# FOOTBALL AND TORTS: TWO AMERICAN TRADITIONS AND THE NFL CONCUSSION LITIGATION

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## I. INTRODUCTION

On January 31, 2012, the Judicial Panel on Multidistrict Litigation issued an order consolidating several lawsuits against the National Football League ("the NFL") into one "master" case of Multidistrict Litigation ("MDL").[1] All of these lawsuits claim tortious conduct on the part of the NFL resulting in neuro-degenerative disease and injury to professional football players.[2] As of January 24, 2013, over 4,000 retired NFL players, more than one third of players to ever sign an NFL contract had brought suit against the NFL concerning head injuries they sustained on the field of play.[3] Among these plaintiffs are famous players, unknowns, spouses of

[1] Case Management Order No. 1, *In re* National Football League Players' Concussion Litigation, No. 2:12-cv-03224-AB (E.D. Pa. Mar. 6, 2012). As a matter of civil procedure, the Panel here acted pursuant to its power under 28 U.S.C. § 1407, which provides that, "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

[2] Case Management Order No. 1, *In re* National Football League Players' Concussion Litigation, No. 2:12-cv-03224-AB (E.D. Pa. Mar. 6, 2012).

[3] Paul D. Anderson, *NFL Concussion Lawsuit Roundup*, NFL CONCUSSION LITIGATION (Jan. 24, 2013), http://nflconcussionlitigation.com; *see also* Nathan Fenno & Luke Rosiak, NFL CONCUSSION LAWSUITS (Sept. 11, 2012), http://www.washingtontimes.com/footballinjuries/; *see generally* Paul D. Anderson, NFL CONCUSSION LITIGATION, http://nflconcussionlitigation.com.

players, and even estates of players who took their own life.[4] With the outstanding popularity of the NFL, these lawsuits have garnered national attention, prompting debate, discussion, and research about the dangers of football-related head injuries and the future of the NFL.[5] The litigation has potential to reach the scale of the tobacco litigation of the 1990's[6], but the NFL has thrown a substantial wrench in the players' suit with a federal employment law preemption defense.[7]

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[4] *See* Paul D. Anderson, *Court Documents*, NFL CONCUSSION LITIGATION, http//nflconcussionlitigation.com/?page_id=18; *see, e.g.*, Complaint, Estate of Duranko v. Nat'l Football League, No. 2:12-cv-00702-AB (E.D. Pa. Feb. 9, 2012).

[5] *See, e.g.*, Nathan Fenno, *Ray Easterling's Death Brings Injuries' Effects Into Focus*, WASH. TIMES (Jun. 20, 2012), http://www.washingtontimes.com/news/2012/jun/20/easterlings-death-brings-injuries-effects-into-foc/?page=all (detailing the mental illness and ultimate suicide by former Atlanta Falcon, University of Richmond Spider, and Richmond resident Ray Easterling); Doug Farrar, *Ray Easterling, Lead Plaintiff in NFL Concussion Lawsuit, Commits Suicide*, YAHOO! SPORTS (Apr. 12, 2012), http://sports.yahoo.com/blogs/nfl-shutdown-corner/ray-easterling-lead-plaintiff-nfl-concussion-lawsuits-commits-025009388.html.

[6] *See* Darren Heitner, *NFL Faces Tobacco-Like Damages Reaching Billions Of Dollars In Concussion Litigation*, FORBES (Jun. 12, 2012), http://www.forbes.com/sites/darrenheitner/2012/06/12/nfl-faces-tobacco-like-damages-reaching-billions-of-dollars-in-concussion-litigation/.

[7] *See* Master Motion to Dismiss Brief, *In re* National Football League Players' Concussion Litigation, No. 2:12-md-02323-AB (E.D. Pa. Aug. 30, 2012) [hereinafter Motion to Dismiss]; *see also* Daniel Fisher, *NFL Concussion Suit Likely to Get Sacked by Employment Law*, FORBES

The consolidation of cases into the MDL has created a concrete forum to decide the legal issues presented by the players' claims and the NFL's defenses. This note examines the merits of these claims and defenses, and concludes that the court will likely dismiss the plaintiffs' claims. Part II details the history and recent rise in football-induced concussion litigation. Part III addresses the specific claims the plaintiffs made against the NFL in their master complaint. Part IV discusses the issue of federal preemption and the NFL's motion to dismiss on that basis. Finally, Part V predicts that the trial court will grant the motion to dismiss, and discusses the future implications of the court's ruling.

## II. RECENT HISTORY OF CONCUSSION LITIGATION

### *A. The History of Concussions in Football*

As mentioned above, former football players are joining lawsuits at a tremendous pace. The players have no downside. The attorney's fees are contingent; they no longer have an NFL paycheck, and do not know what symptoms wait to develop from their alleged injuries.[8] The game of football is changing at a slower pace than medical science, and as a consequence, injuries to litigate and potential damages are on the rise.[9]

In 1912, Pop Warner, famous football coach, said:

> Playing without helmets gives players more confidence, saves their heads from many jolts, and keeps their ears from becoming torn or sore. I do not encourage their use. I have never seen an accident to the head which was serious, but I have

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(Jun. 12, 2012), http://www.forbes.com/sites/danielfisher/2012/06/12/nfl-concussion-suit-likely-to-get-sacked-by-employment-law/2/.

[8] *See, e.g.*, Andrew Brandt, *The NFL's Concussion Conundrum*, ESPN (Oct. 19, 2012, 12:53 PM), http://espn.go.com/nfl/story/_/id/8513300/the-issue-concussions-nfl-not-going-away.

[9] *Id.*

> many times seen cases when hard bumps on the head so dazed the player receiving them that he lost his memory for a time and had to be removed from the game.[10]

Coach Warner's statements reflect the changed perception of medicine in football, while also identifying a key development in football that is arguably the solution and problem: the helmet. The helmet Coach Warner spoke of was merely a leather cap, disincentivizing putting one's head in the game, but now, "[t]he modern helmet is like a weapon."[11] Because players are aware of the protection helmets provide, on balance the helmet has become "more of a sword than a shield."[12] This paradox is exacerbated for brain injuries because the modern helmet, while superb, really only provides protection of the skull, not the brain matter underneath.[13]

The problem has not gone unnoticed in the NFL. Over the course of the back half of the twentieth century, the NFL has slowly enacted several rule changes aimed at

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[10] Paul D. Anderson, *Exhibits*, NFL CONCUSSION LITIGATION (Jan. 9, 2013), http://nflconcussionlitigation.com/?page_id=187.

[11] Jeremy P. Gove, *Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem*, 14 VAND. J. ENT. & TECH. L. 649, 656 (Spring 2012) (quoting Dr. Julian Bailes, nueorosurgeon *in* Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions.

[12] *Id.*

[13] *Id.* (citing Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions (forensic pathologist Dr. Bennet Omalu noting that he had performed numerous autopsies of people in motorcycle accidents where the helmet protected the skull, but the brain was "mush")).

improving player safety.[14] In 1962, the NFL initially issued a prohibition on grabbing a player's facemask.[15] In 1977, the NFL prohibited slapping another player's head, i.e., the "Deacon Jones Rule."[16] In 1979, the NFL prohibited players' using helmets to "butt, spear or ram an opponent," but that rule did not carry the weight and enforcement of a personal foul until 1996.[17] Finally, prior to the 2011 season, the NFL moved kickoffs from the kicking team's own thirty yard line to the the team's thirty-five yard line.[18] The change sought to increase the frequency of kicked balls reaching the far end zone, thus increasing the number of touchbacks, thus reducing the number of kickoff returns, a play that poses great threat of collision and injury.[19] Some argue that these rule changes

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[14] *Id.*

[15] *Id.* (citing Complaint ¶ 118, Maxwell v. Nat'l Football League, No. BC465842 (Cal. Super. Ct. July 19, 2011)).

[16] *Id.* Deacon Jones, a defensive lineman, was known for slapping the head of his opposing offensive lineman in order to get a step on him in rushing the quarterback. *Id.* at 656 n.42.

[17] *Id.* at 657 (citing Complaint ¶ 7, Easterling v. Nat'l Football League, No. 11CV05209, 2011 WL 3627055 (E.D. Pa. 2011).

