Will the NFL Feel the Long-Term Effects of Concussions or Can it Avoid the Big Hit?

Former Atlanta Falcon Ray Easterling committed suicide on April 19, 2012.[1] He suffered from depression and insomnia, classic symptoms of traumatic brain injury.[2] As his problems progressively worsened he routinely became disoriented and forgot where he put things and where he was while jogging.[3] Easterling was diagnosed with dementia in 2011 and is one of a growing number of former players who have reacted to their post-career symptoms by taking their own lives.[4] Notably, he was the lead plaintiff in the first federal lawsuit filed against the National Football League (NFL) claiming the league failed to properly treat players for concussions and tried to conceal the causal link between football and brain injuries.[5]

Over the past year, more than 2,300 former players and their family members have since filed similar lawsuits accusing the NFL of hiding information and failing to take appropriate preventative measures to protect against permanent brain injuries.[6] On June 7, 2012, a "master complaint" was filed coalescing these claims into a single document, as the plaintiffs hope to hold the NFL responsible for the care of players suffering from those health problems.[7] The

---

[1] *Police: Ray Easterling Shot Himself*, ESPN (April 21, 2012, 5:19 PM), http://espn.go.com.

[2] Nathan Fenno, *Ray Easterling's Death Brings Injuries' Effects Into Focus,* Washington Times (June 20, 2012). http://www.washingtontimes.com/.

[3] Mike Tierney, *Ray Easterling's Widow To Keep Fighting For Retired NFL Players With Head Injuries*, NY Times (May 3, 2012). http://www.nytimes.com/.

[4] Doug Farrar, *Ray Easterling, Lead Plaintiff in NFL Concussion Lawsuit, Commits Suicide,* Yahoo! Sports (April 21, 2012, 10:50 PM) http://sports.yahoo.com/.

[5] Charles Ray Easterling, et al., v. National Football League, Inc. (E.D. Penn. 2011) (11-cv-05209-AB).

[6] *Police: Ray Easterling Shot Himself, supra* note 1. The number of plaintiff's is likely to have increased, perhaps considerably, since the writing of this paper.

[7] Master Compl. *In Re* National Football Players' Concussion Injury Litig. (MDL No. 2323) (No. 2:12-md-02323-AB). The complaint was filed in the Tenth Circuit of the United States District Court, Eastern District of Philadelphia. Relief sought includes declaration of liability, financial compensation, injunctive relief and medical

primary issue before the court is whether the suit will be permitted to proceed in tort or if it's preempted pursuant to section 301 of the Labor Management Relations Act (LMRA) and subjected to the exclusive remedies under the NFL's Collective Bargaining Agreement (CBA).[8]

This paper will analyze the allegations of the master complaint in conjunction with the preemptive force of section 301 of the LMRA. Part I provides an overview of the allegations set forth in the master complaint, examining why the plaintiffs believe their suit against the NFL should be permitted to proceed in tort. Part II lays out section 301 of the LMRA, the Supreme Court's standard for preemption, and why the NFL will likely assert it as a defense. Part III examines the relevant case law to illustrate why several cases brought against the NFL and their member clubs have been permitted to proceed in tort while others were preempted. Part IV applies the law to the allegations of the master complaint to determine whether the plaintiffs' claims can survive preemption. Finally, part V examines the NFL's potential liability if the plaintiffs proceed to trial and receive judgments in their favor.

I: Master Complaint: What is it? What does it allege?

The concussion-related lawsuits against the NFL were filed in various courts throughout the United States. Each complaint is similar in nature and premised around a former player, or collection of players, alleging the NFL failed to provide information linking football related head

---

monitoring for former players. Riddell was also named as a defendant in the case but their potential liability is not discussed, as it is a separate issue. Until recently, lawsuits were brought only against the NFL and not the individual teams. The teams are considered the players employer, which usually subjects a players' claims to specific remedies set forth in a CBA: i.e. worker's compensation. However, the players believe there is an exception, as they allege the league intentionally misled them about the dangers of concussions. The present lawsuit involves only former players suing the league, not the individual teams.

