

# **Helmet to Helmet:**

## **Riddell's Role in the NFL's Concussion Litigation**

### **I. Prologue; Taking the Field**

The National Football League (NFL) is currently embroiled in contentious litigation with former players regarding how the league handled concussions. The questions are what did the league know or should have known about the long term effects of concussive brain injuries and could have done to minimize their impact on the game. However, behind the multibillion dollar NFL lies a second defendant football helmet manufacturer Riddell.<sup>1</sup> Riddell has been the official helmet manufacturer for the NFL since 1989.<sup>2</sup> It is estimated that as high 80% of NFL players use Riddell brand helmets.<sup>3</sup> In addition to superior knowledge negligence claims, former players have also brought claims against Riddell for strict liability in manufacturing defect, design defect, and failure to warn.<sup>4</sup>

This article is specifically tailored to evaluate the claims against Riddell. In evaluating these claims this article will center around the case of *Maxwell v. National Football League*, which also has Riddell as a defendant<sup>5</sup>. *Maxwell* was the first case filed against the National Football League and Riddell regarding concussions.<sup>6</sup> The case was originally filed in California state court.<sup>7</sup> It was removed to federal district court in California, before ultimately being added to a designated multidistrict litigation (MDL) in the Eastern District of Pennsylvania.<sup>8</sup> Because the *Maxwell* case was originally filed in California, the legal analysis provided will be based on California law.

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1 Riddell is being sued under a series of names, which company is the proper defendant has yet to be determined. The companies comprising the Riddell defendants are Riddell, Inc. (d/b/a Riddell Sports Group, Inc.), All American Sports Corporation, d/b/a Riddell/All American, Riddell Sports Group, Inc., Easton-Bell Sports, Inc., Easton-Bell Sports, LLC, and EB Sports Corp., RBG Holdings Corp.

2 Schwarz, Alan, [Helmet Standards Are Latest N.F.L. Battleground](http://www.nytimes.com/2009/12/24/sports/football/24helmets.html?pagewanted=all&_r=0), New York Times online (Dec. 23, 2009), [http://www.nytimes.com/2009/12/24/sports/football/24helmets.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/12/24/sports/football/24helmets.html?pagewanted=all&_r=0)

3 [Id.](#)

4 Amended Master Complaint at 77-81, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB (E.D. PA 2012) (MDL No. 2323).

5 *Maxwell v. National Football League*, Case NO.: CV aa-8394 (Cal. Super. L.A. Co. 2011).

6 Complaint, *Maxwell v. National Football League*, Case NO.: CV aa-8394 (Cal. Super. L.A. Co. 2011)

7 [Id.](#)

8 California Central District-History/ Documents Query for 2:11-cv-08394-R-MAN pages 1,2,3 ;Transfer Order

Due to the nature of a superior knowledge negligence claim it is likely premature to evaluate that claim before discovery because it remains unknown what Riddell knew regarding the long term effect of concussions on football players. Therefore, this article will not address the merits of that claim. Instead the article will be focused on the manufacturing defect, design defect, and failure to warn claims and the defenses Riddell will likely raise in litigation. These defenses include Riddell's motion to dismiss based on preemption as well as affirmative defenses Riddell will likely assert in future motion practice or their answer to the Plaintiffs' complaint in the present MDL.<sup>9</sup> But, before one can go into the claims against Riddell, one must first understand how Riddell and the NFL got to where they are today.

## **II. Kickoff: The history of the NFL's concussion litigation**

On July 19, 2011, over seventy former NFL players filed the first lawsuit of its kind against the NFL and football helmet manufacturer Riddell seeking liability for the former players' traumatic brain injuries.<sup>10</sup> The suit consists of a range of claims including negligence, fraud, and products liability claims for design, manufacturing, and failure to warn defects. The suit was the proverbial first shot in a now hotly contested battle pitting the NFL and Riddell against former NFL players. To date, over 160 lawsuits regarding concussions and traumatic brain injuries have been filed.<sup>11</sup> The reach of the now includes over 3,500 former NFL players.<sup>12</sup> Following the surge of filings some suits have begun to consolidate.<sup>13</sup> As it stands, plaintiffs' lawyers have had their cases corralled into the Federal District Court for the Eastern District of Pennsylvania for MDL.<sup>14</sup> This MDL will allow plaintiffs' lawyers to gather the answers to some of the persisting common questions about the NFL and Riddell's knowledge about the systemic issue of brain injuries among current and former NFL players. The cases will remain

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<sup>9</sup> Riddell Def's Motion to Dismiss Based on LMRA § 301 Preemption,

<sup>10</sup> Complaint, *Maxwell v. National Football League*, Case NO.: CV aa-8394.

<sup>11</sup> NFL Concussion litigation website (Court Documents), [http://nflconcussionlitigation.com/?page\\_id=18](http://nflconcussionlitigation.com/?page_id=18)

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

<sup>13</sup> Fisher, Daniel, [NFL Concussion Suit Likely To Get Sacked By Employment Law](http://www.forbes.com/sites/danielfisher/2012/06/12/nfl-concussion-suit-likely-to-get-sacked-by-employment-law/), Forbes online (Jun. 12, 2012, 9:45 AM), <http://www.forbes.com/sites/danielfisher/2012/06/12/nfl-concussion-suit-likely-to-get-sacked-by-employment-law/>

<sup>14</sup> Lisk, Jason, [Breaking Down the NFL Head Injury Litigation Situation](http://www.thebiglead.com/index.php/2012/04/16/breaking-down-the-nfl-head-injury-litigation-situation/), Big Lead Sports (Apr. 16, 2012, 4:33 PM), <http://www.thebiglead.com/index.php/2012/04/16/breaking-down-the-nfl-head-injury-litigation-situation/>

packaged together for much of the pretrial process as well as discovery, before potentially being redivided for individual trials within the districts where the law suits were filed. The MDL will likely result in key figures such as current NFL commissioner Roger Goodell and executives within Riddell only being subjected to one deposition, saving both time and resources.<sup>15</sup>

So how did the fate of so many different lawsuits end in the hands of Pennsylvania Federal District Judge Anita Brody? To explain the process, one need look no further than the case that started it all *Maxwell v. The National Football League*. The NFL and Riddell were able to successfully remove the *Maxwell* case to Federal court in October of 2011. The plaintiffs were unsuccessful in moving the court to remand the case back to state court.<sup>16</sup>

In the wake of the concussion litigation being filed in California, the first suit in federal court was filed in the Eastern District of Pennsylvania on August 17, 2011, *Easterling v. NFL*.<sup>17</sup> *Easterling*, included Riddell as a defendant but did not allege any manufacturing or design defects.<sup>18</sup> There have now been over 30 additional concussion cases filed against the NFL and Riddell in the Eastern District of Pennsylvania.<sup>19</sup> The Eastern District was subsequently chosen by the United States Judicial Panel on Multidistrict Litigation to be the forum for the concussion MDL.<sup>20</sup>

In February of this year, the California Central District Court sent notification that the *Maxwell* case was among the cases to be included in the MDL. With the several of the California cases now consolidated in the MDL, a master complaint was filed within the Pennsylvania Eastern District Federal Court on June 7, 2012.<sup>21</sup> The master complaint was amended in July of 2012, and contains a vast array of causes of action against the NFL and Riddell.<sup>22</sup> Plaintiffs' allege the NFL is liable for

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15 *Id.*

16 California Central District-History/ Documents Query for 2:11-cv-08394-R-MAN pages 1,2,3

17 NFL Concussion litigation website (Court Documents), [http://nflconcussionlitigation.com/?page\\_id=18](http://nflconcussionlitigation.com/?page_id=18)

18 Complaint, *Easterling v. National Football League, Inc.*, Case No. 11-cv-05209-AB (E.D. PA 2011)

19 NFL Concussion litigation website (Court Documents), [http://nflconcussionlitigation.com/?page\\_id=18](http://nflconcussionlitigation.com/?page_id=18)

20 Hagstrum, Melissa L., [NFL Players' Concussion Injury Litigation-Emerging Trends in Multidistrict Litigation](#), Larkin Hoffman Attorneys (May 30, 2012), [http://www.larkinhoffman.com/news/article\\_detail.cfm?ARTICLE\\_ID=900](http://www.larkinhoffman.com/news/article_detail.cfm?ARTICLE_ID=900)

21 Amended Master Complaint at 77-81, In Re National Football League Players' Concussion Injury Litigation, No. 2:12-md-02323-AB

22 *Id.* at 53-71

wrongful death, fraudulent concealment, fraud, negligent misrepresentations, negligence pre-1968, negligence post-1968, negligence between 1987 and 1993, negligence after 1994, negligent hiring, negligent retention, civil conspiracy/fraudulent concealment, medical monitoring and finally a declaratory judgment for liability.<sup>23</sup> Riddell is alleged to be liable for strict liability for design defect, manufacturing defects, failure to warn, and negligence.<sup>24</sup> Both the NFL and Riddell are being pursued for loss of consortium.<sup>25</sup>

In April of 2012, Judge Brody issued the first pretrial order, scheduling deadlines for both the NFL and Riddell to submit their respective major pre-discovery motions.<sup>26</sup> The NFL was to file a motion to dismiss, while Riddell was seeking a motion to sever the claims against them from the current NFL concussion litigation as well as a motion to dismiss based on preemption.<sup>27</sup> The order set a deadline of August 9, 2012.<sup>28</sup> On July 16, the Court granted a stipulated order extending the deadline to August 30, 2012.<sup>29</sup> The NFL filed its Motion to dismiss on August 30th based on the argument that the litigation between former players and the league needs to be handled through the procedures outlined in the collective bargaining agreement between the NFL and the NFLPA.<sup>30</sup> Plaintiffs' have until October 31, 2012 to respond to the NFL's motion to Dismiss, with the NFL given until December 17, 2012 to file their reply.<sup>31</sup> Riddell has filed its motion to sever as well as its motion to dismiss. As of this article no response has been submitted.

### **III: Injury time out: Football, the NFL, and its history with traumatic brain injuries.**

In 1994, the NFL, in the wake of concussion injuries ending the promising careers of running

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<sup>23</sup> *Id.* 77-81.

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

<sup>25</sup> *Id.* at 69

<sup>26</sup> Case Management Order 2, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

<sup>27</sup> *Id.* at 3

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

<sup>29</sup> Stipulated Order, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

<sup>30</sup> NFL Motion to Dismiss, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

<sup>31</sup> Stipulated Order, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

back Merrill Hodge and Al Toon, convened the NFL brain injury committee.<sup>32</sup> The committee was lead by Dr. Elliott Pellman, a rheumatologist who was employed by the New York Jets as a team physician.<sup>33</sup> This is regarded as an interesting choice as Pellman would have been one of the physician's who cared for Al Toon, whose injuries motivated the NFL's studies.<sup>34</sup> Further casting doubt upon Pellman is that, his medical specialty is in rheumatology. Rheumatologists specialize in the human joints, muscles, and connective tissue. This is contrasted by nerology which is the specialty focused on the brain.