[18] Jarrett Bell, *New NFL Kickoff Rule Could be Game-Changer*, USA TODAY (Sept. 11, 2011), http://www.usatoday.com/sports/football/nfl/2011-09-08-new-nfl-rule-could-change-kickoff-return-strategy_n.htm.

[19] *See id.* The rule also prevents the kicking team's players from getting more than a 5-yard running start before the kick, once again aiming to reduce the jousting-like impact of the two teams charging at each other from opposing ends of the field. *Id.* Additionally, the rule follows a

"represent an implied admission by the NFL that injuries occur as a direct result of impact to the head," and that the NFL "did not take these injuries seriously for many years, and still fails to do so."[20]

Among professional football's seemingly obvious propensity for head injuries, the NFL remained silent and secretive on opinions and figures for some time.[21] The first attempt at addressing the issue came in 1994, when then-NFL Commissioner Paul Tagliabue convened the Mild Traumatic Brain Injury ("MTBI") Committee.[22] MTBI is "the more academically appropriate term" for concussion.[23] That committee went on to publish a thirteen-part study over the course of three years, writing on numerous scientific claims about the intersection of the NFL and concussions.[24] The committee concluded that there were 0.41 reported concussions per NFL game between the 1996 and 2001 seasons.[25] More than fifty-one percent of the players who

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change in the year prior that legislated how many players can form the "wedge" coverage on kick coverage schemes. *Id.*

[20] Gove, *supra* note 11, at 658.

[21] *Id.* at 658-74 (discussing the NFL's flip-flopping attempts to research the concussion issue).

[22] *Id.* at 659 (citing Paul Tagliabue, Editorial, *Tackling Concussions in Sports*, 53 NEUROSURGERY 796, 796 (2003)).

[23] *Id.* at 660 (quoting Elliot J. Pellman, Editorial, *Background on the National Football League's Research on Concussion in Professional Football*, 53 NEUROSURGERY 797, 797 (2003)).

[24] *Id.* The committee reviewed game film, questioned different tackling techniques, etc. *Id.*

[25] *Id.* at 661.

suffered a reported concussion either continued playing after little to no rest or at least returned to play in the same game, placing them at a serious risk for second-impact syndrome.[26]

Along with these published reports came a curious series of events relating to the condition known as chronic traumatic encephalopathy ("CTE"). CTE is a progressive degenerative brain disease found in retired athletes with a history of repetitive concussions, only truly diagnosable post-mortem.[27] The Taglibue-founded MTBI Committee did not discover any cases of CTE in NFL players,[28] and the NFL's official stance denied any increased risk of suffering injury after a concussion.[29] The MTBI Committee limited CTE cases to being

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[26] *Id.* (citing Robert C. Cantu, *Second Impact Syndrome*, 17 CLINICS SPORTS MED. 37, 38 (1998) ("The syndrome occurs when an athlete who sustains a head injury--often a concussion or worse injury, such as a cerebral contusion-- sustains a second head injury before symptoms associated with the first have cleared.")).

[27] *See* Press Release, Ctr. for the Study of Traumatic Encephalopathy, New Pathology Findings Show Significant Brain Degeneration in Professional Athletes with History of Repetitive Concussions (Sept. 25, 2008), *available at* http:// www.bu.edu/cste/news/press-releases/september-25-2008 ("[CTE] is clinically associated with the development of memory loss, confusion, impaired judgment, paranoid and aggressive behavior, depression, dementia and Parkinsonism.").

[28] Gove, *supra* note 11, at 663.

[29] *See* National Football League, *NFL Outlines for Players Steps Taken to Address Concussions*, NFL.COM (Aug. 14, 2007 8:37 PM), http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true ("Current research with professional athletes has shown that you should not be at greater risk of

"reported only in boxers and a few steeplechase jockeys."[30] Yet, in September 2002, Hall of Fame center "Iron" Mike Webster of the 1970's Steelers died of heart failure at the age of 50.[31] Living out of his battered Chevrolet pick-up, Webster suffered from countless symptoms including chronic pain, insomnia, and dementia.[32] When the local coroner, Dr. Bennet Omalu conducted an autopsy he found tau protein clusters in his brain indicating that Webster suffered from CTE at the time of his death.[33] This finding prompted Dr. Omalu, along with University of Pittsburgh Doctors, to publish an article documenting the first case of long-term cognitive decline in an NFL player.[34] Multiple doctors found the football-CTE theory plausible and

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further injury once you receive proper medical care for a concussion and are free of symptoms.").

[30] Gove, *supra* note 11, at 663 (quoting Elliot J. Pellman, Editorial, *Background on the National Football League's Research on Concussion in Professional Football*, 53 NEUROSURGERY 797, 797 (2003)).

[31] Greg Garber, *A Tormented Soul*, ESPN (Jan. 24, 2005), http://sports.espn.go.com/nfl/news/story?id=1972285.

[32] *Id.* ("After 17 seasons in the National Football League, Webster had lost any semblance of control over his once-invincible body. His brain showed signs of dementia. His head throbbed constantly. He suffered from significant hearing loss. Three lumbar vertebrae and two cervical vertebrae ached from frayed and herniated discs. A chronically damaged right heel caused him to limp. . .").

[33] *Id.*

[34] *See* Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 Neurosurgery 128, 131 (2005).

consistent with the similarities between football and boxing, the sport most commonly associated with CTE.[35] The NFL's MTBI Committee called for retraction of the article claiming Dr. Omalu misinterpreted and misapplied the applicable medical literature on CTE and questioning the amount of medically defined "traumatic" head blows offensive linemen actually take.[36] Yet, Dr. Omalu never retracted the article.[37]

*B. The Commencement of Litigation*

A group of plaintiffs, headed by Vernon Maxwell, filed the first concussion-based suit against the NFL on July 19, 2011.[38] Since then, the primary suit has been consolidated into the MDL, and over 4,000 former players have joined.[39] The scale and nature of the NFL concussion litigation has been likened to the big tobacco litigation of the 1990s in that there can be no dispute that players knew football was dangerous, but the plaintiffs question what the NFL knew,

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[35] Gove, *supra* note 11, at 666 (citing Julian E. Bailes, Commentary, *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 Neurosurgery 128, 134 (2005); Joseph Bleiberg, Commentary, *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 Neurosurgery 128, 134 (2005)).

[36] *Id.* at 666-67.

[37] *Id.* at 667.

[38] Complaint, Maxwell v. Nat'l Football League, No. BC465842 (Cal. Super. Ct. July 19, 2011); *see also* Paul D. Anderson, *NFL Concussion Lawsuit Roundup*, NFL CONCUSSION LITIGATION (Dec. 27, 2012), http://nflconcussionlitigation.com.

[39] *See* Nathan Fenno & Luke Rosiak, NFL CONCUSSION LAWSUITS, (Jan. 23, 2013), http://www.washingtontimes.com/footballinjuries/ (creating a navigable database of plaintiffs based on position, time, era played, etc.).

when it knew it, and what it did about it, just like the tobacco company scientists.[40] In addition, damages could reach epic figures, with the NFL's revenue reaching upwards of $9 billion in 2010 alone.[41]

The coming of litigation was no surprise, especially after congressional hearings on the NFL's concussion issue in October 2009.[42] In the hearings, which included doctors, former player Merrill Hoge, and others, Commissioner Roger Goodell refused to definitively answer whether there was "a link between playing professional football and the likelihood of contracting a brain-related injury such as dementia, Alzheimer's, depression, or CTE."[43] In response to a pressed question, Goodell only said, "The answer is, the medical experts would know better than

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[40] *See, e.g.*, Jon Campisi, *NFL Players' Concussion Litigation – New 'Big Tobacco' – Moves Forward in Philly*, LEGAL NEWSLINE (Sept. 19, 2012), http://legalnewsline.com/in-the-spotlight/237346-nfl-players-concussion-litigation-new-big-tobacco-moves-forward-in-philly ("The crux of these cases is: What did medical professionals know historically about concussions, and what was the common medical practice 10, 20 years ago when these issues started arising?" (quoting sports law attorney Travis Leach)). Additionally, about a quarter of the plaintiffs' attorneys working on the case were involved in the big tobacco litigation. *Id.*

[41] *See* Heitner, *supra* note 6.

[42] *See Legal Issues Relating to Football Head Injury (Parts I and II): Hearings Before the H. Committee on the Judiciary*, 111th Cong. (2009, 2010).