[8] Williams v. National Football League, 582 F.3d 863 (8th Cir. 2009) (reiterating the CBAs are the product of negotiations between the NFL Management Council, the exclusive bargaining representative of the NFL, and the NFL Players Association, the exclusive bargaining representative of the NFL players).

trauma to permanent brain injury.[9] The cases were consolidated into a master complaint, which was filed in federal court.[10] Filing a master complaint is a standard part of multi-district litigation allowing pretrial issues of lawsuits with common factual issues to be handled more efficiently.[11] Additionally, multi-district litigation allows for separate trials and settlements in different lawsuits rather than binding all members to the result of a single trial like a class-action suit.[12]

At issue is whether the NFL knew there were links between football-related head trauma and degenerative brain diseases and failed to take appropriate action. The master complaint states the cause of action arises from the NFL's negligence and intentional misconduct in responding to scientific studies documenting these links, which resulted in the mild traumatic brain injuries that former players now suffer from.[13] It alleges that despite this knowledge and its controlling role in governing player conduct on the field, the NFL turned a blind eye to the risk, failed to warn players or impose safety regulations, and took affirmative action to disprove the causal link.[14]

The plaintiffs' contend the NFL mythologized and glorified violence through the media, including its NFL film division.[15] Through this division the league emphasized the magnitude of hits through slow motion replays and promoted a culture where playing hurt is both respected

---

[9] Albert Breer, *'Master Complaint' Says NFL Hid Brain Injury Links*, NFL.com (June 7, 2012, 11:36 AM) http://www.nfl.com/.

[10] Master Compl., *supra* note 8.

[11] Lori J. Parker, Esq., Cause of Action Involving Claim Transferred to Multidistrict Litigation, Causes of Action Second Series at § 14 (2012), *available at* WestLaw.

[12] *Id.* at § 25.

[13] Master Compl., *supra* note 8.

[14] *Id. See* Greg Risling, *NFL Concussion Lawsuits Are Next Big U.S. Litigation,* Star Tribune (July 1, 2012, 8:42 AM) http://www.startribune.com/ (where Sol Weiss, co-lead counsel for the players, said the NFL "took a page out of the tobacco industry playbook and engaged in a campaign of fraud and deception, ignoring the risks of traumatic brain injuries in football and deliberately spreading false information to its players").

[15] *Lawsuit: NFL Hid Brain Injury Links,* ESPN (June 7, 2012 7:24 PM) http://www.espn.com/.

and expected.[16] The plaintiffs' point out that as recently as October 2010, the NFL fined players for dangerous and illegal hits yet sold photos of those hits to turn a profit.[17] As a result, the plaintiffs' allege the NFL has generated billions of dollars in revenue through their promotion and condoning of violence even though they knew or should have known the dangerous long-term effects of concussions.

The medical community has known for decades that repetitive and violent jarring of the head can cause Mild Traumatic Brain Injury (MTBI). Accordingly, the plaintiffs' argue that the NFL knew or should have known for years the effects of MTBI and was in a superior position to act. Football is unquestionably a physical sport where injuries are common.[18] As such, it is vital to the safety of the players that the NFL act reasonably to identify risks of serious injury associated with playing and take the appropriate steps to protect players. Plaintiffs allege that for decades the NFL voluntarily offered to take these steps by instituting programs to support player health and safety and went so far as to "publicly insert itself into the business of head injury" by establishing a Committee on MTBI (Committee) in 1994.[19]

Despite voluntarily undertaking the responsibility of studying football-related head injuries, the NFL allegedly failed to take effective action and failed to inform the players of the true risks associated with concussions. Though there has been overwhelming medical evidence that football related head trauma led directly to degenerative brain disorders and had tragic repercussions for retired players, the NFL allegedly misrepresented and concealed this

---

[16] Master Compl., *supra* note 8, at 15 (NFL Films has produced the following titles: "*Top Ten Gutsiest Performances,*" "*Moments of Impact,*" "*Crunch Course I & II*" and "*The Best of Thunder and Destruction: NFL's Hardest Hits*").