Around the same time the NFL began its concussion studies, the NFLPA<sup>35</sup> began sponsoring their own research into players' traumatic brain injuries.<sup>36</sup> The union funded the research of nerosurgeon Dr. Julian Bates as well as neurologist Dr. Barry Jordan.<sup>37</sup> The doctors surveyed over 1,000 players, most of whom had been diagnosed with a concussion during their playing careers.<sup>38</sup> What the doctors discovered was that players with histories of concussions showed more signs of permanent brain damage such as confusion, memory loss and speech problems.<sup>39</sup> Those symptoms are consistent with the symptoms of Chronic Traumatic Encephalopath commonly referred to as CTE.<sup>40</sup>

When the doctors dug deeper, they found that players diagnosed with more than three concussions were more prone to depression and were three times more likely to have significant memory problems than players who had never been diagnosed with a concussion.<sup>41</sup> These findings

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32 Magels, John, [NFL could face thousands of lawsuits from ex-players over brain damage from concussions](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html), Cleveland Plain Dealer online (May 27, 2012, 6:02 AM), [http://www.cleveland.com/science/index.ssf/2012/05/thousands\\_of\\_ex-player\\_lawsuit.html](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html)

33 Magels, John, [NFL could face thousands of lawsuits from ex-players over brain damage from concussions](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html), Cleveland Plain Dealer online (May 27, 2012, 6:02 AM), [http://www.cleveland.com/science/index.ssf/2012/05/thousands\\_of\\_ex-player\\_lawsuit.html](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html)

34 Id.

35 The NFLP is the labor union for current and former NFL players.

36 Id.

37 Id.

38 Id.

39 Id.

40 CTE will be further explored *supra*.

41 Id.

were consistent with the work of Dr. Augustus Thorndike, a former chief surgeon at Harvard University, who in 1952 had recommended that football players with three or more concussions end their athletic careers.<sup>42</sup> However, Dr. Bailes and Dr. Jordan's work only identified troubling trends. They were not able to identify the underlying cause of the symptoms. This is where the tragic death of a former Super Bowl Champion and Pro Football Hall of Famer may have changed things forever.

That player is former Steeler's Center Mike Webster. Webster died in 2002 of heart failure.<sup>43</sup> Prior to his death, Webster suffered from dementia and found himself homeless and living on the streets.<sup>44</sup> Upon Webster's death, Dr. Bennet Omalu, a forensic pathologist at the Allegheny County Medical Examiner's office, dissected the brain of Webster. For the first time a doctor was able to study the effects of a brain subjected to years of playing professional football. Dr. Omalu discovered clumps of knotted up nerve-fibers known as neural tangles.<sup>45</sup> The tangles are consistent with CTE.<sup>46</sup> This was the first time CTE had been identified in a professional football player.<sup>47</sup> Dr. Omalu published his findings in 2005.<sup>48</sup> Omalu would later discover CTE in the brains of former Steeler's offensive lineman Terry Long and former Eagle's defensive back Andre Waters. Both players died prematurely as a result of suicide.<sup>49</sup>

CTE is the medical name for the long known brain impairment known commonly as being Punch Drunk.<sup>50</sup> The term punch drunk, first coined in 1928, by a New Jersey medical examiner, who used the term to identify the common phenomena in fighters of unsteadiness and fogginess after being subjected to repeated blows to the head.<sup>51</sup>

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42 Id.

43 Magels, John, NFL could face thousands of lawsuits from ex-players over brain damage from concussions, Cleveland Plain Dealer online (May 27, 2012, 6:02 AM), [http://www.cleveland.com/science/index.ssf/2012/05/thousands\\_of\\_ex-player\\_lawsuit.html](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html)

44 Id.

45 Id.

46 Id.

47 Id.

48 Id.

49 Id.

50 Id.

51 Id.

During the 1950's researchers observed the brains of deceased boxers who had demonstrated symptoms of punch drunkenness during their lifetime.<sup>52</sup> The boxers's brains were severely degraded, containing both knotted up nerve fibers and plaque.<sup>53</sup> The damage was centralized in the frontal and temporal lobes, which control the brains processes for planning, emotions, the persons limbs, and sensory perceptions.<sup>54</sup> By the 1970s, further research connected CTE to other high contact activities including rugby and professional wrestling.<sup>55</sup>

In light Dr. Omalu publishing his findings, the NFL released its own findings on the long term effects of concussions on NFL players.<sup>56</sup> The results of the NFL studies seemed directly contrary to the other studies being released. The report suggested that concussions were not extremely serious because many players were able to return to play in the same game where they suffered the concussion; the report also stated there was no reason to hold player's out from a game if their concussion symptoms had dissipated and that losing consciousness to a concussion did not increase the players' risk of prolonged concussion symptoms or post-concussion syndrome.<sup>57</sup> Directly contrary to the findings of Dr. Jordan; Dr. Bailes; and Dr. Omalu, went on to state that players with three or more concussions had no worse injuries or chronic cumulative effects from concussions.<sup>58</sup>

In the wake of the mounting studies indicating NFL players as having greater susceptibility to long term brain damage, the House Judiciary Committee held a two day hearing on brain injuries and football.<sup>59</sup> Among the witnesses called to testify before the committee was NFL commissioner Roger Goodell.<sup>60</sup> During his testimony, Goodell repeatedly refused to concede that there is a causal link

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52 Id.

53 Magels, John, NFL could face thousands of lawsuits from ex-players over brain damage from concussions, Cleveland Plain Dealer online (May 27, 2012, 6:02 AM), [http://www.cleveland.com/science/index.ssf/2012/05/thousands\\_of\\_ex-player\\_lawsuit.html](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html)

54 Id.

55 Id.

56 Id.

57 Id.

58 Id.

59 Hart, Alexander C., NFL head injuries a hot topic in Congress, Los Angeles Times online (Oct. 29, 2009), <http://articles.latimes.com/2009/oct/29/sports/sp-football-congress29>

60 Id.

between playing professional football and brain disorders.<sup>61</sup> This reflected the NFL's continuing position on the dangers of the game.

Following Commissioner Goodell's highly scrutinized testimony, the NFL reversed course on its denials of the long term risks of playing football. One of the first major changes was the resignation of Dr. Ira Casson, the co-chairman of the league's panel on head injuries.<sup>62</sup> Casson testified before Congress following his resignation. He reiterated that no connection could be made between football and brain injuries, "there is not enough valid, reliable or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long-term brain damage."<sup>63</sup> The league also responded to the Congressional inquiry by making several league-wide initiatives including updating the return to play protocol for concussions<sup>64</sup>, requiring teams to employ independent neurologists as advisers, entering into a partnership with the Boston University Center for the Study of Traumatic Encephalopathy<sup>65</sup>, and conducting tests on helmets.<sup>66</sup>

The NFL's helmet testing study was widely panned by critics.<sup>67</sup> The study was conducted throughout 2009 by the NFL's dubious head injury panel.<sup>68</sup> Over the course of that year every member of the panel resigned and was replaced with a new panel of independent researchers.<sup>69</sup> Two members of the newer independent committee testified before congress that they would discard all the research and work conducted by the the previous committee.<sup>70</sup> The committee members, Dr. H. Hunt Batjer and Dr. Richard G. Ellenbogen, criticized the former panel's work as being based in "poor methodologies" and

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61 Id.

62 ESPN.com news services, Casson says more study needed, ESPN.com (Jan. 4, 2010, 8:32 PM), <http://sports.espn.go.com/nfl/news/story?id=4795302>

63 Id.

64 Players are no longer able to return to the same game in which they suffered a concussion.

65 The Boston University Center had previously given the league great opposition to its practices in regards to concussions, and had even testified against the league during the course of the Congressional investigation.

66 Id.

67 Schwarz, Alan, Releasing Disputed Data on Helmets Puts Heat on N.F.L., New York Times online (Jul. 24, 2010), <http://www.nytimes.com/2010/07/25/sports/football/25nfl.html>

68 Id.

69 Id.

70 Id.



“not acceptable by any modern standards.”<sup>71</sup> However, the report regarding helmet testing was released in July of 2010.<sup>72</sup> The study, which evaluated the resistance to concussion impacts in open field tackling, praised two helmets manufactured by Riddell and one helmet manufactured by competitor Schutt as providing the best protection among tested helmets.<sup>73</sup> Skeptics of the report were quick to point out that results could be used to imply that certain helmets protect players from concussive injuries. Dr. Robert Cantu, a senior adviser on the NFL's current head injury committee, stated “I believe that the document is accurate and that every word in it is true, but they imply something to the lay reader — namely that these top-performing helmets are safer against concussion. . . I fear that it will be used to market helmets to youth players. In reality, they may be more unsafe for the lower forces known to cause concussions, primarily in youth football.”<sup>74</sup> The results were released after the underlying results and methodology were independently verified by Duke and Penn University biomechanics consultants.<sup>75</sup>

#### **IV. The Defense Takes the Field**

To date no answer has been filed by Riddell in response to either the *In re National Football Players' Concussion Injury Litigation* Master Complaint or Amended Master Complaint. An answer is not likely to be filed until the present motion to dismiss has been addressed by the court. With a schedule giving Defendant's until December 17, 2012 to file a reply brief on the motion.<sup>76</sup> It is unlikely any answer will be filed before the early portion of January 2013. Once an answer is filed by Riddell, it will likely include a laundry list of affirmative defenses.

Riddell previously filed a motion to dismiss the *Maxwell* suit in the Central District of California.<sup>77</sup> In that motion, Riddell sought dismissal based on preemption as well as a series of 12(b)

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<sup>71</sup> Schwarz, Alan, [Releasing Disputed Data on Helmets Puts Heat on N.F.L.](http://www.nytimes.com/2010/07/25/sports/football/25nfl.html), New York Times online (Jul. 24, 2010), <http://www.nytimes.com/2010/07/25/sports/football/25nfl.html>

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

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

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

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

<sup>76</sup> Stipulated Order, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

<sup>77</sup> Riddell Motion to Dismiss, *Maxwell v. National Football League*, Case NO.: CV aa-8394

(6) and rule 8 allegations that the Plaintiffs failed to state a claim for which relief can be granted.<sup>78</sup> The substance of these arguments relate to allegations that the Plaintiffs failed to properly plead the claims they were asserting<sup>79</sup>. Riddell also asserted a statute of limitations affirmative defense. It is likely that in Riddell will again raise a statute of limitations defense in the MDL as well as any further *Maxwell* proceedings.<sup>80</sup> Riddell will also likely plead affirmative defenses of assumption of the risk and comparative negligence.<sup>81</sup> Finally, still pending before the MDL court is a motion to dismiss on the basis of preemption.