[43] *Id.* at 85 (question of Congressman John Conyers, Jr. of Michigan); *see also* Alan Schwarz, *N.F.L. to Shift in Its Handling of Concussions*, N.Y. TIMES, Nov. 22, 2009, at A1.

I would with respect to that."[44] Representative Linda Sánchez of California went on tell Goodell, "[t]he N.F.L. sort of has this blanket denial or minimizing of the fact that there may be this, you know, link. And it sort of reminds me of the tobacco companies pre-'90s when they kept saying, 'Oh, there's no link between smoking and damage to your health.'"[45] Interestingly though, twenty-four of the forty-one committee members that convened the hearing in 2009 received contributions from the NFL's Gridiron PAC.[46] After the hearings, the NFL moved to institute new guidelines requiring teams to receive advice from independent neurologists while treating players with brain injuries.[47] And in April 2010, the NFL gave researchers of traumatic brain injury at Boston University an unrestricted gift of $1 million, likely an attempt to mitigate public distrust.[48]

With greater awareness of the issue, more players have come forward as plaintiffs. Awareness and plaintiffs gained large spikes with the May 2, 2012 suicide of 12-time Pro Bowl

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[44] *Hearings*, *supra* note 42, at 86 (statement of Roger Goodell, Commissioner, National Football League).

[45] *Id.* at 116.

[46] Melissa Segura, *NFL's Political Action Committee Has Doled Out $876,857 in 2012*, SPORTS ILLUSTRATED.COM (Nov. 6, 2012 3:35 PM), http://sportsillustrated.cnn.com/2012/writers/melissa_segura/11/06/donations/index.html.

[47] Alan Schwarz, *N.F.L. to Shift in Its Handling of Concussions*, N.Y. TIMES, Nov. 22, 2009, at A1.

[48] Art Jahnke, *Looking For Trouble: A Gift from the NFL Helps Scientists Take the Lead in Traumatic Brain Disorder Research*, BOSTONIA (Fall 2012), *available at* www.bu.edu/bostonia/campaign12/head-trauma/.

linebacker Junior Seau.[49] At the same time, researchers are increasingly studying the science surrounding traumatic brain injury, and increasingly suggesting that football can cause CTE.[50] Researchers at Boston University identified CTE in sixty-eight of the eighty-two brains they have examined including those of former professional hockey players.[51] Publicity and science came to a confluence for plaintiffs and future plaintiffs with the release of Seau's autopsy report by the National Institutes of Health, as requested by Seau's family.[52] The diagnosis was no revelation: CTE.[53] Paul Anderson, the attorney who runs the blog NFLConcussionLitigation.com, expects the CTE diagnosis to spawn even more plaintiffs in the suit.[54]

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[49] *See* Sean Gregory, *Will Junior Seau's CTE Diagnosis Cause More Ex-players to Sue the NFL?*, TIME (Jan. 11, 2013), http://keepingscore.blogs.time.com/2013/01/11/will-junior-seaus-cte-diagnosis-cause-more-ex-players-to-sue-the-nfl/.

[50] *See, e.g.*, Jahnke, *supra* note 48.

[51] *Id.* Medical professor Ann McKee noted, "We have a very clear idea of how the disease progresses through the nervous system, and we realize because of the ease of collecting all these cases that it must be more prevalent than we ever thought." *Id.*

[52] Gregory, *supra* note 49.

[53] *Id.* ("Specifically, the neuropathologists found abnormal, small clusters called neurofibrillary tangles of a protein known as tau within multiple regions of Mr. Seau's brain.").

[54] *Id.* The researchers at Boston University have even been contacted by criminal defense lawyers seeking information about CTE as a legal defense based on the disease's violent symptoms. *See* Jahnke, *supra* note 48.

## III. THE PLAYERS' CASE

Former NFL players ("the plaintiffs" or "the players") have alleged a multitude of tortious actions by the NFL.[55] The parties to this civil action are obviously of note. Together, the plaintiffs and defendant constitute professional football and one of the most popular entertainment products in the United States.[56] The NFL is an unincorporated association made up of thirty-two independently owned professional football teams.[57] If the plaintiffs do make it to the trial stage, "it appears that the NFL could be confronted with the possibility of paying out tobacco-like damages reaching upwards of billions of dollars."[58] As outlined below, the plaintiffs' case will center on what the NFL did or did not do in warning players about potential head injuries.

### *A. The Master Amended Complaint*

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[55] *See* Master Amended Complaint, *In re* National Football League Players' Concussion Litigation, No. 2:12-cv-03224-AB (Jul. 17, 2012) [hereinafter MAC]. The plaintiffs have also asserted claims against other defendants including NFL Properties LLC and Riddell, Inc. (primary helmet manufacturer), but those claims are tangential and beyond the scope of this note. *See id.*

[56] *See, e.g.*, Scott Collins, *Super Bowl's on a New Ratings High, Again*, L.A. TIMES, Feb. 8 2012, at D16 ("Total viewership of NBC's Super Bowl coverage was an average 111.3 million.").

[57] American Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2207 (2010). The NFL originally organized in 1920 in Canton, Ohio. *Id.*

[58] Heitner, *supra* note 6 (asserting "[t]hat level of liability would likely bring the NFL to an abrupt end").

As with all complaints, the plaintiffs' complaint sets out an elaborate series of factual allegations followed by several legal claims.[59] The plaintiffs assert, "Since the NFL's inception in the first half of the 20th Century, the NFL has been aware of the growing body of scientific evidence and its compelling conclusions that professional football players who sustain repetitive MTBI during their careers are at greater risk for chronic neurocognitive illness and disabilities both during their football careers and later in life."[60] The plaintiffs allege that the NFL sat on that information and "ignored, minimized, disputed, and actively suppressed" the link between concussive football injuries and degenerative neurological disease and the "broader awareness" of that link.[61]

The plaintiffs allege that the NFL "mythologized violence through the media," it "markets and glorifies football's violence through NFL Films," and was in a "superior position of knowledge and authority and owed a duty to players."[62] Further, the NFL "knew the dangers and risks associated with repetitive head impacts and concussions," and "voluntarily undertook

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[59] *See* MAC.

[60] *Id.* ¶ 4.

[61] *Id.* ¶ 5.

[62] *Id.* ¶¶ 50 – 66. The list of videos created by NFL Films glorifying violent plays includes, but is not limited to, the following titles: "NFL: Moment of Impact" (2007); "NFL's 100 Greatest Tackles" (1995); "Big Blocks and King Size Hits" (1990); "The Best of Thunder and Destruction – NFL's Hardest Hits"; "NFL Films Video: Strike Force" (1989); "The NFL's Greatest Hits" (1989); "Crunch Course"; "Crunch Course II" (1988); "Crunch Masters"; "In the Crunch" (1987); "NFL Rocks"; "NFL Rocks: Extreme Football" (1993). *Id.* ¶ 56.

the responsibility of studying head impacts in football, yet fraudulently concealed their long-term effects."[63]

The plaintiffs set out fourteen different counts of legal claims.[64] These include negligence-based claims and fraud-based claims: declaratory relief, medical monitoring, wrongful death and survival, fraudulent concealment, fraud, negligent misrepresentation, negligence, loss of consortium, negligent hiring, negligent retention, and civil conspiracy/fraudulent concealment.[65] Principle among these is the plaintiffs' allegation that the NFL, as the "monopolistic" governing body of professional football, "held itself out as the guardian and authority on the issue of player safety and has unilaterally shouldered for itself a common law duty to provide players with rules and information that protect them as much as possible from short-term and long-term health risks."[66] Thus, the crux of the negligence-based claims is what the NFL failed to do in order make the game safer, earlier.

On the other hand, the fraud-based claims center on the affirmative actions the NFL allegedly took to mislead players about risks of head injury.[67] Factually, the key issue will be whether the NFL made an effort to disprove findings about concussions, effectively withholding information and failing to warn players about the long-term health risk when they played on the field. Here, the plaintiffs target the NFL's MTBI Committee as the wrongdoer who published materials that, "the NFL knew or should have known were misleading, downplaying and

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[63] *See id.* ¶ 276.

[64] *See id.*

[65] *Id.*

[66] *Id.* ¶ 6.

[67] *Id.* ¶¶ 277-319.

obfuscating to NFL players the true and serious risks of repetitive traumatic head impacts."[68] But, like the proof of these allegations, whether the players' case makes it to trial, or even discovery, remains to be seen.