[17] *Id.*

[18] *Id.* at 18.

[19] *Id.*

evidence.[20] For example, the MTBI Committee disputed this evidence despite their stated goal to present objective findings on the extent a concussion problem existed in the league.[21] The handpicked Committee reportedly conducted their own research and published their own reports stating multiple concussions did not result in "neurocognitive decline."[22] The NFL event went so far as to publish the "NFL Player Concussion Pamphlet" telling players that current research has shown that multiple concussions does not lead to permanent problems if properly managed.[23] The pamphlet was distributed despite independent studies showing that suffering three or more concussions could have severe long-term consequences.[24]

The NFL stood by its findings until Congress threatened its antitrust exemption and questioned their handling of the issue at a 2009 hearing before the House Judiciary Committee.[25] During that hearing, NFL Commissioner Roger Goodell would not say whether there was a link but said there was no other issue to which he's devoted more time and attention.[26] After the hearing, the NFL announced it would not only support research illustrating the link but also

---

[20] *See* Jeanne Marie Laskas, *Game Brain,* GQ (October 2009) http://www.gq.com/ sports (illustrating the ongoing research on concussions and the work of Dr. Bennet Omalu. In 2002, Omalu performed an autopsy on former Pittsburgh Steeler Mike Webster. Webster, a Hall of Fame inductee went from being a premier player in the sport to a man "pissing in his own oven." When Webster's body was found, he was referred to as a homeless drug user. Omalu referred to Webster's brain as "punch-drunk" and concluded he suffered from Chronic Traumatic Encephalopathy (CTE). He linked the cause of the disease to the hits Webster suffered while playing football. Multiple scientists independently verified this link).

[21] *Lawsuit Accuses NFL of Concealing Concussion Dangers*, NFL.com (July 20, 2011, 7:12 PM) http://www.nfl.com/.

[22] Master Compl., *supra* note 8.

[23] *Mega Lawsuit Says NFL Hid Brain Injury Links,* Sports Illustrated (June 7, 2012, 10:21 Am) http://sportsillustrated.cnn.com/.

[24] John Mangels, *NFL Could Face Thousands of Lawsuits from Ex-Players Over Brain Damage from Concussions,* The Plain Dealer (May 27, 2012, 6:02 AM) http://www.cleveland.com/.

[25] Tom Goldman, *House Hears Testimony on Football, Head Injuries,* NPR (Oct. 30, 2009) http://www.npr.org/.

[26] Alan Schwarz, *NFL Scolded Over Injuries to Its Players,* NY Times (Oct. 28, 2009) http://www.nytimes.com/.

publicly admitted, for the first time, that concussions can have lasting consequences.[27] Finally acknowledging the link, the NFL established a "new" committee: the Head, Neck, and Spine Medical Committee.[28]

This brief chronology is what the master complaint relies on. The plaintiffs' grievance hinges on allegations that the NFL voluntarily assumed a duty to regulate and monitor the sport and failed to act reasonably by fraudulently concealing and misrepresenting the long-term effects of concussions.[29] For the plaintiffs to move forward, the court must be persuaded that the NFL voluntarily assumed a duty to monitor concussions and failed to act reasonably, causing the alleged injuries suffered by the plaintiffs.

II: The NFL's Likely Defense: Section 301 of the LMRA

The NFL's motion to dismiss, due on August 9, 2012, will likely argue the allegation that the NFL hid the effects of concussion related symptoms and sought to mislead players has no merit.[30] The league will point to the numerous provisions contained in every CBA relating to player health and safety. [31] Additionally, the motion will likely argue the plaintiffs' claims are

---

[27] Alan Schwarz, *NFL Acknowledges Long-Term Concussion Effects*, NY Times (December 20, 2009). http://www.nytimes.com/.

