>145</sup> Belote, *supra* note 142, at 33 (citing *Complaint* ¶ 295).  
<sup>146</sup> *Motion to Dismiss, supra* note 123, at 13.  
<sup>147</sup> *Id.* at 14.  
<sup>148</sup> *See Stringer v. Nat’l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007). The court held that despite several provisions in the CBA that imposed express duties on the NFL relating to medical care and treatment of players, the CBA assigned no duty to regulate heat-related illness. *Id.* at 905–07. By voluntarily issuing hot weather guidelines, the NFL voluntarily assumed a duty to exercise reasonable care when implementing them. *Id.* at 904–08. Consequently, the *Stringer* court determined that the plaintiff’s negligence claims arose independently of the CBA, and were not preempted. *Id.* at 908.  
<sup>149</sup> *See id.* at 909–10.  
<sup>150</sup> *See id.*  
<sup>151</sup> *See Motion to Dismiss, supra* note 123, at 14.  
<sup>152</sup> Barrett, *supra* note 67.  
<sup>153</sup> *Id.*  
<sup>154</sup> *Id.*  
<sup>155</sup> *Id.*

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<sup>156</sup> See Patrick Hruby & Jay Lovinger, *Strange as It Sounds, Trouble in Paradise?*, ESPN, <http://sports.espn.go.com/espn/page2/story?page=hruby/070212> (last updated Feb. 13, 2007).

<sup>157</sup> Hall of Famers Lem Barney, Joe DeLamielleure, Mike Ditka, and Jerry Kramer are among the members of the Gridiron Greats Assistance Fund. Clifton Brown, *Ex-Players Say Increase in Pensions Is Needed*, N.Y. TIMES (Feb. 2, 2007), [http://www.nytimes.com/2007/02/02/sports/football/02disabilities.html?\\_r=0](http://www.nytimes.com/2007/02/02/sports/football/02disabilities.html?_r=0).

<sup>158</sup> See Hruby & Lovinger, *supra* note 156.

<sup>159</sup> *Long Term Care Insurance*, NFL PLAYER CARE, <https://www.nflplayercare.com/PlayerCarePlanLongTermCare.aspx> (last visited Apr. 29, 2013).

<sup>160</sup> *Id.*

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

<sup>162</sup> *Id.*

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

<sup>164</sup> *Id.*

<sup>165</sup> Mike O'Hara, *NFL, Retired Players Announce \$42 Million "Common Good Fund" to Benefit All Former Players*, DETROIT LIONS (Mar. 19, 2013), <http://www.detroitlions.com/news/ohara/article-1/NFL-retired-players-announce-42-million-common-good-fund-to-benefit-all-former-players/08070928-a192-41ed-ab66-58a25913b83a>.

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

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> U.S. Dep't of Justice, September 11th Victim Compensation Fund: General Program Information, FAQ §1.5, <http://www.vcf.gov/genProgramInfo.html> (last visited Apr. 29, 2013).

<sup>170</sup> *Id.* § 6.2.

<sup>171</sup> *Id.* §§ 6.5, 6.6.

<sup>172</sup> *Id.* § 6.6.

<sup>173</sup> *Id.* § 8.1.

<sup>174</sup> *Id.* § 3.7.

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

<sup>176</sup> *Id.* § 11.1.

<sup>177</sup> See *infra* notes 33, 46–48 and accompanying text.

<sup>178</sup> See Travis Waldron, *The NFL Is a Tax-Exempt Organization—But One Senator Wants to Change That*, THINKPROGRESS (Apr. 25, 2013, at 5:12 PM), <http://thinkprogress.org/alyssa/2013/04/25/1923231/coburn-nfl-tax-exempt/?mobile=nc>.

<sup>179</sup> *Id.*

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

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* The Marketplace Fairness Act allows states to collect existing sales taxes on purchases made online from an out-of-state company. *Internet Sales Tax Bill Approved by Senate*, INQUISITR (Mar. 23, 2013), <http://www.inquisitr.com/586291/internet-sales-tax-bill-approved-by-senate/>.

<sup>183</sup> Waldron, *supra* note 178.

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

<sup>185</sup> *Id.*

<sup>186</sup> “Technically, the city owns the stadium. Personal seat licenses or PSLs are sold through a public agency, tax-free. Profits are then used to pay down the owner’s share of the NFL loan. The money from the PSLs never goes directly to the teams, though the teams save millions of dollars in taxes and the loan from the NFL is paid down significantly, providing a [substantial] benefit to the owners.” Andrew Delaney, Note, *Taking a Sack: The NFL and Its Undeserved Tax-Exempt Status*, 1 ARIZ. ST. SPORTS & ENT. L.J. 63, 86 (2011).

<sup>187</sup> Waldron, *supra* note 178.