*B. Plaintiffs' Brief in Opposition of the Motion to Dismiss*

As discussed in detail below in Part IV, the NFL has moved to dismiss the case on preemption grounds.[69] In response, the players filed a brief insisting that federal law does not preempt their claims.[70] The players argue that Third Circuit precedent creates a "demanding standard for § 301 preemption,"[71] limiting preemption to claims that require a court to resolve a "bona fide interpretive dispute dispute regarding a CBA's terms."[72] As such, the players assert that the NFL has failed to show that resolution of the plaintiffs' claims would require the court to resolve a bona fide interpretive dispute concerning a CBA provision.[73] The players iterate that the NFL had a duty "to take reasonable precautions to safeguard the health of its players," and that duty is not in rooted in contract, but in a common law duty created by "the NFL's historical

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[68] *Id.* ¶ 310.

[69] *See infra* Part IV.

[70] *See* Plaintiffs' Master Reply Brief in Opposition to the Defendants' Motion to Dismiss, *In re* National Football League Players' Concussion Litigation, No. No. 2:12-md-02323-AB (Oct. 31, 2012) [hereinafter Master Reply Brief].

[71] *Id.* at 12 (citing Kline v. Security Guards, Inc., 386 F.3d 246, 256 (3d Cir. 2004)).

[72] *Id.* at 11.

[73] *Id.* at 13 ("Unless and until both sides proffer competing and plausible interpretations of a specific provision – creating a bona fide interpretive dispute for this court to resolve – Players' claims simply do not implicate § 301.").

actions and statements."[74] According to the players, those actions and statements came in the form of efforts to research concussions, glorification of football violence, and the NFL's voluntary decision to create the MTBI Committee.[75] The players argue that the common law informed the duty that the NFL owed to the players based on the special relationship between the two parties.[76] Moreover, the players argue that because the duty is based in the common law, the court need not interpret the terms of the CBA, triggering preemption.[77]

The players' arguments for both the negligence-based claims and the fraud-based claims assert that the CBA provisions cited by the NFL pose only factual questions, not issues of contract interpretation.[78] "No matter what the CBAs may have required Clubs and doctors to do, they *in fact* failed to warn Players about the dangers of playing with concussive and sub-concussive injuries."[79] Likewise, the players argue that the NFL had a duty not to commit fraud, which did not depend on the meaning of any CBA.[80] The players insist that their fraud-based claims do not require a showing of a duty to disclose because they "do not allege merely that the NFL remained silent in the face of the concussion crisis; they allege that the NFL orchestrated an affirmative 'campaign of disinformation' designed to manipulate Players' understanding of

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[74] *Id.* at 15.

[75] *Id.*

[76] *See id.* at 16.

[77] *Id.* at 18.

[78] *Id.* at 19.

[79] *Id.* at 18 (emphasis in original).

[80] *See id.* at 21.

neurological risk."[81] In essence, proving the elements of an intentional tort do not and cannot require interpretation of a contract. If the court finds this argument persuasive, it could very well grant the motion to dismiss in part severing the case along the demarcation between fraud claims and negligence-based claims.

Finally, the players argue that the NFL's arguments are inapplicable to players whose careers fell entirely within the small gaps of time where no CBA was in place.[82] This last-resort argument attempts to save at least a fraction of the players' cases, but likely seeks a distinction too pedantic.[83]

## IV. MERITS OF THE NFL'S ARGUMENTS

The NFL filed a motion to dismiss with a supporting brief[84], as well as an additional memorandum[85] in further support of its motion to dismiss following the plaintiffs' reply brief in opposition to the motion to dismiss. In its memorandum attached to its motion to dismiss pursuant to Federal Rule 12(b)(6), the NFL argued that federal law preempts the plaintiffs'

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[81] *Id.* (internal quotation marks omitted).

[82] *Id.* at 26. This includes players who retired before 1968 and players whose career fell entirely between 1987 and 1993. *Id.*

[83] *Id.* at 27 ("At a minimum, then, the NFL's motion should be denied wit respect to any Player whose career did not coincide with a CBA.").

[84] Motion to Dismiss, *supra* note 7.

[85] Defendants' Reply Brief in Further Support of Motion to Dismiss, *In re* National Football League Players' Concussion Litigation, No. No. 2:12-md-02323-AB (E.D. Pa. Dec. 17, 2012) [hereinafter NFL Reply Brief].

claims.[86] The NFL presents a bird's eye view of its primary argument in the brief's opening paragraph: "Plaintiffs' action—contending that the NFL failed to fulfill a duty to ensure the safety of NFL players—is a labor dispute the resolution of which depends upon an interpretation of the terms of the applicable CBAs. Accordingly, these claims should be dismissed."[87] The NFL has raised this defense in numerous suits from players before with varying success.[88] Despite the kitchen sink of claims the plaintiffs have brought, the NFL maintains that all claims must be dismissed on preemption grounds.[89] Yet treading carefully, the NFL reserved the intention to argue other grounds for defense and dismissal.[90] In both briefs, the NFL asserted, "To the extent, however, that any claim is found not to be preempted, the NFL intends to argue at a later date that such claims should be dismissed for failure to state a claim and failure to

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[86] *See* Motion to Dismiss, *supra* note 7, at 3.

[87] *Id.*

[88] *See, e.g.*, Duerson v. Nat'l Football League, Inc., No. 12 C 2513, 2012 WL 1658353, at *6 (N.D. Ill. May 11, 2012) (holding concussion claim for negligence preempted); Stringer v. Nat'l Football League, 474 F. Supp.2d 894, 908-09 (S.D. Ohio 2007) (holding Korey Stringer's widow's claims for his heat stroke death preempted); Brown v. Nat'l Football League, 219 F. Supp.2d 372, 387 (S.D. N.Y. 2002) (holding that vicarious liability claims against the NFL for referee's negligently striking player in the eye with a penalty flag were not preempted); Holmes v. Nat'l Football League, 939 F. Supp. 517, 527 (N.D. Tex. 1996) (holding that player's claim for fraudulently inducing his placement in a drug testing program was preempted).

[89] *See* NFL Reply Brief, *supra* note 85, at 22-23.

[90] *See* Motion to Dismiss, *supra* note 7, at 6 n.2, at 9 n.8; NFL Reply Brief, *supra* note 85, at 25 n.9.

follow the agreed-upon grievance procedures, and because they are time-barred."[91] Not including the potential tort defenses at a trial stage, it appears that the NFL has several layers of defenses lined up for the plaintiffs to hurdle, signaling a foreclosure to the possibility of settlement. The first hurdle, though, will be federal preemption.

*A. Labor Management Relations Act Preemption Doctrine*

The doctrine of federal preemption stems from the Supremacy Clause found in Article VI of the United States Constitution.[92] Preemption doctrine pervades the realm of labor law, especially the jurisprudence concerning Section 301 of the Labor Management Relations Act.[93] As the Supreme Court has recognized, "Congressional power to legislate in the area of labor

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[91] Motion to Dismiss, *supra* note 7, at 9 n.8 (citing Case Management Order No. 4, ¶ 3, *In re* National Football League Players' Concussion Litigation, No. 2:12-cv-03224-AB (E.D. Pa. Jun. 21, 2012); *see also* NFL Reply Brief, *supra* note 85, at 25 n.9.

[92] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

[93] Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185(a) (2006) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.").

relations, of course, is long established."[94] Within that area, though, Congress has refrained from occupying the entire field, making the judicial inquiry whether Congress impliedly preempted state law by manifesting that intent in legislation.[95] Here, that inquiry has long been settled.[96] In 1962, the Supreme Court first addressed the preemptive effect of Section 301 in *Teamsters v, Lucas Flour Co.*, and found that Section 301 does preempt state law breach of contract claims because the statute's subject matter "is peculiarly one that calls for uniform law."[97] The Court went on to observe that, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote

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[94] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[95] *Id.*; *see generally* Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341 (2001) (discussing preemption doctrine); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Hines v. Davidowitz, 312 U.S. 52 (1941).

[96] *See* Local 174, Teamsters, Chaukfeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (holding "we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules"); *see also* Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957) (holding that § 301 not only granted federal courts jurisdiction over collective bargaining disputes, but also authorized the courts to fashion "a body of federal law for the enforcement of these collective bargaining agreements").