[28] NFL Health Committees, http://nflhealthandsafety.com/commitment/committees/ (last visited July 18, 2012). The new committee is the successor to the MTBI Committee. The committee is focused on "specific issues related to player health, but also on broad research, advocacy, and education about head, neck and spine injuries and their prevention and treatment."

[29] Motion to Dismiss the Amended Complaint, Charles Ray Easterling, et al., v. National Football League, Inc. (E.D. Penn. 2011) (11-cv-05209-AB).

[30] Breer, *supra* note 11.

[31] *See* Mot. to Dismiss the Am. Compl., Charles Ray Easterling, et al., v. National Football League, Inc. (E.D. Penn. 2011) (11-cv-05209-AB) (where plaintiffs' allegations are analogous and the league argued section 301 warrants preemption. The motion was never decided as the case was consolidated into the multidistrict lawsuit).

preempted by section 301 of the LMRA because the suit is fundamentally a labor dispute that requires an interpretation of the CBA.[32]

Accordingly, the NFL will likely argue each plaintiff played professional football pursuant to the terms of a CBA, which comprehensively governed the relationship between the NFL, its Member Clubs, and the players.[33] The NFL will not only cite to the general health and safety provisions of the CBAs, but also the many health programs it runs for former players and a series of medical benefits it provides after football.[34] Accordingly, the NFL will argue that based upon the various provisions and programs, the plaintiffs' claims are preempted by section 301. The NFL is interested in preemption because federal law requires that "preempted claims must first be presented through the arbitration procedure established in a collective bargaining agreement."[35]

The Supreme Court articulated the standard for preemption in *Allis-Chalmers v. Lueck*: if a tort claim arises under the CBA, or is "substantially dependent" on or is "inextricably intertwined" with the terms of the CBA, then it is completely preempted.[36] Additionally, the court in *Allis-Chalmers* stressed it is the arbitrator, not the court, who has the responsibility to

---

[32] *Id.*

[33] *See* Mem. Op. and Order, Duerson v. National Football League, Inc., (2006) (12-cv-02513) (where in denying plaintiff's motion to remand, Judge Holderman determined it irrelevant that the league operated without a CBA between 1987 and 1992. He stated it is impossible to limit the time period of the complaint because much of the allegations rely on undocumented concussions. By necessity, the CBAs were in effect during at least some of the events alleged).

[34] *See Mega Lawsuit Says NFL Hid Brain Injury Links*, *supra* note 25 (where the author details the supplemental benefits of the CBA. Players are entitled to worker's compensation and supplemental disability benefits, including Line of Duty Disability Benefits and the 88 Plan. The 88 Plan specifically provides physical and custodial care for retired players with dementia. Other supplemental benefits include joint replacement, neurological evaluations, assisted living partnerships, long-term care insurance, prescription, life insurance, and Medicare assistance. The league and the NFLPA have spent over $1 billion on these programs).

[35] *See* Givens v. Tenn. Football Inc., 684 F. Supp. 2d 985, 991 (a claim should be dismissed for failure to make use of grievance procedure in a CBA).

[36] Allis-Chalmers, Corp. v. Lueck, 471 U.S. 202 (1985).

interpret labor contracts.[37] Section 301 thus preserves the central role of arbitration and assures that, pursuant to CBA grievance provisions, an arbitrator will resolve the dispute.[38]

The Supreme Court first illustrated the preemptive effect of section 301 in *Teamsters v. Lucas Flour Company* while accentuating the need for uniformity when interpreting CBAs. [39] The court held it would be disruptive if individual contract terms were interpreted differently under state and federal law and "inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements"[40] The preemptive force of § 301 is so powerful that it entirely displaces any state-law cause of action for violation of a CBA.[41] Due to its preemptive force, the Supreme Court has cautioned that a court must analyze each dispute on a case-by-case basis as not every dispute involving a CBA is preempted by § 301.[42]

Therefore, for the claims to be preempted, the NFL must successfully argue that either plaintiffs' tort claims arose from the various health and safety provisions of the CBA or proof of the claims require an interpretation of its terms.