*A) First Down: Statutes of limitations*

In California, the statute of limitations for a products liability suit is 2 years from the time a claim accrues; this is ordinarily measured from the time the injury is suffered.<sup>82</sup> However, “California's statute of limitations for a products liability claim can be tolled when a plaintiff's physical injury is not commonly thought to relate to a malfunctioning product; tolling depends on whether plaintiff suspected or should have suspected that the malfunctioning product may have caused the injury in question.”<sup>83</sup>

The Plaintiffs allege their injuries resulted from their playing time in the NFL and that the Plaintiffs wore Riddell helmets at times while playing and or practicing during their NFL careers.<sup>84</sup> However, without tolling, only one *Maxwell* plaintiff was still playing within 2 years of the case's filing.<sup>85</sup> <sup>86</sup> If the statute of limitations is not tolled because the plaintiffs did not suspect or should not have expected their injuries were the result of a defective helmet, then their claims will be dismissed

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

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

<sup>81</sup> Vail, Jeff, [Affirmative Defenses \(Litigation Checklist\)](http://www.jeffvail.net/2010/05/affirmative-defenses-litigation.html), Jeff Vail Litigation Strategy & Innovation (Oct. 23, 2012), <http://www.jeffvail.net/2010/05/affirmative-defenses-litigation.html>

<sup>82</sup> Larson, Aaron, [California Statute of Limitations for Civil and Personal Injury Actions - An Overview](http://www.expertlaw.com/library/limitations_by_state/California.html), ExpertLaw (Jul, 2004), [http://www.expertlaw.com/library/limitations\\_by\\_state/California.html](http://www.expertlaw.com/library/limitations_by_state/California.html)

<sup>83</sup> *Tucker v. Baxter Healthcare Corp.*, 158 F.3d 1046, 1049 (9th Cir. 1998)

<sup>84</sup> Amended Master Complaint at 80, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

<sup>85</sup> Complaint at 23-69, *Maxwell v. National Football League*, Case NO.: CV aa-8394

<sup>86</sup> Plaintiff Brett Romberg would be within the statute of limitations, but Romberg and his wife voluntarily dismissed their claims after Romberg signed with the Atlanta Falcons after the 2011 season. *see Riddell Defendants' Motion to Dismiss Plaintiffs' Amended Complaints Pursuant to Rules 8 and 12(b)(6) footnote 5*

before being heard by a jury.

Plaintiffs will likely argue that the long term effects of football related head injuries remained unknown until recently and that until they were able to draw the parallel between their injuries and their football careers they had no reason to suspect that the injuries resulted from a defective helmet. Throughout their complaint, the *Maxwell* Plaintiffs allege that the NFL purposefully withheld and deceived its players about the long term effects of concussions.<sup>87</sup> Plaintiffs also assert that because the NFL decided to investigate the long term effects of head injuries on former players, the player's were reasonable in relying on information from the NFL or its silence on the matter to indicate that long term health effects had not been found.<sup>88</sup>

There are several issues with those arguments to toll the statute of limitations. First, the NFL did not begin undertaking research into the long term effects of head injuries until 1994 when it created the Mild Traumatic Brain Injury Committee (this is stated in the plaintiffs' own complaint).<sup>89</sup> This would mean players who retired prior to this would have no expectation that the NFL would inform them if long term risks were discovered. The complaint also addresses that scientific studies on the dangers of concussions and their long term effects were being published as early as 1928.<sup>90</sup> Many of the plaintiffs in the Maxwell case were already retired and out of the league even prior to 1994, therefore the NFL's "misinformation" may not have been promulgated when older plaintiffs began showing symptoms of their injuries. Even after the NFL began its research it did not publish any findings until 2003.<sup>91</sup> This would eliminate even more plaintiffs from the possibility of being tainted by any NFL misinformation if their symptoms developed prior to 2003. Further, it is unclear how any misinformation provided to players by the NFL could be imputed to Riddell and used to toll the statute of limitations.

Additionally, a parallel can be drawn between the current helmet litigation and previous

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<sup>87</sup> Amended Master Complaint, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.* at 36.

<sup>90</sup> *Id.* at 1-2.

<sup>91</sup> *Id.* at 39.

litigation against big tobacco. In *Soliman v. Philip Morris Inc.* a plaintiff believed that the statute of limitations did not begin to run on his products liability suit until he was diagnosed with dyspnea and orthopnea.<sup>92</sup> The 9th Circuit Court of Appeals disagreed and stated that the significant date was when the Plaintiff “should have known of any significant injury from defendants' wrongful conduct.”<sup>93</sup>

In Master Complaint the Plaintiffs' assert that Riddell's helmets were defective because “they did not provide adequate protection against the foreseeable risk of concussive brain injury.”<sup>94</sup> Applying the logic of *Soliman*, the significant injury based on the wrongful conduct of the defendant would not be any of the long term injuries claimed by Plaintiffs, rather it would be the underlying concussions they suffered during their playing careers.

Overcoming the two year statute of limitations on products liability claims will be a hard defense for the *Maxwell* plaintiffs to refute. All but one of the players involved in the *Maxwell* suit retired more than 2 years prior to the cases filing. Therefore, they could not have been injured by the allegedly defective helmets following the discontinuation of their use. Further, the Plaintiffs if unsuccessful in showing they sustained their injuries within the statute of limitations, must than show that it was reasonable that they did not know that their helmets could potentially have caused their injuries. The majority of the players in this suit retired before the NFL began researching the long term effects of concussions and were not subject to any potential assurances that the NFL was looking into brain injuries. Still more of the Plaintiffs retired before the NFL released its findings regarding brain injuries in 2003. Therefore, these Plaintiffs could not have been confused by the conflicting studies. In addition, the defect alleged by Plaintiffs' is that the helmets did not adequately protect against concussions. The players would have had the opportunity to discover this potential defect when they were diagnosed during their careers with a concussion. Finally, even if the players were alleging that the helmets did not reasonably protect them from the long term effects of multiple concussions,

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<sup>92</sup> *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 972 (9th Cir. 2002)

<sup>93</sup> *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 972 (9th Cir. 2002)

<sup>94</sup> Amended Master Complaint at 81, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

California law states that the statute of limitations begins to run on a products liability suit when the plaintiff should have known of any significant injury from defendants' wrongful conduct, which in this case would have been the underlying concussion(s).

*B). Second Down: Assumption of the Risk*

“Primary assumption of risk occurs when the plaintiff voluntarily participates in an activity involving certain inherent risks and encounters one of the inherent risks; the defense is a complete bar to recovery because there is no duty of care to protect another from the risks inherent in a voluntary activity.”<sup>95</sup> California has maintained Primary Assumption of the Risk as a full bar to recovery stating “in cases involving primary assumption of risk where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury”.<sup>96</sup> In the sports context California's 2nd district defined a risk as inherent in a sport when “its elimination (1) would chill vigorous participation in the sport, and (2) would alter the fundamental nature of the activity.”<sup>97</sup> The risk to be evaluated in the context of the *Maxwell* litigation is whether head injuries caused by football related hits are inherent to the game. In football, the hits sustained on blocks and tackles are likely an inherent risk in the activity. Blocking and tackling are essential to the game of football as it is currently played. Removing the risks involved in blocking and tackling, such as the case in touch or flag football, would entirely change the way the game is played. While removing contact from the game may not chill the participation of those who are paid to play the game, there are those who take part in lower levels of the game because of the contact nature of the sport, and if contact was removed it could potentially chill participation. Such a chill in participation in the lower levels of football would then eventually dilute and chill participation in professional football as well.

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<sup>95</sup> California Affirmative Defenses 2 Cal. Affirmative Def. § 48:24 (2012 ed.)

<sup>96</sup> *Knight v. Jewett*, 3 Cal. 4th 296, 314-15, 834 P.2d 696, 707 (1992)

<sup>97</sup> *Sanchez v. Hillerich & Bradsby Co.*, 104 Cal. App. 4th 703 (Cal. App. 2d Dist. 2002)

Plaintiffs will likely assert that while hitting is a fundamental part of the game, the head injuries suffered by the Plaintiffs were a result of a defect that elevated the risk beyond what is inherent. This is an argument that was successfully litigated in the California case of *Sanchez v. Hillerich & Bradsby Co.*<sup>98</sup> In that case a college baseball player struck by a line drive brought a products liability suit against a bat manufacturer.<sup>99</sup> The player alleged that because the bat was made of aluminum that it increased the speed of the ball off the bat, compared to a wooden bat. This increased speed rose above the inherent risk involved in the game.<sup>100</sup> The trial court granted summary judgment; on appeal, the California Court of Appeals 2nd District reversed finding that there was sufficient evidence that the design of the bat increased the inherent risk.<sup>101</sup>

Riddell will assert that the helmets used by the Plaintiffs did not elevate the inherent danger of the game. Riddell would then argue that the helmets designed and manufactured by Riddell did not increase the danger over other helmets. Given that Riddell has such a large market share of the helmets used in the NFL, it could also be argued that the risk of head injury is essentially assessed from how the game is played with Riddell helmets. Therefore, any risk associated with the helmets used by the plaintiffs are identical to the risks typically inherent in the game of football. While a helmet is used to protect the player's head, it does not eliminate the risk of concussions.

Unlike in *Sanchez*, the *Maxwell* plaintiffs likely can not demonstrate that the helmet increased the force of hits in the way that *Sanchez* was able to show that aluminum bats are designed to drive a baseball harder on contact. The *Maxwell* plaintiffs instead are arguing that the helmets did not properly reduce the risk of concussions. However that is not the issue, primary assumption of the risk is

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Epstein, Timothy Liam, *Sports Products 101*, SmithAmundsen, [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.dri.org%2FDRI%2Fcourse-materials%2F2012-Products%2Fpdfs%2F56\\_Epstein.pdf&ei=07CqUK-rD6jB0AHbsICICw&usg=AFQjCNFoQ0tkxEykjWX2IeGZFgbWweCwfA](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.dri.org%2FDRI%2Fcourse-materials%2F2012-Products%2Fpdfs%2F56_Epstein.pdf&ei=07CqUK-rD6jB0AHbsICICw&usg=AFQjCNFoQ0tkxEykjWX2IeGZFgbWweCwfA)  
<sup>101</sup>*Id.*

premised in the idea that the Defendant does not have a duty to reduce risks that are inherent.