[97] *Id.* at 103.

industrial peace."[98] The NFL is invoking this idea of "industrial peace" and self-governance to keep the players' claims out of court.

The policy goals and doctrine of Section 301 preemption was further refined, and expanded, by the Supreme Court in *Allis-Chalmers Corp. v. Lueck*.[99] There, in confronting a Wisconsin law making denial of insurance claims tortious, the Court held that Section 301 preemption extends beyond contract claims to displace state law tort claims.[100] "Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract."[101] *Lueck* further strengthened the policy goals of uniform federal labor law, and expanded the preemptive effect of Section 301 beyond claims based on the four corners of collective bargaining agreements[102] to claims that are "inextricably intertwined with consideration of the terms of the labor contract."[103] The Court held: "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as § 301 claim, or dismissed as pre-empted by federal labor-contract law."[104] Thus, three

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[98] *Id.* at 104.

[99] 471 U.S. at 210-211.

[100] *Id.*

[101] *Id.* at 211.

[102] *Id.* at 213 ("state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements").

[103] *Id.*

[104] *Id.* at 220.

(or arguably two) situations prompt federal law to preempt state law claims: (i) where the claim arises from the labor contract, (ii) where the claim is "inextricably intertwined" with the terms of the labor contract, or (iii) where the resolution of the state law claim is "substantially dependent on analysis of the terms" of the labor contract.

The Court further developed this seemingly logical issue in *Lingle v. Norge Div. of Magic Chef Inc.*[105] and *United Steelworkers of America, AFL-CIO-CLC v. Rawson*[106]. In *Lingle*, the Court addressed Illinois's tort of retaliatory discharge for filing a worker's compensation claim, and held that "as long as the state-law claim can be resolved without interpreting the [collective bargaining] agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."[107] It does not matter whether the allegedly independent state-law claims and CBA claims deal with "precisely the same set of facts."[108]

In *Rawson*, the Court scaled back what appeared to be an easier test for making a state-law claim independent of a labor-contract.[109] There, survivors of an underground mine fire sued

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[105] 486 U.S. 399, 407 (1988) (holding that the "purely factual questions" of retaliatory discharge's elements did not require the court to interpret any term of a collective-bargaining agreement).

[106] 495 U.S. 362 (1990).

[107] 486 U.S. at 410.

[108] *Id.*

[109] 495 U.S. at 371-72 ("Pre-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort.")

the miners' union for wrongful death based on negligence in inspecting the mine.[110] The Court found that "[t]he only possible interpretation of these pleadings . . . [was] that the duty on which [the plaintiffs] relied as the basis of their tort suit was one allegedly assumed by the Union in the collective-bargaining agreement."[111] As such, the miners' survivors' claims were not independent of the collective-bargaining agreement.[112] The Court framed the question around whom the allegedly breached duty was owed to: "[t]his is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society."[113] In the same vein, some courts have characterized *Rawson* as making the relevant inquiry not to whom the duty is owed, but how the duty came into being.[114] Regardless, if an assessment of an element of a state-law claim arises out of or requires interpretation of a collective-bargaining agreement, then that claim claim is preempted.[115] This line of Supreme Court precedent is the foundation for the NFL's motion to dismiss on preemption grounds.

*B. The NFL CBA's and the Defendant's Case*

As mentioned above, the NFL has raised preemption on numerous occasions in the past.[116] The goal in raising preemption is obviously to keep the claims out of court and funnel

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[110] *Id.* at 369-70.

[111] *Id.* at 370.

[112] *Id.* at 371.

[113] *Id.*

[114] Stringer v. Nat'l Football League, 474 F. Supp.2d 894, 908 (S.D. Ohio 2007).

[115] *Id.* at 909.

[116] *See* note 88.

them towards arbitration, for the "interpretation of collective-bargaining agreements remains firmly in the arbitral realm."[117] For the defendant NFL, arbitration greatly reduces the potential damages, but for the present time, simply dismisses the case. If the court grants the motion to dismiss because federal labor law preempts the players' claims, then the players will be able to pursue the grievance procedures outlined in the CBAs, in compliance with federal labor law.[118] In moving to dismiss the case, the NFL has a strong line of similarly situated cases to draw from in addition to two orders and opinions from federal district courts refusing to remand concussion claims now part of the MDL.[119] As outlined below, those cases yield a persuasive argument for the NFL.[120]

There are roughly thirteen relevant cases brought against the NFL or individual clubs, eight of which the court found the claims preempted by federal labor law.[121] The issue decided

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[117] *Lingle*, 486 U.S. at 411.

[118] *E.g.*, Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185(a) (2006).

[119] *See* Duerson v. Nat'l Football League, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); Maxwell v. Nat'l Football League, No. 11-CV-08394, Dec. 8, 2011 Order (C.D. Cal.).

[120] *See, e.g.*, Darren Heitner, *NFL Concussion Litigation: Breaking Down The NFL's Persuasive* Motion To Dismiss *The Amended Master Complaint*, FORBES (Sept. 2, 2012), http://www.forbes.com/sites/darrenheitner/2012/09/02/nfl-concussion-litigation-breaking-down-the-nfls-persuasive-motion-to-dismiss-the-amended-master-complaint/.

[121] *See Duerson*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012) (claims preempted); *Maxwell*, No. 11-CV-08394, Dec. 8, 2011 Order (C.D. Cal.) (claims preempted); Bentley v. Cleveland Browns Football Co., L.L.C., 194 Ohio App.3d 826 (2011) (claims not preempted); Givens v. Tennessee Football, Inc., 684 F. Supp.2d 985 (M.D. Tenn. 2010) (claims

by the court in these cases is whether the claims are independent of the CBA, but the distinguishing factor tends to be whom the defendant is.[122] Among these cases, a clear pattern arises, where the facts of cases brought against individual clubs, members of the unincorporated NFL, translate to fully independent and therefore not preempted claims. In contrast, courts have typically found suits against the NFL itself rely on a CBA or an interpretation of a CBA.[123] As such, the analogous cases make the NFL's case at hand even more persuasive. The distinction is best illustrated by example.

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preempted); Jurevicius v. Cleveland Browns Football Co., L.L.C., N.D. Ohio No. 1:09 CV 1803, (Mar. 31, 2010); Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009) (some claims preempted); Jeffers v. D'Allesandro, 681 S.E.2d 405 (N.C. Ct. App. 2009) (claims preempted); McPherson v. Tennessee Football Inc., No. 3:07-0002, 2007 WL 5445124 (M.D. Tenn. 2007) (claims not preempted); Stringer v. Nat'l Football League, 474 F. Supp.2d 894, 908 (S.D. Ohio 2007) (claims preempted); Brown v. Nat'l Football League, 219 F. Supp. 2d 372 (S.D.N.Y. 2002) (claims not preempted); Holmes v. Nat'l Football League, 939 F. Supp. 517 (N.D. Tex. 1996) (claims preempted); Sherwin v. Indianapolis Colts, Inc., 752 F. Sup. 1172 (N.D.N.Y. 1990) (claims preempted); Hackbart v. Cincinnati Bengals, 601 F.2d 516 (10th Cir. 1979) (claims not preempted).

[122] *Compare* Bentley v. Cleveland Browns Football Co., L.L.C., 194 Ohio App.3d 826 (2011) (claims against the Cleveland Browns not preempted), *with* Stringer v. Nat'l Football League, 474 F. Supp.2d 894, 908 (S.D. Ohio 2007) (claims against the NFL preempted).

[123] *See, e.g.*, Stringer, 474 F. Supp.2d at 908.

A clear example of an independent claim, distinct from any CBA and therefore not preempted, came in *Brown v. National Football League*.[124] In that case, Cleveland Browns' player Orlando Brown sued the NFL, based on respondent superior, for the negligent behavior of the NFL's employee. An NFL referee, an employee of the NFL, threw a weighted penalty flag in calling a false start, striking Brown in the eye and causing severe damage, ending his football career.[125] The NFL asserted that the claim was preempted, but the court found that Brown's negligence claim was independent of any CBA.[126] Echoing the Supreme Court in *Rawson*, the court asserted that it was "clear that Plaintiffs [had] adequately stated a claim that [the referee] was negligent in a manner that would give rise to a cause of action on the part of any member of the general public who might have been injured by his conduct."[127] Here, it is easy to imagine that a fan struck by an errant penalty flag would be able to state a tort claim against the NFL without any need to interpret a CBA. Hence, a claim like Brown's or LeCharles Bentley's claim against the Cleveland Browns for contracting a staph infection at the Browns' rehab facility[128], does not necessitate any interpretation of the players' CBA.