III: Applicable Case Law

There are several instances where players have been permitted to bring tort lawsuits against the NFL or one of its teams. The first was *Hackbart v. Cincinnati Bengals, Inc.* where a player from the Cleveland Browns illegally elbowed Dale Hackbart, a defensive back for the Denver Broncos, in the back of his head after the play was whistled dead causing multiple

---

[37] *Id.* at 219.

[38] *Id.* at 220.

[39] Teamsters v. Lucas Flour Company, 369 U.S. 95 (1962).

[40] *Id.* at 103.

[41] Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[42] Lingle v. Norge Division of Magic Chef, 486 U.S. 399 (1988).

fractures to vertebrae in his neck. [43] Without a jury, the court ruled the claim was preempted reasoning professional football is predicated upon physicality.[44] The court held the injurious action was not "so unusual as to be unexpected in any NFL game" and therefore the player consented to this action as a party of the CBA.[45]

The Court of Appeals reversed the trial court, determining it highly questionable that a professional football player consents to injuries caused by conduct not within the rules.[46] It held the claim was the result of recklessness and as a result, the court permitted the personal injury claim. It reasoned the intentional act by Clark was not a normal hazard of the game and pro football players do not consent to being intentionally injured by choosing to play in the NFL. Therefore, the court concluded the claim arose independently of the CBA.

In *Brown v. National Football League*, Orlando Brown, an offensive tackle for the Cleveland Browns, was permitted to bring suit for an injury to his eye that ended his playing career.[47] Brown was struck in the eye by an improperly weighted penalty flag negligently thrown by an NFL referee. The injury was so serious that Brown could no longer play football without "significant risk of further injury."[48] He brought suit against the NFL alleging it was vicariously liable as the employer of the referee. The NFL argued the claims should be preempted and the arbitration clause of the CBA enforced. However, the court disagreed and found the duties breached by the NFL were owed to all members of society, not just NFL players. Specifically, the NFL breached its duties to Brown and the general public to hire competent referees, ensure

---

[43] 601 F.2d 516 (1979).

[44] *Id.* at 520.

[45] *Id.*

[46] *Id.* at 527.

[47] 219 F. Supp. 2d 372 (2002).

[48] *Id.*

penalty flags are not unsafely weighted in violation of NFL rules, and to train its employees on the proper manner penalty flags should be thrown. Citing *United Steelworkers v. Rawson*, the court reasoned the claim arose independently of the CBA as any member of the general public injured in the same manner could bring similar claims against the NFL.[49]

Additionally, in *Jurevicius v. Cleveland Browns Football Co., LLC*, a wide receiver for the Browns contracted a staph infection at the Browns training facility.[50] Joe Jurevicius alleged the Browns organization made false representations regarding efforts made and concealed information about the lack of precautions taken to prevent staph infections at their training facility. Because the facility was open to the general public, Jurevicius alleged his claims arose independently of the CBA. He alleged that a duty to maintain a facility open to the general public was owed to all members of society, not players specifically. The court agreed and remanded the case for trial, holding the claims arose independently of the CBA. It held the CBA had provisions concerning a player's physical condition but was silent on maintaining a training facility.[51]

Similarly, in *McPherson v. Tennessee Football, Inc.*, Adrian McPherson of the New Orleans Saints brought suit for injuries sustained during halftime of a preseason game against the Tennessee Titans.[52] McPherson was injured when the Titans mascot drove a vehicle onto the playing field and struck him during the halftime warm-up. The court reasoned the alleged negligence of the defendant's mascot on the defendant's premises during halftime was

---

[49] *Id. See* United Steelworkers v. Rawson, 495 U.S. 362 (1990) (holding that to be independent of the CBA, a tort claim must allege a violation of a duty owed to every person in society. The court in *Stringer* would later determine this reading too broad, narrowing the inquiry to how the duty came into being as opposed to whom the duty was owed).

[50] 2010 WL 8261220 (N.D. Ohio Mar. 31, 2010).