C.) *Third Down: Comparative Negligence*

In 1975 California replaced the old system of contributory negligence, which barred plaintiffs in negligence cases from recovery if “the Plaintiffs' negligent conduct [ ] contributed as a legal cause in any degree to the harm suffered by him,” with what is now known as a pure comparative negligence system of recovery.<sup>102</sup> Pure comparative fault “apportions liability in direct proportion to negligence.”<sup>103</sup> This means that based on a 100% scale, if a defendant is only partially liable for plaintiffs injuries , the plaintiff will only be able to collect the portion of the total damages the defendant is responsible for.<sup>104</sup>

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California extended the apportionment principles of comparative negligence to strict products liability cases in *Daly v. Gen. Motors Corp.*<sup>106</sup> The Court held that the “[p]rinciples of comparative negligence . . . apply to actions founded on strict products liability, thereby reducing Plaintiffs' recovery only to the extent that his own act of reasonable care contributed to his injury.”<sup>107</sup> The Court reasoned that the principles should be transferred to strict liability on the basis of fairness.<sup>108</sup>

Based on the holding of *Daly*, Riddell will look to the principles of comparative negligence to reduce its percentage of liability if they are held liable. Riddell likely will try to apportion percentages of liability to both the NFL and the players themselves. One theory behind the NFL's liability is that the NFL forms and polices the rules that govern the players' on field conduct. In governing that conduct, the NFL may have been negligent in failing to protect players by creating rules to make the game safer. The NFL has in the past exhibited that they may have taken on an enhanced duty to players when they made changes such as creating in game penalties for unnecessary contact against a player who is in a

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102 *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226 (Cal. 1975)

103 *Id.*

104 *Id.*

105 For Example: If plaintiff is injured as a result of defendant's negligence but defendant can prove that plaintiff was 90% responsible for the injuries he sustained, then plaintiff would only be able to collect 10% of the total damages he suffered.

106 *Daly v. Gen. Motors Corp.*, , 20 Cal. 3d 725, 575 P.2d 1162 (Cal. 1978)

107 *Id.*

108 *Id.*

defenseless position, grabbing the facemask of an opponent, or butting, ramming, or spearing an opponent with their helmet.<sup>109</sup> Riddell would also argue that under the collective bargaining agreement between the NFL and the NFLPA, the parties have bargained to help govern the games rules and equipment requirements.<sup>110</sup> The parties have created a Joint Committee on Player Safety and Welfare, which includes both union and NFL representatives.<sup>111</sup> Representatives on the committee to recommend and draft potential rules and equipment changes.<sup>112</sup> Riddell would then argue that the NFL and union may have been negligent in failing to establish proper rules to protect its players. Therefore, Riddell's liability should be decreased by the percentage of fault a jury would apportion for failure to create injury preventing rules and regulations.

In addition to the NFL, Riddell will also likely try to apportion a percentage of fault to the players themselves outside of the collective bargaining agreement. Riddell would argue that the players may have failed to take ordinary care during their playing careers. For example a player may not taking reasonable care if he failed to inform medical personnel of potential injuries or continuing symptoms of head injuries. Players would also have to show they took reasonable care in how they played the game. An example of such negligence may be if a player deliberately lead with his helmet in trying to tackle and opponent, or any other conduct a reasonable player would know creates an unreasonable risk of injury.

Defending allegations that proper rules were not created or that players took unreasonable risks puts the Plaintiffs' in an unenviable position. These are similar to the allegations the Plaintiffs have asserted against the NFL. The Plaintiffs' master complaint states that

Between 1933 and 1968, the NFL assumed and carried out a duty to inform and advise players and teams of the foreseeable harm that can arise from such things as the use of leather helmets, the need to wear hard

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<sup>109</sup> 2012 NFL Official Rules: Rule 12 Player Conduct, Section 2 Personal Fouls, Article 6 Unnecessary Roughness (h) (I) Article 7 Players in a defenseless posture

<sup>110</sup> Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 2, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



plastic helmets to reduce head wounds and internal injury (1943) and the grabbing of an opponent's facemask to minimize or avoid head and neck injuries (1956/1962). These warnings and imposed safety rules were furnished by the NFL because it had assumed a duty to provide a safe environment for players and because of its superior knowledge of the risks of injury to players.<sup>113</sup>

This allegation would be in line with a defense by Riddell that the NFL had a heightened duty to create rules to protect its players. A potential issue for the Plaintiffs would be that if the NFL has its claims preempted and separated from the litigation involving Riddell, the court would not be able to apportion that percentage of an award to the NFL because they would no longer be party to the case.

Plaintiffs will further argue that any conduct on their part was not negligent. In regards to returning to play and not reporting symptoms, the players would argue that they were unaware of the potential effects of returning to play with a head injury. This is in line with the Plaintiffs' stance that they were unaware of the long term effects of head injuries and that the NFL and Riddell failed to make the players aware of these effects.<sup>114</sup> Additionally, the players all differ in the way they played and what conditions lead to their injuries. Simply put, Riddell cannot make a one size fits all defense against the players that they were negligent in how they played the game or negligent in failing to properly work with doctors to mitigate their injuries.

Ultimately, if Riddell can show the NFL breached a heightened duty to create rules protecting its players they will likely have a potential award reduced. How vigorously the Plaintiffs' would defend this claim will largely depend on if the NFL and Riddell remain co-defendants in the suit. If the NFL is still before the court the Plaintiffs' would benefit from a finding of negligence against the NFL. However, if the NFL is preempted the Plaintiffs will have a difficult decision to make because if they establish the NFL did not have a duty the NFL will likely use that in their defense against the Plaintiffs when resolving their disputes under the collective bargaining agreement. If the Plaintiffs don't combat the comparative negligence of the NFL they risk losing that percentage of an award outright if they are

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<sup>113</sup> Amended Master Complaint at 66-67, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB.

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

not successful in further proceedings. Comparative negligence against individual players may prove easy in some situations based on discovery, but Riddell likely would not be able to establish negligence against every plaintiff because of the unique nature of every players' claims.

*D.) The Goal Line Stand: Preemption based on the Labor Management Relation Act*

On August 30, 2012, Riddell filed a motion to dismiss the cases in the MDL based on complete field preemption by the Labor Management Relations Act (LMRA).<sup>115</sup> Riddell's motion to dismiss generally argues that although Riddell is not a party to the NFL's collective bargaining agreements with the NFLPA. The resolution of Plaintiffs' claims against Riddell requires interpretation of collective bargaining agreements, and that state courts are preempted from interpreting collective bargaining agreements.<sup>116</sup> Riddell bases this argument on the Labor Management Relations Act's preemption provision.

Under the Labor Relations Management Act

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.<sup>117</sup>

The United States Supreme Court was called upon to interpret this portion of the LMRA in *Local 174, Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Lucas Flour Co.*<sup>118</sup> In interpreting the LMRA the Supreme Court reasoned that the “[s]ubject matter of Labor Management Relations Act section dealing with suits by and against labor organization is peculiarly one calling for application of uniform law”.<sup>119</sup>

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115 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

116 *Id.* at 1.

117 *Id.*

118 *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962)

119 *Id.* at 82

Riddell then goes on to craft its arguments based on a series of 3rd Circuit decisions.<sup>120 121 122</sup>

Firstly, Riddell illustrated that even if the state law claim does not directly involve a collective bargaining agreement, but rather requires the study or interpretation of a collective bargaining agreement, the court should still find the claim preempted by the LMRA.<sup>123</sup> Riddell cites to the 3rd Circuit cases of *Voilas v Gen. Motors Corp* and *Beidelman v. Stroh Brewery Co.* which states “if resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is preempted and federal-labor law principles . . . must be employed to resolve the dispute.”<sup>124</sup> Riddell then quoted *Voila* which reasoned from the Supreme Courts decision in *Local 174* that “state laws that might produce differing interpretations of the parties' obligations under a collective bargaining agreement are preempted.”<sup>125</sup>

Riddell then cites to *Allis Chalmers Corp. v. Lueck*, which held that preemption claims that are “inextricably entwined” with the analysis of a collective bargaining agreement can be preempted even though a claim is based in tort rather than breach of the agreement.<sup>126</sup> The Court based it decision on a need for collective bargaining agreements to be uniformly interpreted.<sup>127</sup> Both the NFL and Riddell are seeking to use this precedent to find that the Plaintiffs' state law tort claims should be preempted because they require the interpretation of NFL and NFLPA's collective bargaining agreements. This argument was successfully used in prior litigation against the NFL and Riddell in *Stringer v. Nat'l*

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120 The Third Circuit Court of Appeals is the binding authority over the Federal District Court for the Eastern District of Pennsylvania, where the multidistrict litigation is being conducted.

121 Riddell sets forth five different arguments for preemption. Riddell's arguments for preemption based in the Plaintiffs' loss of consortium claim, claim for punitive damages, and shared allegations are not covered by this paper.

122 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 10-12, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

123 *Id.* at 11.

124 *Voilas v Gen. Motors Corp*, 170 F.3d 367 (3d Cir. 1999). *Beidelman v. Stroh Brewery Co.*, 182 F.3d 225, 231-32 (3d Cir. 1999).

125 *Voilas v Gen. Motors Corp*, 170 F.3d 367, 372-73. Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 12, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

126 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 12, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB. *Allis Chalmers Corp v. Lueck* 471 U.S. 202, 213 (1985).