On the other hand, some cases squarely arise from the CBA. In *Holmes v. National Football League*, player Clayton Holmes sued the the NFL for breach of the CBA, as well as a series of torts including fraudulently inducing him to submit a urine sample and intentional infliction of emotional distress all related to his involuntary placement in the NFL's Drug

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[124] 219 F. Supp. 2d 372 (S.D.N.Y. 2002).

[125] *Id.* at 376.

[126] *Id.* at 380.

[127] *Id.*

[128] *Bentley*, 194 Ohio App.3d at 833.

Program, part of the CBA in force.[129] After assessing the elements of his tort claims, the court held the claims arose from the CBA, were inextricably intertwined with, and substantially depended on the the terms of the CBA.[130] Therefore, federal law clearly preempted Holmes's claims because the drug program itself was a product of the CBA.

In the third, and more gray case, claims may not arise from a CBA, but the claims still substantially depend upon or are inextricably intertwined with an analysis of the terms of the CBA.[131] The *Stringer* case provides an example where the claim did not arise from the CBA, but it was inextricable intertwined with the CBA.[132] There, Vikings' lineman Korey Stringer died from complications of heatstroke after training camp practice.[133] His widow brought a wrongful death claim against the NFL based on allegations of negligent medical care and supervision.[134] In response, the NFL claimed, as one might expect, that federal labor law preempted the claims because it was a labor dispute pertaining to work conditions and thus covered by the CBA.[135] The federal court in Ohio went into a thorough two-step analysis to determine (i) if the wrongful death claim alleged breach of a duty that arose from the CBA, and if not, (ii) whether the claim

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[129] Holmes v. Nat'l Football League, 939 F. Supp. 517, 519 (N.D. Tex. 1996).

[130] *Id.* at 527.

[131] *E.g.*, Duerson v. Nat'l Football League, No. 12 C 2513, 2012 WL 1658353, at *4 (N.D. Ill. May 11, 2012); Givens v. Tenn. Football Inc., 684 F. Supp. 2d 985, 990-91 (M.D. Tenn. 2010); Stringer v. Nat'l Football League, 474 F. Supp.2d 894, 908 (S.D. Ohio 2007).

[132] *Stringer*, 474 F. Supp.2d at 909.

[133] *Id.* at 898.

[134] *Id.*

[135] *Id.* at 899.

was substantially dependent on an analysis of the terms of the CBA or inextricably intertwined with it.[136] On the first prong of the inquiry, the court rejected the NFL and the Southern District of New York in *Brown*'s reading of *Rawson* requiring that for a claim to be independent of a CBA, the defendant must owe the alleged duty to every person in society as "too broad."[137] "The relevant inquiry," the court asserted, "is not to whom the duty is owed, but how it came into being."[138] Thus, the court concluded that because Mrs. Stringer alleged that the NFL's duty came into being by voluntarily assuming the duty by publishing its Hot Weather Guidelines, the common law defined the source of that duty, not the CBA, and therefore, the claim did not arise from the CBA.[139] But, when the court moved onto the second prong of its analysis, it held that resolution Mrs. Stringer's claim required an interpretation of the terms of the CBA.[140] Citing *Holmes v. National Football League*, the court's logic went as follows. Stringer must prove duty, breach, and causation. Her theory of breach was that the NFL failed to use reasonable care in publishing the Hot Weather Guidelines leaving the Vikings' staff ill-prepared to diagnose or treat Stringer's symptoms. The question of whether the NFL was negligent in publishing those guidelines is inextricably intertwined with key provisions of the CBA because the court must consider the degree of care owed and what was reasonable under the circumstances "in light of pre-existing contractual duties imposed by the CBA on the individual clubs concerning the

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[136] *Id.* at 906-09.

[137] *Id.* at 908.

[138] *Id.*

[139] *Id.*

[140] *Id.*

general health and safety of the NFL players."[141] "In other words, the degree of care owed cannot be considered in a vacuum."[142] As such, the court held that federal law preempted Stringer's wrongful death claim, and granted summary judgment in favor of the NFL.[143]

In the case at hand, the NFL argues that the players have brought claims of both the second and third type, meaning that some of the claims plainly arise from the CBAs and others, the majority of claims, are substantially dependent upon an analysis of the CBAs for resolution. In making its arguments, the NFL can draw heavily upon the line of cases already discussed in its favor. The fact that the CBAs that may or may not need to be interpreted are the same documents as in prior decided cases is key in this respect. Like the court in *Stringer*, the NFL in its Motion to Dismiss brief points to several provisions of the CBA(s) needed for resolution of the concussion liability claims.[144] The NFL cites as implicated: (i) player medical care provisions, (ii) rule-making and player safety rule provisions, (iii) grievance procedures, and (iv)

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[141] *Id.* at 910. Here, the court cited two particularly implicated CBA provisions. *Id.* One provision mandated that trainers be certified by the National Athletic Trainers Association. The court noted that whatever that certification entails would dictate the degree of care the NFL's Hot Weather Guidelines took on, making an assessment inextricably intertwined with the CBA. *Id.* The second provision placed the primary responsibility of identifying detrimental physical conditions of players on team physicians, which also weighed on the degree of care the NFL owed to Korey Stringer. *Id.* at 911.

[142] *Id.* at 910.

[143] *Id.* at 911. Stringer also asserted different claims against other defendants based on equipment, on which the court denied summary judgment. *Id.* at 911-15.

[144] Motion to Dismiss, *supra* note 7, at 5-9.

player benefit provisions.[145] The NFL cites ten different provisions regarding medical care and the duties placed on team physicians in making "return to play" decisions.[146] For example,

> If a club physician advises a coach or other Club representative of a player's physical condition which adversely affects the player's performance or health, the physician will also advise the player. If such condition could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity.[147]

The NFL argues that resolution of the players' claims, whether they be negligence or fraud based, would substantially depend on an analysis of the terms of the CBAs. In its favor the, the NFL cites to two recent federal district decisions on the same concussion litigation: *Duerson*[148] and *Maxwell*.[149] In *Duerson*, the court held exactly what the NFL posits: the resolution of the plaintiff's concussion based negligence claims would require interpretation of several of the CBA's provisions concerning player health and safety.[150] All of the CBAs, but for the initial 1968 CBA, mandated that each Club "have a board-certified orthopedic surgeon as one of its Club physicians," that "[a]ll full-time head trainers . . . be certified by the National Athletic Trainers Association," and that "[a]ll part-time trainers must work under the direct supervision of

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[145] *Id.*

[146] *Id.* at 6. Note also that seven different CBAs have been in effect in 1968, almost without interruption. *See id.* at 5 n.2.

[147] 1993 CBA Art. XLIV § 1; Ex. 10, 2006 CBA Art. XLIV § 1; *see also* 2011 CBA Art. 39 § 1(c); 1982 CBA Art. XVII § 1.

[148] 2012 WL 1658353.

[149] No. 2:12-cv-03224-AB (E.D. Pa. Mar. 6, 2012).

[150] 2012 WL 1658353, at *4.

a certified trainer."[151] The 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 central for the plaintiffs to prove their negligence claims. Because the court could "plausibly interpret those [return to play] provisions to impose a duty on the NFL's clubs to monitor a player's health and fitness to continue to play football . . . [the] NFL could then reasonably exercise a lower standard of care in that area itself."[152] As such, the *Duerson* claims were preempted, and likewise, the MDL plaintiffs' claims are preempted.

This line of reasoning applies to both negligence-based claims and fraud-based claims. Whether the court uses an origin-based test of *Stringer* or whom-the-duty-is-owed test of *Rawson*, the negligence claims clearly require the court to assess the duty and standard of care within the context of the intertwined CBA terms.[153] The fraud-based claims require a deeper, but equally logical, reasoning.[154] Here, the NFL offers two reasons the fraud-based claims are also preempted by the need to interpret the CBAs. The first and weaker argument is that because the plaintiffs "allege that the NFL 'had a duty to advise Plaintiffs' of the 'heightened risk' of 'neurodegenerative disorders and diseases,' which the NFL purportedly breached by 'willfully and intentionally' misleading Plaintiffs and concealing the risk from Plaintiffs," that duty must

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[151] Motion to Dismiss, *supra* note 7, at 10 (quoting 1982 CBA Art. XXXI §§ 1-2; 1993 CBA Art. XLIV §§ 1-2; 2006 CBA Art. XLIV §§ 1-2; *see also* 2011 CBA Art. 39 §§ 1-2).