[51] *Id.*

[52] 2007 WL 5445124 (M.D. Tenn. May 31, 2007).

comparable to the alleged negligence of an NFL official on the field during a game.[53] Like *Brown*, McPherson's claim was remanded for trial as the court held there were no provisions in the CBA concerning mascots or field safety for half time activities, thus the claim arose independently of the CBA.

Despite several cases proceeding against the NFL or its member clubs, numerous cases have been preempted. In *Stringer v. National Football League*, Korey Stringer died after suffering from heatstroke while attending Vikings' training camp.[54] His widow brought wrongful death and negligence claims against the NFL, alleging it failed to establish regulations to ensure adequate monitoring of players suffering from heat-related illness and returning to practice.[55] The league argued the claims were preempted because the dispute was over working conditions, which are discussed in the general health and safety provisions of the CBA.[56] Conversely, the plaintiff argued her claims were based solely on common law tort principles and could be resolved without interpreting the CBA.

Since the case was in the Sixth Circuit, the court relied on the two-part test set forth in *DeCoe v. General Motors Corp.* to analyze whether the claim should be preempted.[57] In determining whether the claim arose independently of the CBA, the court held despite several provisions in the CBA relating to medical care and treatment of players expressly imposing some

---

[53] *See id.* at 11 (comparing the alleged negligence of defendant's mascot to the negligence of the referee in *Brown*. The court reasoned the mascot could have injured any member of the public and therefore, pursuant to *Brown*, a duty was owed to all members of the public and not football players specifically).

[54] 474 F. Supp. 2d 894 (2007).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 900. *See generally Decoe*, 32 F.3d 212, 216 (6th Cir. 1994) (adopting a two-step inquiry to determine whether a case is independent of the CBA. A court must first determine if the right is created by a CBA. If it is, the claim is preempted. If it is not, the court must examine whether proof of the state law claim requires interpretation of CBA terms. If proof of the claim requires interpretation, it is preempted.)

duties on the NFL, no heat-related duty was assigned When the NFL voluntarily issued hot weather guidelines, it voluntarily assumed a duty to exercise reasonable care when implementing them.[58] As a result, the court determined the claim arose independently of the CBA.[59]

However, the court held the claim was preempted because proof of the wrongful death claim was inextricably intertwined with the terms of the CBA.[60] The claim was predicated on the theory that the NFL's failure to use reasonable care in publishing hot weather guidelines resulted in team trainers and physicians not being adequately prepared to treat Stringer. The court held the degree of care owed by the NFL could not be determined without first analyzing the duties imposed by the CBA.[61]

Similarly, the court in *Givens v. Tennessee Football, Inc.* held claims against the team for allegedly withholding certain medical information regarding a player's injured knee were preempted.[62] In *Givens*, David Givens brought suit against the Tennessee Titans for failing to advise him of the result of an orthopedics' examination showing a defect in his knee. The issue was whether an interpretation of the CBA is required to determine that the defendant's failure to

---

[58] *Stringer*, 474 F. Supp. 2d at 903-904 (plaintiff relying on §§ 323 and 324A of *Restatement (Second) of Torts* (1965)).

[59] *Id.* at 908.

[60] *Id.* at 909. *See* Holmes v. National Football League, 939 F. Supp. 517 (1996) (suspending a player for testing positive for marijuana. Holmes alleged he was misled in submitting to the drug test. The court held the claims were preempted because resolution was inextricably intertwined with the CBA provision authorizing the team to conduct the drug test, which prompted the claims).

[61] *Stringer*, 474 F. Supp. 2d at 910 (citing to Art. XLIV § of the 1993 CBA requiring a team physician to inform a player in writing if the player has a physical condition that will be "significantly aggravated by continued performance." The court held heat exhaustion and heatstroke fall under this category). Though the wrongful death claim was preempted, the court permitted the negligence claim alleging the NFL breached their duty to ensure the players had safe equipment. The court determined the claim arose independently of the CBA because no provision expressly imposed duty to ensure the safety of equipment regarding heat-related injuries; any such duty arose from common law. Resolution did not require interpretation of the CBA because it is largely silent on the topic of equipment safety. The claim was settled privately.