127 *Allis Chalmers Corp v. Lueck* 471 U.S. 202, 213 (1985).

football league.<sup>128</sup> In *Stringer*, the widow of a deceased NFL player sued the NFL and Riddell for their conduct that allegedly resulted in the death of her husband as a result of complications from heat stroke.<sup>129</sup> The court held the claim for wrongful death against the NFL and was preempted by the LMRA and the NFL's collective bargaining agreement<sup>130</sup> The court further stated that even though Riddell was not a party to the collective bargaining agreement, the resolution of the claim would require the interpretation of the NFL's collective bargaining agreement and that if the collective bargaining agreement needed to be interpreted the claims would be preempted.<sup>131</sup> However, while the court acknowledged that the state law claims against Riddell **could** be preempted by the collective bargaining agreement, the Court found that the products liability claims against Riddell may require the Court to examine the CBA but would not require the Court to interpret any of the provisions.<sup>132</sup> Since the court would not need to interpret any collective bargaining agreement provisions, there was no need for preemption of the claims. In August of 2011, the remaining claims were eventually settled out of court, nearly 10 years after the original complaint was filed.<sup>133</sup> Riddell argues that the current case would require interpretation of the collective bargaining agreement. Riddell strengthened its claim for preemption by citing a case where Judge Brody, the presiding judge over the MDL, preempted state-law claims because they would require the interpretation of a collective bargaining agreement (*Henderson v. Merck & Co., Inc.*, 998 F. Supp 532 (E.D. Pa. 1998) (Brody, J.)).<sup>134</sup>

Based on the case law presented Riddell makes three arguments for why the claims against Riddell require either interpretation of the CBA or that the claims are inextricably intertwined with the CBA. Riddell first argues that the negligence claim would require interpretation of the CBA to

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<sup>128</sup> *Stringer v Nat'l Football League*, 474 F. Supp.2d 894 (S.D. Ohio 2007)

<sup>129</sup> *Id.*

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

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

<sup>132</sup> *Id.* at 894

<sup>133</sup> Associated Press, [Lawsuit between Stringer's widow, Riddell Inc. settled](http://www.nfl.com/news/story/09000d5d82151178/article/lawsuit-between-stringers-widow-riddell-inc-settled), NFL.com (Aug. 9, 2011, 8:48 Am), <http://www.nfl.com/news/story/09000d5d82151178/article/lawsuit-between-stringers-widow-riddell-inc-settled>

<sup>134</sup> Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 12, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

determine what the requisite degree of care Riddell owed to the Plaintiffs.<sup>135</sup> Further, Riddell argues that to properly determine whether proximate causation of Plaintiffs' injuries was due to a breach of a duty to protect requires "interpretation of the applicable CBAs and their extensive, relevant, and material provisions on player safety, rules, injury treatment and care, and the allocation of responsibility assigned under the CBAs to the NFL, its Clubs, the Club physicians and trainers, and the player's association".<sup>136</sup> Finally, the CBA could potentially need to be interpreted if Riddell is found liable and liability needs to be apportioned in accordance with comparative fault principles<sup>137</sup>

1. *Misdirection Play: Plaintiff's claims require interpretation of the CBA to determine the duty Riddell owed Plaintiffs*

The first argument Riddell makes for preemption is that the Plaintiffs' claims requires direct interpretation of the collective bargaining agreement.<sup>138</sup> Riddell argues that the court in *Stringer* preempted Stringer's wrongful death claim because to resolve the claim and determine the proper duty of the NFL would require the interpretation of the collective bargaining agreement.<sup>139</sup> The court in *Stringer* stated "although Plaintiff's [Stringer's] claim against the NFL does not arise from the CBA, resolution of that claim is substantially dependent on, and inextricably intertwined with, an analysis of certain provisions of the CBA."<sup>140</sup> The court reasoned that the claim would require analysis of "certain CBA provisions imposing duties on the clubs with respect to medical care and treatment of NFL players."<sup>141</sup>

Plaintiffs will likely use *Stringer* to refute Riddell's arguments. While the court in *Stringer* did preempt Stringer's claim of wrongful death against the NFL, the court found that none of the claims raised against Riddell were preempted by the CBA.<sup>142</sup> The Court held that

even though collective bargaining agreement (CBA) between

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<sup>135</sup> *Id.* at 16.

<sup>136</sup> *Id.* at 31

<sup>137</sup> *Id.* at 32

<sup>138</sup> *Id.* at 15

<sup>139</sup> *Id.*

<sup>140</sup> *Stringer v Nat'l Football League*, 474 F. Supp.2d 894, 903 (S.D. Ohio 2007)

<sup>141</sup> *Id.* at 909

<sup>142</sup> *Id.* at 915

representatives of NFL players and clubs established Joint Committee to address issues of player safety, including safety of equipment and widow alleged that use of equipment was “league-mandated”; resolution of subject claims was not in any way dependent on interpretation of meaning of CBA provision establishing Joint Committee, and fact decedent might have been required as condition of his employment to wear subject equipment was irrelevant to question of whether that equipment was negligently designed or manufactured.<sup>143</sup>

Similarly, Plaintiffs' will argue that while Riddell again asserts that resolution of the negligence and Failure to Warn claim would require analysis of the provisions regarding the Joint Committee on player safety, any duties created by the CBA would be independent of any duty that Riddell owes as a product manufacturer.

However, *Stringer* is not binding precedent because it is a federal district court case from Ohio. Because the claims against Riddell were ultimately settled, it remains unknown what would be necessary to prevail on the merits and whether the judge would be required to look at the CBA in making any rulings

Riddell also seeks to bolster its position based on the actions the *Maxwell* trial court took before the case was sent off into MDL. Riddell cites the court's decision not to remand the case back to state court. The *Maxwell* court stated that *Stringer* was persuasive and that likewise the negligence claims in *Maxwell* would require analysis of the CBA to determine the duty of care owed by the NFL creating a Federal Question basis for jurisdiction.<sup>144</sup> However, Plaintiffs will argue that just as the *Stinger* court found claims against the NFL preempted, similarly the *Maxwell* court only implicated the claims against the NFL would require the interpretation of the CBA.

Finally, Plaintiffs will likely argue that even if their claim for negligence requires analysis of the CBA to determine the duty owed to them, a similar finding would not be necessary for their strict liability claims of design, manufacturing, or failure to warn defects. Under strict liability principles of

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<sup>143</sup> *Id.* at 914

<sup>144</sup> Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 23, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB. Citing *Maxwell v Nat'l Football League*, No. 2:11-cv-08394-R -MAN, Order at 1 (C.D. Cal. Dec. 8, 2011).

defect, duty is not an element to the cause of action. Strict liability causes of action require that if a manufacturer's product injures a plaintiff through either an error in the manufacturing, design, or instructions of the the product the manufacturer will be liable to the plaintiff for those injuries.<sup>145</sup>

2. *Up the Middle: To determine if Riddell breached a duty to protect players from repetitive head injuries, the CBA must be evaluated to determine if this breach was the proximate cause of the injuries.*

Riddell argues that

Plaintiffs' causation arguments also implicate and require interpretation of the CBAs' numerous medical-care provisions. Specifically, Plaintiffs would be required to show that it was the Riddell Defendants' duty to protect them from the alleged risks of multiple concussions, and that the supposed failure to do so was the proximate cause of their injuries. Yet, this argument cannot be made without interpretation of the applicable CBAs and their extensive, relevant, and material provisions on player safety, rules, injury treatment and care, and the allocation of responsibility assigned under the CBAs to the NFL, its Clubs, the Club physicians and trainers, and the players' association, all of which must be interpreted to assess causation properly. Thus, Plaintiff's claims are preempted on this additional ground.<sup>146</sup>

Plaintiffs will argue that this is essentially the same argument for preemption based on duty.

Riddell asserts that the CBA must be looked at to measure and determine the duty the NFL owed.

Plaintiffs should then look to *Stringer*, as no matter how the claims were couched against Riddell, the court reasoned that there was no need to interpret the relationship between the players and the NFL to determine the liability of Riddell. The *Stringer* court would seem to have stated that regardless of the issues between the union and management, the duty owed by the manufacturer remains stagnant and causation would be based off that duty.

In regards to failure to warn claim, Plaintiffs can argue that the causation can be determined without looking to the CBA. In California, for failure to warn causation, plaintiffs must show “that the lack of [a] sufficient [instruction] [or] [warning] was a substantial factor in causing [name of plaintiff]’s

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145 California Civil Practice- Torts Cal. Civ. Prac. Torts § 24:1

146 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 30-31, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

harm.<sup>147</sup> It is not required that the failure to warn was the sole factor but merely a substantial factor in causing the harm. A determination that the failure to warn was a substantial factor could be made without looking into the CBA. In addition, using the logic of *Stringer* that the duty between the NFL and its union does not effect Riddell, the causation should be looked at independently as well. The argument is that the claims against Riddell should be evaluated in a vacuum, with their liability unaffected by anything the union and NFL bargained for in their own separate agreement.

3. Offsetting Personal Fouls: *The CBA would need to be interpreted to apportion fault under comparative negligence principles*

Riddell's final argument is that even if Plaintiffs' claims do not inextricably require analysis or interpretation of the collective bargaining agreement, any off set of liability from comparative negligence by the players or the NFL would require interpretation under the CBA.<sup>148</sup> Under California law, persons not a party to a suit can still be considered when allocating fault under comparative negligence.<sup>149</sup> Riddell's argument is that to properly argue comparative negligence of the players or the NFL the CBA would need to be interpreted to determine their respective duties for negligence purposes.<sup>150</sup> Further interpretation could be required to determine if the NFL or the player plaintiffs breached any of their responsibilities under the CBA. Any interpretation of the CBA in the suit against Riddell would potentially subject the CBA to differing interpretations based on different courts when the multidistrict litigation concludes or when plaintiffs' suits are severed as motioned for by Riddell.<sup>151</sup> In addition, the comparative fault issue was not raised in *Stringer*. Therefore, even though Riddell's claims were not preempted in *Stringer*, the court never faced the issue of how comparative fault would

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147 California Model Civil Jury Instructions 1205. Strict Liability—Failure to Warn—Essential Factual Elements

148 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 32, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

149 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 a t32, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB; citing *Cal. Civ. Code. § 1431.2(a) & Wilson v. Ritto*, 129 Cal Rptr. 2d 336, 340-41 (Cal. App. 2003)

150 Brief in Support of Riddell Defendants' Motion to Dismiss based on LMRA § 301 at 32, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

151 Riddell Defendants' Motion to Sever, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB



be accessed without interpreting the CBA. Because the case was settled, apportionment of liability to potential other causes was never explored.

Plaintiffs' best argument is to rely on the issue that *Stringer* is not binding. They would argue that resolution of the claims against the NFL would not require analysis of the collective bargaining agreement. Plaintiffs will have already argued this point to avoid having their case against the NFL found preempted. Convincing the Court that *Stringer* should not apply is only half the battle. The Plaintiffs would then have to successfully argue that the resolution of any negligence claim against the players union or the NFL would not require the CBA to determine their respective duties and obligations.

The only additional argument Plaintiffs may have would be coached in public policy. If the state law claims against Riddell are preempted, the Plaintiffs are left without a remedy to their injuries caused by Riddell. Because Riddell is not a party to the CBA, Riddell is not bound by the agreement's dispute resolution process. Without the courts nor the resolution process of the CBA, there is no avenue for the plaintiffs to resolve their injuries from Riddell's allegedly defective products.

The *Stringer* ruling will likely lead to preemption of Plaintiffs' state law claims against Riddell. Even though *Stringer* stated that the products liability claims were not inextricably entwined with the CBA, this will likely not protect Plaintiffs' claims in this case. It is possible that the court will determine that a review of the CBA is necessary to determine the duty of Riddell with regards to the failure to warn claim or possibly in determining causation. However, the real trouble to Plaintiffs' claims is allocating comparative fault. *Stringer* reasoned that to determine the duty of the NFL in a negligence based wrongful death claim the CBA needed to be interpreted. Similarly, to determine negligence on the part of the union or the NFL, the court would need to examine the CBA to determine what duty NFL and NFLPA have in protecting players' safety. The potential conflict created by numerous courts interpreting these provisions is the very reason courts have found claims to be preempted by the LMRA in the past.