[152] 2012 WL 1658353, at *4.

[153] *See id*; Stringer v. Nat'l Football League, 474 F. Supp. 2d 894, 909 (S.D. Ohio 2007).

[154] *See* Motion to Dismiss, *supra* note 7, at 13 ("because these claims are founded on the same alleged duty as Plaintiffs' negligence claims, the same analysis applies here").

also be assessed in light of the CBA, exactly like the negligence claims.[155] Here, the NFL appears to pull an argument out of a hat by scraping together duty-based language of the plaintiffs' claims around paragraph eight of the master amended complaint with claims in the 248th paragraph of the master amended complaint.[156] But, the second argument carries significant merit.

The NFL's next argument centers on the justifiable reliance element of the plaintiffs' fraud-based claims, as well as the negligent misrepresentation claim. To prove fraud, the players must prove as an element: "justifiable reliance on the misrepresentation."[157] The NFL argues that the court cannot determine whether the plaintiffs justifiably relied on information provided by the NFL without interpreting the CBAs' health and safety provisions.[158] The plaintiffs allege that they justifiably and reasonably relied on the NFL's omissions and misrepresentations about the "the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive injury."[159] The defendants thus argue that numerous provisions of the CBAs delineate the relationship that the court must consider in deciding the question of justifiable reliance.[160] Here, the NFL has another case in its quiver, *Williams v. National*

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[155] *Id.* (quoting MAC ¶¶ 248(a)-(c)).

[156] *Id.*

[157] Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

[158] Motion to Dismiss, *supra* note 7, at 13.

[159] MAC ¶ 295.

[160] Motion to Dismiss, *supra* note 7, at 13 (citing Tran v. Metro. Life Ins. Co., 408 F.3d 130, 135 (3d Cir. 2005) (discussing that the court must consider the relationship of the parties in determining justifiable reliance).

*Football League*.[161] In *Williams*, the Eighth Circuit dismissed several claims against the NFL as preempted by the LMRA including fraud, constructive fraud, and negligent misrepresentation.[162] *Williams* demonstrates that assessing the elements of fraud-based claims can also substantially depend on an analysis of terms of the NFL and NFL Players Association's CBA. Another example comes from the provisions of the CBA establishing the Joint Committee on Player Safety and Welfare, which includes three NFLPA representatives for the purpose of discussing the player safety aspects of the NFL's playing rules.[163] "To the extent that the players' representatives were specifically charged with responsibility in the area of player safety, the players' reliance on the NFL in the same area may not be reasonable."[164]

Finally, the NFL argues that these same results arise with respect to the plaintiffs' claims of post-retirement fraudulent concealment.[165] The NFL argues that because the plaintiffs' fraudulent concealment and negligent misrepresentation claims hinge on a duty to disclose, the assessment of any such duty on the part of the NFL requires an interpretation of the CBAs' numerous post-retirement benefits provisions.[166] Those post-retirement benefits cover a wide

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[161] 582 F.3d 863 (8th Cir. 2009) (discussing players' suit concerning the NFL Drug Program); *see also* Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1183 (11th Cir. 2010); Sherwin v. Indianapolis Colts, Inc., 752 F.Supp. 1172 (N.D. N.Y. 1990) (player's claim that team physician intentionally withheld true nature of his injury preempted).

[162] *Id.* at 881.

[163] Motion to Dismiss, *supra* note 7, at 14.

[164] *Id.*

[165] *Id.*

[166] *Id.*

range of subjects, including medical care for eligible retirees, including, for example, in the case of "dementia."[167] Again here, the NFL has case law on point to support this claim.[168]

In addition to the argument that resolution of the plaintiffs' claims substantially depend upon interpreting the CBAs, the NFL asserts that several of the claims actually arise under the CBAs, and are thus preempted by federal law.[169] Here, the NFL points specifically to the plaintiffs' claim that the NFL failed to implement changes in the rules of the game to minimize head injury and impose safety regulations to address players' health and safety.[170] The NFL posits that the CBAs "establish the duty of the NFL and its Clubs to implement and enforce rules

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[167] *See* 2006 CBA Art. XLVIII-D ("The parties agree to . . . establish a . . . plan . . . to provide medical benefits to former Players who are . . . determined . . . to have 'dementia.' "); *see also* 2011 CBA Art. 58 § 1; Ex. 11, 2011 CBA Art. 65 § 1 ("[T]he Disability Plan will be amended to provide a benefit for those eligible Players, as defined below, who have permanent, neuro-cognitive impairment . . . .").

[168] *See* Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1183 (11th Cir. 2010) (holding former players' negligent misrepresentation claim--that the NFL provided inaccurate background information regarding investment advisors for the players--was preempted because "whether Plaintiffs reasonably relied on Defendants' alleged misrepresentations is substantially dependent on the CBA's language," which placed responsibility for player finances on players themselves).

[169] Motion to Dismiss, *supra* note 7, at 15; *see also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985).

[170] *See* MAC ¶¶ 9, 333.

regarding professional football generally, and health and safety-related rules in particular."[171] Therefore, federal law preempts these claims based on the *Rawson* analysis: the NFL certainly does not owe a duty to every person in society to promulgate rules concerning football play and safety.[172] The claims are not independent of the CBA, and thus preempted.

## V. FORECAST FOR THE COURT AND THE RULING'S IMPACTS

The NFL's cohesive arguments give it a strong chance of success on its motion to dismiss the MDL. Precedent is on the NFL's side, putting the pressure on the plaintiffs to successfully distinguish away that case law. Based on the pleadings and memoranda filed before the court, the defendants' arguments will likely carry the day.

### *A. The NFL's Preemption Argument Is Persuasive.*

In response to the plaintiffs' Master Reply Brief, the NFL filed an additional brief in further support of its motion to dismiss the MAC.[173] This brief reiterates the NFL's preemption arguments laid out in the Motion to Dismiss, while at the same time refuting the plaintiffs' brief in opposition to the motion. Coupled, these two briefs showcase the strong argument for dismissal.

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[171] Motion to Dismiss, *supra* note 7, at 15.

[172] *Id.*; United Steelworkers of America, AFL-CIO-CLC v. Rawson, 495 U.S. 362, 371 (1990).

[173] *See* Reply Memorandum of Law of Defendants National Football League and NFL Properties LLC in Further Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds, *In re* National Football League Players' Concussion Litigation, No. No. 2:12-md-02323-AB (E.D. Pa. Dec. 17, 2012) [hereinafter Brief in Further Support of Motion to Dismiss].

In its brief the NFL points out that the players insist upon an "inapposite" standard for Section 301 preemption, as opposed to binding Supreme Court precedent, when the players argue the "bona fide dispute" standard.[174] Additionally, the players "ignore[] the centrality of the CBAs in assessing relative duties."[175] For example, the plaintiffs' argument that the CBA provisions cited by the NFL pose only factual questions[176], not issues of contract interpretation frames the court's function too narrowly. In determining the duty owed by a defendant or any other element of a claim, i.e., breach of contract, the court engages in fact finding. The *fact* here is that the court must take into account the terms of the CBAs in assessing whether NFL owed any duties to the players and if so, whether the NFL breached those duties. The plaintiffs inadvertently acknowledge this as well in the Master Reply Brief.[177] The plaintiffs quote a Pennsylvania case concerning the justifiable reliance element of their fraud-based claims, asserting that "justifiable reliance is typically a question of fact for the fact-finder to decide, and requires a consideration of the parties, their relationship, and the circumstances surrounding their transaction."[178] The latter half of that sentence points directly to the relevant terms of CBAs and "requires" their consideration much like *Holmes* and other cases discussed above.[179] The CBAs are intertwined with the claims, and numerous cases on the NFL's side demonstrate that conclusion. As such, federal law preempts the players' claims.

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[174] *Id.* at 5.

[175] *Id.* at 4.

[176] *See* Master Reply Brief at 18.