[62] 684 F. Supp. 2d 985 (2010) (alleging negligent infliction of injury, outrageous conduct, and bad faith performance of a contract).

inform would constitute outrageous conduct. The court determined the questions raised, such as whether the club had a duty independent of the physician to advise a player of his medical condition, were inextricably intertwined with the provisions of the CBA.[63] Givens also argued that since the Titans knew of the defect in his knee, they negotiated his playing contract in bad faith. He argued the tort was independent of the CBA. The court disagreed and cited the implied duty of good faith and fair dealing in every contract under Tennessee state-law.[64] The Tennessee Court of Appeals has specifically held the duty of good faith does not stand alone as independent tort. Therefore, the court held the claim of bad faith also required interpretation of the CBA.[65]

In *Sherwin v. Indianapolis Colts, Inc.*, a former player's claims that the team provided negligent medical treatment and fraudulently concealed the extent of his injury were preempted.[66] The court held the Club did not owe a duty to "provide medical care to the plaintiff independent of the relationship established in the CBA."[67] It was the CBA that established the duty of a club physician to inform the player of physical conditions. Relying on *Jeffers v. D'Allesandro*, the court illustrated that deciding whether the physician and the club both owed a duty is precisely the question reserved for an arbitrator.[68]

---

[63] *Id.* at 990.

[64] *Id.* at 991.

[65] *Id.* at 991. *See* Oak Ridge Precision Industries, Inc., v. First Tennessee Bank National Ass'n., 835 S.W.2d 25, 30 (Tenn. Ct. App. 1992) (holding a claim must be grounded in the bad faith refusal of a party to comply with an agreement which establishes its duties).

[66] 752 F. Supp. 1172 (1990).

[67] *Id.* at 1177.

[68] *Id.* at 1178. *See* Jeffers v. D'Allesandro, 681 S.E.2d 235 (2005) (alleging the team physician performed unauthorized procedures during knee surgery. He also alleged the team negligently retained the team doctor and required him, and other players, to have a physician-patient relationship with that doctor. The court held the claims were preempted. It reasoned the claims were substantially dependent on the CBA because the agreement set out the parties' rights in connection with medical care. Therefore, the duty of the players to have a physician-patient relationship with the doctor arose from the CBA, as without the CBA there would have been no obligation for the team to have a physician at all).

The court in *Williams v. National Football League* held determining whether plaintiffs justifiably relied on concealment by the NFL cannot be done without interpreting the CBAs' health and safety provisions.[69] In *Williams*, two players were suspended for testing positive for a banned substance under the "Policy on Anabolic Steroids and Related Substances." The players alleged breach of fiduciary duty, negligence and gross negligence on the part of the NFL for failing to disclose that "StarCaps", the dietary supplement that caused the positive test, contained a banned substance. Without looking to the CBA provision imposing the duty, the players could not demonstrate reasonable reliance.[70]

In *Duerson v. National Football League*, a case analogous to the present, Chief Judge James Holderman denied the plaintiff's motion to remand the case to state court.[71] Duerson's estate seeks to hold the NFL liable for allegedly causing Duerson's brain damage by breaching its duty to ensure his safety.[72] In the opinion, Judge Holderman determined multiple provisions of the CBA addressing player health and safety could be interpreted to impose a general duty on the NFL clubs to diagnose and treat ongoing conditions like concussive brain trauma.[73] Additionally, he concluded the general provisions could also impose a duty to monitor a player's

---

[69] 582 F.3d 863 (8th Cir. 2009).

[70] *Id.*

[71] *See* Mem. Op. and Order, *supra* note 35 (where former Chicago Bears player Dave Duerson committed suicide, allegedly shooting himself in the stomach to preserve his brain for science. Duerson was found to have CTE). The case presently remains in Federal Court pending further action by the Multidistrict Litigation Panel. *See* Dan Pompei, *Duerson Lawsuit Not Part of Master Complaint*, Chicago Tribune (June 7, 2012) http://articles.chicagotribune.com/ (where the attorney's for the plaintiffs did not want the case consolidated, insisting the case is "vastly different" from any other against the NFL).