## V. 4th down and Goal; Defending on the Merits

When the plaintiffs in *Maxwell* filed their complaint in California, they included three products liability claims against Riddell.<sup>152</sup> The complaint alleged Riddell of being liable for injuries to Plaintiffs on the basis of strict liability design defect, strict liability manufacturing defect, and a failure to warn cause of action.<sup>153 154</sup> In addition to the causes of action, the master complaint for the MDL supplements the counts with a section of allegations exclusively against Riddell.<sup>155</sup> These allegations highlight the history of Riddell and the innovations the company has made in helmet technology from the 1930's through the present day.<sup>156</sup> Most of the information seemingly comes directly from Riddell's company website.<sup>157</sup> The additional allegations also address Riddell's status as the official helmet manufacturer of the NFL, that the company is engaged in the helmet manufacturing and sales business, and that the Plaintiffs relied on Riddell and the NFL to protect them from the long term effects of concussions.<sup>158</sup> Additionally, Plaintiffs allege that “[u]pon information and belief, Plaintiffs wore Riddell helmets at times while playing and/or practicing during their NFL careers.”<sup>159</sup>

### A.) *Design Defects*

Under California law, a “[a] manufacturer, distributor, or retailer is liable in tort for defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way.”<sup>160</sup> In *Barker v. Lull Engineering Co.*, the California Supreme Court held that

A product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests: first, the product may be found defective in design if

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<sup>152</sup> Complaint, *Maxwell v. National Football League*, Case NO.: CV aa-8394.

<sup>153</sup> *Id.*

<sup>154</sup> The *Maxwell* complaint included a negligence claim, however this claim is not covered in this article.

<sup>155</sup> Amended Master Complaint at 77-80, In Re National Football League Players’ Concussion Injury Litigation, No. 2:12-md-02323-AB

<sup>156</sup> *Id.* see Riddell, <http://www.riddell.com/innovation/history/> (last visited Nov. 19, 2012)

<sup>157</sup> *Id.*

<sup>158</sup> Amended Master Complaint at 80, In Re National Football League Players’ Concussion Injury Litigation, No. 2:12-md-02323-AB

<sup>159</sup> *Id.*

<sup>160</sup> *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 560 (Cal. 1994) citing, *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121 (Cal. 1972); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (Cal. 1963).

plaintiff establishes that it failed to perform safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner<sup>161</sup>, and second, a product may be found defective in design if plaintiff demonstrates that its design proximately caused his injury and defendant fails to establish, in light of relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent therein.<sup>162 163</sup>

Following the decision in *Barker*, California courts grappled with how and when it was appropriate to use the two tests laid out by the Supreme Court.<sup>164</sup> The California Supreme Court clarified its position on when the Consumer Expectations Test would apply as opposed to the Risk-Benefit test in *Soule v. General Motors Corp.*<sup>165</sup>

In *Soule*, a plaintiff was injured in a car accident and had both of her ankles fractured.<sup>166</sup> The plaintiff alleged that her injuries would not have been as substantial if the car's control arm bracket and frame had not defectively been designed to permit the wheel to travel rearward in the event the bracket should fail.<sup>167</sup> Both the plaintiff and defendant elicited expert testimony on the design and manufacture of the vehicle.<sup>168</sup> The trial court instructed the jury in both the Consumer Expectation Test and Risk Utility test to determine whether GM was liable.<sup>169</sup> The jury eventually returned a verdict of liability against GM.<sup>170</sup> GM appealed the decision to the California Court of Appeals arguing that the jury should not have been instructed on the Consumer Expectations test because the case dealt with a complex design.<sup>171</sup> The appeals court “concluded that a jury may rely on expert assistance to determine

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161Editors note: this is commonly known as the Consumer Expectations Test

162Editors note: this is more commonly known as the Risk-Benefit Test.

163*Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443 (1978)

164 *see generally* *Campbell v. General Motors Corp.*, 32 Cal. 3d 112 (Cal. 1982); *Bates v. John Deere Co.*, 148 Cal. App. 3d 40 (Cal. App. 1st Dist. 1983); *Lunghi v. Clark Equipment Co.*, 153 Cal. App. 3d 485 (Cal. App. 1st Dist. 1984); *West v. Johnson & Johnson Products, Inc.*, 174 Cal. App. 3d 831 (Cal. App. 6th Dist. 1985); and *Rosburg v. Minn. Mining & Mfg. Co.*, 181 Cal. App. 3d 726 (Cal. App. 1st Dist. 1986) (all cited for their interpretations of *Barker* in *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 560 (Cal. 1994)

165*Soule v. General Motors Corp.*, 8 Cal. 4th 548, 560 (Cal. 1994)

166 *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 557 (Cal. 1994)

167 *Id.*

168 *Id.* at 557-58.

169 *Id.* at 559.

170 *Id.*

171 *Id.*

what level of safe performance an ordinary consumer would expect under particular circumstances.”<sup>172</sup>

<sup>173</sup> The court did however affirm the trial court decision finding the improper instruction to be harmless error.<sup>174</sup> This led to GM's appeal to the California Supreme Court.

The California Supreme Court held that a jury must be instructed solely on the Risk Utility Test for design defect whenever an instruction on the Consumer Expectation Test would “allow a jury to avoid the risk-benefit analysis in a case where it is required.”<sup>175</sup> The court clarified this position when it stated “[t]he crucial question in each individual case is whether the circumstances of the product's failure permit and inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its consumers.”<sup>176</sup> When that inference can be rightfully drawn by the jury the Consumer Expectation Test is available. However, when the inference cannot be drawn the jury should solely rely on the Risk Utility Test. The Court, under the facts of the case stated, that an

ordinary consumer of automobiles cannot reasonably expect that a car's frame . . . will be designed to remain intact in any and all circumstances. Nor would ordinary experience and understanding inform such a consumer how safely and automobile's design should perform under the esoteric circumstances of the collision at issue here. . . . Therefore injection of ordinary consumers expectations into the design defect equation was improper.

The court provided an example where the ordinary consumer expectations would be proper in determining a design defect “ordinary consumers of modern automobiles may and do expect. . . vehicles will be designed not to explode while idling at stoplights, experience sudden steering or brake failure as they leave the dealership, or roll over and catch fire in two-mile-per-hour collisions.”<sup>177</sup> Taken together, the Court seems to state that when a complex product such as a car is claimed to be

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<sup>172</sup> *Id.* at 560.

<sup>173</sup> The Supreme Court had yet to rule on the propriety of the Consumer Expectations Test in complex design cases however, the Appeals court chose between differing lines of authority within the state.

<sup>174</sup> *Soule*, 8 Cal. 4th 548, 560. (Cal. 1994)

<sup>175</sup> *Id.* at 568

<sup>176</sup> *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 558-59. (Cal. 1994)

<sup>177</sup> *Id.* at 566.

defective, the Consumer Expectations Test would only be appropriate in cases similar to the principle of *Res Ipsa Loquitur* meaning, cases where the mere fact that an accident occurred raises an inference of negligence.<sup>178</sup>

*1. Will the Consumer Expectation Test be available to the Maxwell Plaintiffs?*

In the *Maxwell* case the Risk-Benefit Test will likely apply. *Maxwell* plaintiffs claim that Riddell negligently failed to design helmets with a safe means of “attenuating and absorbing force and/or that the shock attenuating system of Riddell's helmets was not properly configured.”<sup>179</sup> As a result, “the helmets did not provide adequate protection against the risk of concussive brain injuries”.<sup>180</sup> These allegations resemble *Soule*, a helmet like a car is generally known to be safe and is expected to be designed to prevent injuries. But just like in *Soule*, where the Court held that a lay consumer would not have a reasonable expectation of the amount of force a car frame could withstand, a lay person is likely to know that players still injure themselves while wearing helmets. Further, lay persons are likely unaware of the reasonable expectation of how much force a shock attenuating system should or even could withstand. To demonstrate how the football helmet is designed and the rationale behind the design would likely require expert testimony to explain the biomechanics and engineering behind the helmet. This would likely remove reasonable the consumer expectation out of the purview of the jury. Further testimony would likely be needed to respond to the allegation that there was a defect in not providing adequate warnings or instructions. However, even if the consumer expectation test was available to the jury, it would still be questionable whether an ordinary consumer would believe that Riddell's helmets failed to meet expectations for safety as will be discussed *supra*.

*2. Plaintiffs allegations and Claim*

The allegations regarding the *Maxwell* Plaintiffs' design defect claim and the allegations spelled out in the MDL master complaint are nearly identical. However, the MDL complaint included

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<sup>178</sup> RES IPSA LOQUITUR, Black's Law Dictionary (9th ed. 2009), *res ipsa loquitur*

<sup>179</sup> Complaint at 76, *Maxwell v. National Football League*, Case NO.: CV aa-8394

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

additional allegations that prior to 2002 Riddell made no attempt to design their helmets to protect against concussion, and that after 2002 the helmet produced to reduce concussions, the “Riddell Revolution” helmet, was still not sufficiently designed to protect players from concussions.<sup>181 182</sup> The *Maxwell* complaint alleges

At the time the helmets were designed, manufactured, sold, and distributed by the Riddell Defendants, the helmets were defective in design, unreasonably dangerous, and unsafe for their intended purpose because they did not provide adequate protection against the foreseeable risk of concussive brain injury. The design defect includes, but is not limited to the following:

- (a) Negligently failing to design the subject helmet with a safe means of attenuating and absorbing the foreseeable forces of impact in order to minimize and/or reduce the forces and energy directed to the player’s head;
- (b) Negligently designing the subject helmet with a shock attenuating system which was not safely configured;
- (c) Negligently failing to properly and adequately test the helmet model;
- (d) Other acts of negligence that may be discovered during the course of this matter;
- (e) Failing to warn Plaintiffs that their helmets would not protect against the long-term health consequences of concussive brain injury;

The defective design and unreasonably dangerous condition were a proximate and producing cause of the personal injuries suffered by the Plaintiffs and other damages, including but not limited to, economic damages and non-economic damages. At all times, the helmets were being used for the purpose for which they were intended. The Riddell Defendants are strictly liable for designing a defective and unreasonably dangerous product and for failing to warn which were proximate and producing causes of the personal injuries and other damages including, but not limited to, economic damage as alleged herein. A safer alternative design was economically and technologically feasible at the time the product left the control of the Riddell Defendants.