[177] *See, e.g.*, *id.* at 24.

[178] *Id.* (quoting Toy v. Metropolitan Life Ins. Co., 928 A.2d 186, 208 (Pa. 2007)).

[179] *See supra* Part IV.B.

*B. The Court Will Likely Grant the Motion to Dismiss*

As discussed above, the NFL's position is strong on the merits. Additionally though, the tactical and intangible factors tend to push the balance in the NFL's favor as well. As veteran litigator Stephen Susman said, "The remedy they are seeking speaks volumes' about the weakness of the case."[180] The players are seeking money damages for medical monitoring of their conditions, a tactic trial lawyers frequently use when they cannot claim specific injuries to their clients.[181] Medical monitoring suits have typically been successful only in toxic tort suits[182], and the Supreme Court has even rejected medical monitoring for railroad workers exposed to asbestos.[183]

At the same time, some contend that the court may have already shown its hand on the preemption issue in a different case.[184] Overseeing this case, and eventually ruling on the NFL's motion to dismiss is United States District Court Judge Anita Brody.[185] In September 2012, she denied a motion to dismiss from Kellogg's, the cereal company, on labor preemption grounds in a suit by an employee for racial discrimination.[186] There, Judge Brody did not find Kellogg's'

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[180] Daniel Fisher, *NFL Concussion Suit Likely to Get Sacked by Employment Law*, FORBES (Jun. 12, 2012), http://www.forbes.com/sites/danielfisher/2012/06/12/nfl-concussion-suit-likely-to-get-sacked-by-employment-law/2/ (quoting Stephen Susman in an interview).

[181] *See* MAC ¶¶ 249-266; Fisher, *supra* note 180.

[182] Fisher, *supra* note 180.

[183] *See* Metro-North Commuter R.R. Co., v. Buckley, 521 U.S. 424, 433 (1997).

[184] *See* Campisi, *supra* note 40.

[185] *Id.*

[186] Harrell v. Kellogg Co., No. 11-7361, 2012 WL 3962674, at *8 (E.D. Pa. Sept. 11, 2012).

preemption argument compelling enough to grant the motion to dismiss, but did concede that "[a]lthough Harrell's claims do not appear from the face of the Complaint to require interpretation of the CBA, discovery might yield another conclusion."[187] Because that case dealt with Section 1981[188] racial discrimination claims and waiver of enforcement, it is sufficiently different so as not to be a clear indicator for Judge Brody, but the ruling is still relevant, making it possible that the court will allow the players to at least move on to discovery. Allowing the case to proceed to discovery would tailor to the plaintiffs' arguments that all of its claims require factual questions, not contract interpretation. After all, the burden falls on the moving party, the NFL, to prove that the players have not stated a claim for which relief can be granted.

*C. Future Implications of the Court's Ruling*

While it is only a trial court ruling, the court's decision at this stage could significantly shape the future of football, the NFL, and sports-related litigation. If, on the one hand, the court dismisses the case, then that will place a sizeable wrench in the players machinery. In that event though, plaintiffs will surely not be deterred.[189] Additionally, as the NFL argues, the players can resort to the grievance procedures of the respective CBAs, but that could be of little use to players compared to massive damages awards. Whether the court grants the motion to dismiss or not, the safety, rules, and related culture of the NFL game will invariably stay on an upward trajectory away from head injuries, partly as precaution to any future litigation, but also for the

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[187] *Id.*

[188] *See* 42 U.S.C. § 1981.

[189] *See* Brandt, *supra* note 8 (noting that a new 10-year CBA is place, television contracts are being renewed at record levels, and assets values of teams are skyrocketing).

health of the players.[190] At the same time, the NFL and team lawyers will, and are, working to develop contract language attempting to release them from the concussion liability.[191] Teams will also avoid players with a history of head injuries. Just like a team acquiring a player now grades their physical exam with knees, ankles, and arms, teams will factor in the player's risk for concussions – another step mitigating potential liability.

On the other hand, if the court denies the motion, the players will steamroll forward with plaintiffs inevitably hopping on for the ride. Particularly with the fraud-based claims, discovery will be a gigantic undertaking. Then, at the trial stage, the players would face a steep uphill battle, e.g., proving that they did not assume the risk of football and detrimentally relied on the NFL's publications despite many players' having played football from the pee-wee ranks into their thirties.[192]

Several sports writers and pundits have put together doomsday scenarios for football if the plaintiffs are successful.[193] Certainly, the plaintiffs have potential to win massive damages from the NFL based on its liability,[194] but with a win against the NFL several ancillary suits will target other defendants including helmet manufacturers like Riddell, other sports leagues, the

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[190] *See id.*

[191] *See id.*

[192] *See, e.g.*, Gove, *supra* note 11, at 681-90.

[193] *E.g.*, Tyler Cowen and Kevin Grier, *What Would the End of Football Look Like?*, GRANTLAND (Feb. 9, 2012), http://www.grantland.com/story/_/id/7559458/cte-concussion-crisis-economic-look-end-football (suggesting that the hyperbolic end of football is fathomable by citing the fact that 40 percent of companies listed in the 1983 Fortune 500 no longer exist).

[194] *See, e.g.*, Gove, *supra* note 11, at 689 (modestly suggesting $588 million).

NCAA, and so on.[195] The doomsday chain of events plays out as follows. Tragic cases of suicide and CTE coincide.[196] Former players began to win judgments, and then insurance companies cease to insure colleges and high schools against football-related lawsuits. At the same time, increasingly worried modern parents keep their children from playing football. More and more parents follow suit based on a "contagion effect" as seen with past decision-based risks like smoking or driving without a seatbelt.[197] The result is that the NFL's feeder system dries up and the NFL's product value diminishes. Then, advertisers and networks shy away from associating with the NFL based not only on the diminished value but the negative public relations, stigma, and potential liability from associating with the dangerous sport. Eventually, the theory goes, football goes the way of horse racing and boxing, two of the most popular sports of the first half of the twentieth century.[198] While this scenario is hyperbolic, if the players do win a judgment, severe changes could follow. The NFL is an entertainment product, largely a

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[195] *See* Cowen and Grier, *supra* note 193 (noting that precollegiate football is sustaining 90,000 concussion per year).

[196] *See, e.g.*, Heather Hollingsworth, *Jovan Belcher Autopsy: Chiefs LB Legally Drunk At Time Of Murder-Suicide*, HUFFINGTON POST (Jan. 14, 2013 3:59 PM), http://www.huffingtonpost.com/2013/01/14/jovan-belcher-autopsy-drunk-chiefs_n_2473140.html (discussing the autopsy report of Kansas Chiefs' twenty-five year old linebacker Jovan Belcher who, on December 1, 2012, shot his girlfriend nine times and then killed himself in front of his coach and general manager).

[197] Cowen and Grier, *supra* note 193.

[198] *See id.*

television show licensed out to television networks[199], where the violence of play is certainly part of the marketing appeal. If that appeal diminishes because of crippling rule changes designed to prevent liability and injury, the NFL could certainly suffer as a result.

## VI. CONCLUSION

The ultimate issue here and now is federal preemption under Section 301 of the Labor Management Relations Act. Whether federal labor law preempts the players' state law tort claims will decide the pending motion to dismiss, and the ruling on that motion will be a strong barometer for how the litigation will fare. That issue is in the hands of Judge Anita Brody. Cases such as *Stringer* and *Duerson* provide the persuasive legal analysis for this motion. The well-reasoned conclusion is that federal labor law preempts the players' state law claims because resolution of those claims requires an interpretation of the CBAs. The fact that scientific medicine has developed plausible causation theory for injuries does not guarantee the players a legal remedy from the NFL. Based on the strong case law in the NFL's favor, Judge Brody will likely grant the motion, avoiding a legal fumble.[200] But, the rest of the game is still to play out, and there is always overtime – NFL concussion litigation will likely be dismissed in the Eastern District of Pennsylvania, but will doubtfully go away.

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[199] *See* Kevin Clark, *Game Changer: NFL Scrambles to Sell More Tickets*, WALL ST. J., July 2, 2012, at A1 (noting that the NFL's "average game attendance is down 4.5% since 2007, while broadcast and online viewership is soaring.").

[200] In the words of the famous football coach John Heisman, "Gentlemen, it is better to have died as a young boy than to fumble this football."