### 3. *Consumer Expectation Analysis*

Under the consumer expectations test Plaintiffs would have to establish that (1) Riddell's helmets failed to perform as safely as an ordinary consumer would expect, (2) the defect existed when the product left Riddell's possession, (3) the defect was a “legal cause” of plaintiffs' injuries, and (4) the

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<sup>181</sup> Amended Master Complaint at 39, *In Re National Football League Players’ Concussion Injury Litigation*, No. 2:12-md-02323-AB

<sup>182</sup> Of the 74 plaintiff players in the *Maxwell* suit only 4 players claim to have played in 2002 or beyond and none allege to have used the “Riddell Revolution” helmet. Amended Master Complaint at 39, *In Re National Football League Players’ Concussion Injury Litigation*, No. 2:12-md-02323-AB

product was used in a reasonably foreseeable manner.<sup>183</sup>

The *Maxwell* Plaintiffs' argument can be laid out simply. An ordinary consumer would expect that a helmet worn to protect the head from injury in a football game would be reasonably designed to protect the wearer from concussions, a frequent and foreseeable head injury in football. The defect would have existed when it left Riddell's possession because by the allegations no helmet ever designed by Riddell was free from the defect of a design that failed to protect from concussions. Further, if the helmets had been designed properly and without defect, they would have been able to withstand the force and shock of foreseeable violent contact that occurs when playing the game of football. Finally, Riddell designs its helmets to be used for protection while playing football, so Plaintiffs were using them in a foreseeable manner when they wore them for head protection while playing professional football.

There are several weaknesses to that argument. First, it is entirely reasonable that a jury could find that a football helmet would not completely protect players from concussions. Football is a violent sport and if a person is familiar with the game of football, they are undoubtedly knowledgeable of the fact that players often get injured in the course of the game. Concussions are a frequent football related injury. Just as an ordinary consumer would not expect the frame of a car to withstand all forces of a potential car accident, the ordinary consumer would be equally unlikely to assume that wearing a helmet protects players from concussions regardless of the force, angle, or nature of the impact to the player.

Without more discovery, it is unclear if Plaintiffs can establish that the helmets left Riddell containing a defect. Presently, Plaintiffs do not even allege what model of helmet they were wearing. Over the years, Riddell has made multiple models with various technological improvements. Unless all Riddell helmets are defectively designed, Plaintiffs would need to be able to show what model Riddell helmet the player wore and that it was defective when it left Riddell.

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<sup>183</sup> *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 559 (Cal. 1994)

Plaintiffs will also have to demonstrate that the helmets were the cause of the injury. This is also hard because Plaintiffs would need to demonstrate that the unique model helmet the player wore caused the concussion. Ultimately there are numerous additional factors that will have lead to the concussion most notably the speed, angle, and location of the hit that caused the injury. With these claims being brought so far removed from when the players were actively playing, it will be challenging to point to the events or plays that actually caused concussions, especially if the concussion was not diagnosed immediately following its occurrence.

Given the challenges presented with establishing the Plaintiffs' claim, without the use of expert witnesses, the Consumer Expectation Test may not be something Plaintiffs would even look to as a potential litigation strategy. However, if they do prevail in being able to use the Consumer Expectation Test, Plaintiffs will need to procure many vital facts in discovery regarding the model helmets used by the Plaintiffs, the design of those models, and the medical records of the team medical personnel indicating the occurrence and nature of the alleged concussions.

#### *4. Risk-Benefit Analysis*

Under the Risk-Benefit test Plaintiffs need to establish that Riddell manufactured their helmets, The plaintiffs were harmed; and That the helmets' designs were a substantial factor in causing the harm to the Plaintiffs.<sup>184</sup> If the Plaintiffs prove those three facts, Ridell will be liable for design defect, unless they can prove that the benefits of the design outweigh the risks. In deciding whether the benefits outweigh the risks, a jury should consider the following: (a) the gravity of potential harm resulting from the use of the helmet; (b) the likelihood that this harm would occur; the feasibility of an alternative safer design at the time of manufacture; the cost of an alternative design; and other relevant factors.<sup>185</sup>

Under risk-benefit analysis, Plaintiffs' will argue that Riddell's helmets failed to protect players from concussions and that the designs implemented in the helmets shock absorption padding were a

<sup>184</sup>Judicial Council of California Civil Jury Instructions 1204

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



substantial factor in causing these concussions. Assuming that the Plaintiffs will actually be able to establish how and when their concussions occurred, the issue is whether the helmets sufficiently absorbed contact. Plaintiffs will likely present engineering and biomechanics engineers to testify that Riddell's helmets, regardless of the model, fail to absorb enough impact to prevent concussions. However, Plaintiffs will also need to establish how the players could potentially be protected. This would likely require a demonstration of a reasonable alternative design.

Riddell will not concede the first portion of the risk-benefit test and as such will likely frame their argument to reflect that the helmets' designs were not a substantial factor to the Plaintiffs' harm. Riddell will also call experts, these experts would presumably testify that not only do the helmets not cause Plaintiffs' injuries, but that they also prevent injuries, by using well researched and tested materials and designs. Riddell will also put the Plaintiffs to their burden in establishing that they were using Riddell helmets when they suffered their injuries, as Plaintiffs have only asserted that on information and belief Riddell helmets were worn at some point by the players during their NFL careers.<sup>186</sup> Should the jury find that the Riddell helmets, through their design, harmed the plaintiffs, the factors of risk-benefit will provide many additional battle grounds for the parties. Most importantly would be the possibility of a reasonable alternative design.

Without a team of experts, it is unclear what kind of reasonable alternative designs Plaintiffs are likely to submit to a jury. However, spurred by the media attention that football related concussions are receiving, there are new football helmet designs being drawn up across the globe. One such innovation is the “guardian” a supplement to helmets where a cover is created for the existing helmet.<sup>187</sup> The cover consists of a series of gel-filled pouches that absorb impact from blows to the helmet and would further absorb blows from two helmets both equipped with the cover.<sup>188</sup> The technology is already being

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186 Amended Master Complaint at 39, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

187 Malone, Scott, [Football turns to helmet technology to tackle head injuries](http://www.reuters.com/article/2012/04/02/sports-football-helmets-idUSL2E8E8CKY20120402), Reuters online (Apr. 2, 2012, 12:59 AM), <http://www.reuters.com/article/2012/04/02/sports-football-helmets-idUSL2E8E8CKY20120402>

188 *Id.*

experimented with at the high school level in Georgia and Pennsylvania.<sup>189</sup> Another design being tested is the “Bulwark”, the principle of the design is that rather than a single piece of plastic, as current helmets are currently manufactured, the Bulwark would be made of multiple plates with the idea being that the multiple plates would deflect more of the force from big hits and nearly eliminate the force of more frequent smaller contacts incidental to the game.<sup>190</sup> Finally, there is one company already producing NFL helmets that have a different cushioning system from the traditional foam padding interiors used by Riddell. Xenith brand helmets replaced cushion padding with air capsules that take in and release air in response to impact to the helmet.<sup>191</sup>

While the guardian gel technology may still be in its infancy and testing, both the Bulwark and Xenith technologies may have been designs that Riddell could have safely implemented in the past. The Bulwark design is based on the concept that multiple pieces to the helmet would deflect impact. Riddell helmets did not take their present construction of a shell consisting of a single piece of molded plastic until 1969, when the company implemented the design to improve the structural integrity of the entire helmet.<sup>192</sup> The case for the Xenith technology is even more compelling. Assuming the process withstands scientific scrutiny, Riddell will likely be unable to explain why they had not adopted the technology. Riddell has publicly stated that they patented the throttled air technology the Xenith helmets use in their cushioning system in the 1970s.<sup>193</sup> One Riddell representative stated that the company explored the throttled air cushioning and “tried, used and discontinued using it.”<sup>194</sup>

However even if the Bulwark or Xenith designs were considered reasonable alternatives for ALL of the numerous models implicated by Plaintiffs, the question would still remain as to whether they would present prohibitive costs or other disadvantages. Without more information the cost aspect

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189 *Id.*

190 *Id.*

191 *Id.*

192 Amended Master Complaint at 39, *In Re National Football League Players’ Concussion Injury Litigation*, No. 2:12-md-02323-AB

193 Kaplan, Daniel, [Helmet maker uses safety as sales tool](#), SportingNews.com (May 8, 2012, 11:54 AM),

<http://aol.sportingnews.com/nfl/story/2012-05-08/nfl-concussion-conundrum-helmet-maker-uses-safety-as-sales-tool>

194 *Id.*

of the alternative design is not something that can foreseeably be projected. However, there are legitimate potential disadvantages to the alternative designs. With regard to the Bulwark, the additional protection of a helmet that would be made of multiple plates is the deflection of the impact, however in severe enough impact the plates would be likely to be more prone to structural failure than a single piece of plastic, this was the reason for the single piece design in the first place. While this deflective impact may reduce concussions, it potentially could make the helmet less safe in protecting from head injuries such as fractures that could result from the helmet breaking and the head being subjected to further trauma. With regards to the Xenith technology, it is possible that the cushioned air technology may create a different fit for the helmet. Helmets are designed specifically to have a tight almost sculpted fit to the player's head, which is presumably the intention of the current padding system. If these air cushions were compromised, they could deflate leaving the helmet to fit differently. The difference in fit could result in loss of the helmet, which could subject the player to injury or even position the helmet in a way that would not provide the full protection possible when worn properly.

Finally, whether the Bulwark or Xenith actually completely protect or even greatly reduce the risk of concussions is still unconfirmed. Currently there is not a helmet in production that completely eliminates the risks of injury associated with football. Before an assessment can be had, it still must be established that the Riddell helmets were a substantial factor in causing the harm. This would be a jury question that can likely only be answered through a battle between Riddell and the Plaintiffs' experts.

#### B.) *Manufacturing Defects*

California law provides that a manufacturing defect occurs when a product is produced that “differs from the manufacturer's intended result or from other ostensibly identical units of the same product line.”<sup>195</sup> To prevail on a manufacturing defect claim the *Maxwell* Plaintiffs will have to establish that (1) Riddell manufactured the helmets worn by Plaintiffs; (2) That the helmets contained a manufacturing defect when it left Riddell; (3) The Plaintiffs were harmed; (4) that the helmets' defects

<sup>195</sup> *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Products Liab. Litig.*, 754 F. Supp. 2d 1208, 1222 (C.D. Cal. 2010) quoting *Barker v. Lull Eng'g Co.*, 20 Cal.3d 413, 429, ( Cal. 1978)

were a substantial factor in causing the Plaintiffs' harm.

Both the MDL complaint and the *Maxwell* complaint share the same allegations of a manufacturing defect. These allegations essentially parrot design defect with the term design being replaced with manufactured.<sup>196</sup> The Plaintiffs allege that Riddell's helmets were defective because they did not provide adequate protection from concussions and that Riddell's failure to “design the helmets to design and manufacturing specifications” resulted in failing to produce helmets with a safe shock absorption system.<sup>197</sup> The also allege that Riddell negligently manufactured their helmets without a safe shock absorption system, failed to properly test or inspect the helmets, and failed to warn that the helmets would not protect against concussions.<sup>198</sup> The complaint goes on to allege that the manufacturing defect was a proximate cause to the Plaintiffs' injuries.

Simply put this claim does not properly allege a manufacturing defect. Rather, the allegations redundantly allege a design defect (including an allegation of a reasonable alternative design) as well as suggesting that Riddell failed to properly warn consumers about the danger of concussions. At no point does the complaint allege that the helmets worn by the Plaintiffs' differed from those of the normal model of the helmet used nor that they did not meet design specifications. The allegations further do not address how the helmets worn by the Plaintiffs differed from design specifications or the typically released version of the helmet model. Riddell will likely attempt to have the manufacturing defect claim dismissed for failure to state a claim upon which relief can be granted.<sup>199</sup>

Even if the claim is not dismissed, it would likely need to be amended to properly fit the California standards. Plaintiffs would then have to prove that any or all of the helmets worn by the 75 plaintiffs in the case contained a manufacturing defect. Proving the defect would likely be a near impossible challenge. Unless paperwork turned over in discovery documented some sort of defect or

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<sup>196</sup> Amended Master Complaint at 39, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB; Complaint at 77-80, *Maxwell v. National Football League*, Case NO.: CV aa-8394

<sup>197</sup> Amended Master Complaint at 83, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB; Complaint at 77-80, *Maxwell v. National Football League*, Case NO.: CV aa-8394

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

<sup>199</sup> *See Fed. R. Civ. P. 12(b)(6)*

flaw in a helmet, the only real way to show the defect would be to examine the helmet(s). For the majority of the players in this suit these helmets will not have been used in anywhere from 5-40 years. The location of helmets long discarded would prove challenging. In addition, even helmets that are found would need to be further proven to have been worn by the Plaintiff and that the particular helmet was worn when the player was injured. Finally, if all of those issues were resolved it would still need to be proven that the helmet was defective when it left Riddell's hands. Again with the length of time between when many of the Plaintiffs played professional football and when these claims were brought, the specificity and definitiveness of such assertions would be ripe for defense questioning. Assuming as smoking gun fails to turn up in discovery, Plaintiffs would likely carry more credibility if they voluntarily dismissed the manufacturing defect claim prior to arguing cases before a jury.

C.) *Failure to Warn.*

To prevail on a failure to warn claim in California the plaintiff must show that the helmets lacked sufficient warning of the potential risk of concussions and the long term effects of concussions<sup>200</sup> To establish that claim, the Plaintiffs must prove all of the following:

(1.) That Riddell manufactured the helmets plaintiffs wore when they suffered a concussion; (2.) That the helmets did not properly protect players from concussions and that the long term effects of concussions were known in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of manufacturing; (3.) That the potential risks presented a substantial danger when the helmets were used or misused in an intended or reasonably foreseeable way; (4.) That ordinary consumers would not have recognized the potential of concussions or the long term effects of multiple concussions; (5.) That Riddell failed to adequately warn of the potential concussion risks (6.) That Plaintiffs were harmed; and (7.) That the lack of sufficient warnings were a substantial factor in causing Plaintiffs' harm.<sup>201</sup>

The original *Maxwell* complaint alleges that Riddell failed to provide adequate and necessary

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200 Judicial Counsel of California Civil Jury Instructions 1206

201 Judicial Counsel of California Civil Jury Instructions 1206

warnings to reduce the risk of concussions. It also alleges that other model helmets provide greater shock absorption of blows to the head. Finally, they allege that failure to warn of the risk of concussions caused the injuries to the Plaintiffs.<sup>202</sup> These allegations were supplemented in the MDL master complaint. In the MDL complaint it alleges that Riddell knew or should have known of the risks of concussions when the helmets were used in a foreseeable manner and that counsel ignored research indicating a risk of sustaining a concussion while playing football.<sup>203</sup> They further allege that corporate counsel was well read on the dangers and despite this knowledge, no warning regarding concussions was included on helmets until 2002.<sup>204</sup> They also allege that the warnings provided in 2002 about returning to play after a concussion are still inadequate because they fail to notify players of the long term effects of concussions.<sup>205</sup> Finally, the complaint alleges that Riddell “knew that the dangers were not readily recognizable to an ordinary consumer or user and that such a person would use these products without inspection for defects.

The complaint goes on to make allegations about the Plaintiffs. First that players did not know or have reason to know of the defects “or increased risk of harm.”<sup>206</sup> Next, it claims Plaintiffs used Riddell helmets in a foreseeable manner.<sup>207</sup> Finally Plaintiffs allege that the “plaintiffs' damages were the legal and proximate result of the actions of the Riddell Defendants who owed a duty to warn Plaintiffs of the risks of substantial harm with the foreseeable use of their products.”<sup>208</sup>

Riddell will argue that no such warning was necessary. Any information known by Riddell was available publicly. Even the information that Plaintiffs allege Riddell knew was publicly available. There is no allegation of hidden internal testing, concealed by Riddell. Riddell will also argue that Plaintiffs knew there was a risk of concussions. Having played the game of football for years with

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202 Complaint at 79, *Maxwell v. National Football League*, Case NO.: CV aa-8394

203 Amended Master Complaint at 84-85, *In Re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

teammates of varying experiences, it is likely the Plaintiffs would have come in contact with someone who had suffered a concussion while playing football, even while wearing a helmet.

Next, Riddell would argue that the scientific evidence that football related concussions have long term effects is a relatively recent discovery. As stated earlier in this article, CTE was not first diagnosed in a former football player until 2005.<sup>209</sup> Even in the wake of that report, conflicting information was still being published, including the work produced by the NFL.<sup>210</sup> While today it seems the long term risks are well known as a result of extensive media coverage, these developments were not truly confirmed with regards to football until recently. Plaintiffs allege that a warning should have been given that other helmets provide greater protection, it is unclear where Plaintiffs could establish that other helmets provided better protection from concussions. Further, it is unclear why Riddell would be expected to suggest a competitor's product is superior to their own.

Plaintiffs also will need proof that they were wearing Riddell helmets. While the model of the helmets may be unnecessary for failure to warn purposes, because Plaintiffs allege all Riddell helmets fail to properly warn, it is still not established that the players wore Riddell helmets. More importantly, it has not been established that the helmets were worn at the time of their injuries.

There are also causation issues with Plaintiffs failure to warn claim. The plaintiffs must establish that the warning would have or likely would have prevented or reduced the Plaintiffs harm. Playing professional football carries with it many benefits. Players gain celebrity status as high profile members of the community. In addition the NFL provides generous salaries to their players. Salaries that for many Plaintiffs would likely be unavailable to them in any other career for which they were qualified.

Finally, the culture of the NFL would likely prevent players from truly heeding any warnings

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<sup>209</sup> Magels, John, [NFL could face thousands of lawsuits from ex-players over brain damage from concussions](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html), Cleveland Plain Dealer online (May 27, 2012, 6:02 AM), [http://www.cleveland.com/science/index.ssf/2012/05/thousands\\_of\\_ex-player\\_lawsuit.html](http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html)

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

provided to Plaintiffs. NFL player contracts are not guaranteed.<sup>211</sup> This means that a player can be released at any time during their contract and be owed only what was previously due and any money guaranteed in a signing bonus.<sup>212</sup> In a recent poll, nearly 50% of NFL players claim they feel pressure to play even when injured.<sup>213</sup> In that same poll 45% of players said they have had or believe they have had a concussion.<sup>214</sup> The poll also found that over 80% of those polled feared the long term effects of concussions.<sup>215</sup> Yet, despite this fear and knowledge of potential long term effects, these player remained playing the game. The results of this poll are not scientific and do not necessarily speak for the perceptions of the Plaintiffs but, it is illustrative. There are perks and advantages to playing professional football that make the line of work attractive despite its dangers.

The failure to warn claim may still be the Plaintiffs best chance at relief. Earlier warnings may have curtailed the Plaintiffs from football, modified how the players played, or changed player perceptions on how to handle concussion symptoms they experienced while using the product. However, the claim is not without its weaknesses. It needs to be shown Riddell knew of the long term effects of concussions and that their helmets did not properly protect players. Plaintiffs also must show that the warnings would have done any good. This means overcoming a culture which encourages participation in spite of injury, a culture of owing a duty to your teammates to play, and a line of work that provides celebrity and impressive compensation. Should Plaintiffs establish the need and potential good provided by a warning, the Plaintiffs will still be put to their paces in proving the use of a Riddell helmet. While challenging, this may still be the easiest claim for Plaintiffs to prevail on.

## **VI. Instant Replay: Does the Play Stand?**

With so many plaintiffs already bringing suit against Riddell and so many more potential

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211 Legwold, Jeff, NFL players' base salaries rarely guaranteed, Denver Post online (Aug. 9, 2010, 12:47 PM), [http://www.denverpost.com/broncos/ci\\_15718872](http://www.denverpost.com/broncos/ci_15718872)

212 *Id.*

213 Sporting News, NFL players poll: About half feel pressure to play with injuries, SportingNews.com (Aug. 31, 2012, 9:36 AM), <http://aol.sportingnews.com/nfl/story/2012-08-31/nfl-players-poll-concussions-injuries-pressure-fear-for-safety>

214 *Id.*

215 *Id.*



plaintiffs in the waiting should litigation be successful, Riddell is left vulnerable to a high exposure to damages. However, properly defended Riddell has a litany of defenses that are not only meritorious, but could tie litigation up for the foreseeable future. The first line of defense has already been submitted in the MDL, when Riddell filed a motion to dismiss based on the Labor Management Relations Act. If successful, Riddell would be dismissed from the present litigation because in order to properly adjudicate the Plaintiffs' claims the court would have to interpret the collective bargaining agreement between the NFL and its players. Riddell argues that the court is preempted from doing so under the LMRA. Even in Riddell's motion to dismiss they hinted that subsequent motions to dismiss may still be filed if the preemption argument is not successful. These additional motions to dismiss will likely address issues of assumption of the risk and the statutes of limitations. Should the court rule against Riddell on those defenses, Plaintiffs will still have to prevail on the merits of their claims. While discovery has still yet to begin, Plaintiffs have causation issues that Riddell will look to expose to be found not liable. Riddell could potentially further insulate itself from damages by arguing comparative negligence and look to have any award reduced to the percentage of fault for the Plaintiffs' injuries Riddell could be reasonably tied to. Finally, if all else fails Riddell still has the option to try and settle the claims out of court. While the current concussion litigation will likely have long reaching effects on the game of football in America, from the way the game is played, to the equipment that is used to protect its player, Riddell will likely be able to weather the storm and potentially keep its position as the industry standard for football helmets.