[72] Mem. Op. and Order, *supra* note 35.

[73] *Id.* at 6 (citing CBA provisions requiring a club's team physician to be an orthopedic surgeon and a club to pay of all medical care rendered to their players).

heath and fitness to continue playing football.[74] Though his decision on the motion does not set a precedent, it may be persuasive.

IV: To Preempt Or Not To Preempt: That is the Question

Pursuant to case law, to decide whether Section 301 of the LMRA preempts the plaintiffs' claims, the court must determine whether the tort claims arise independently of the CBA or whether proof of the state-law claim is "substantially dependent on" or "inextricably intertwined" with the terms of the CBA.[75]

Based on the aforementioned cases brought against the NFL or its member clubs, it is possible the court will determine the various tort claims arise independently of the CBA. Despite CBA provisions relating to the general health and safety of players, the NFL appears to have voluntarily assumed a duty to specifically monitor concussions. The NFL knew or should have known about concussions and their long-term effect either through medical studies dating back to the 1920's or its establishment of the MTBI Committee. Since nearly its inception, the league has made statements regarding its efforts to ensure players safely return to play after being diagnosed with a concussion. However, the actions of the NFL directly contrast these statements. The NFL appears to have tried not only to conceal information linking traumatic brain injury to football-related injuries, but also refute and disprove it.

Alternatively, as in Judge Holderman's Memorandum and Opinion in *Duerson*, the court could justifiably determine the CBAs impose a duty on the NFL's member clubs to monitor concussions through the general health and safety provisions.[76] For example, if the court agrees with the NFL's likely position that determining whether a former player's concussive brain

[74] *Id.* at 7 (citing CBA provisions requiring a club to administer a pre-season physical examination to each player, as well as a post-season examination at their request).

[75] *Allis-Chalmers*, 471 U.S. 202.

[76] Mem. Op. and Order, *supra* note 35.

trauma worsened as a result of a team's failure to adequately implement the "return to play" provision, then by necessity the club had a duty to warn the player. If the court interprets other health and safety provisions in the same manner, it must necessarily conclude the claims arose from the CBA and are preempted.

The stronger argument is that of the former players. It is significant that despite the general health and safety provisions, the NFL voluntarily chose to pinpoint concussions and designate specific committees to it. Voluntarily assuming the duty to monitor concussions is analogous to voluntarily assuming the duty to monitor heat-related injuries. The court in *Stringer* found the NFL's decision to voluntarily monitor heat-related injuries, despite the general health and safety provisions in the CBA, meant they expressly assumed a duty. Here, since there were no provisions in the CBA expressly pertaining to concussions, the court will likely find, as in *Stringer*, the claim arose independently of the CBA.[77]

Assuming the court reaches the same conclusion, it will look to whether proof of the claims are "substantially dependent on" or "inextricably intertwined" with the CBA. This appears to be the major hurdle the plaintiffs' will have to clear. The plaintiffs' allege that the NFL failed to implement adequate rules and regulations regarding player health and safety, and failed to adequately enforce the safety-related rules that it did promulgate.[78] This is problematic as the court in *Stringer* pointed out that the degree of care cannot be considered in a vacuum.[79] For the court to ascertain the degree of care owed by the NFL in voluntarily assuming a duty to monitor and treat concussions, it must consider the conduct of the NFL in conjunction with the

[77] *Stringer*, 474 F. Supp. 2d 894. Though there were "return to play" procedures for all injuries, the NFL's voluntary actions regarding concussions likely illustrates their treatment requires significant action beyond that called for by the CBA.

[78] *Id.*

[79] *Id.* at 909.

contractual duties mandated to the individual member clubs by the general health and safety provisions of the CBA. [80]

Similar to *Stringer*, the court cannot determine the degree of care without first analyzing the various general health and safety provisions of the CBA.[81] There are many duties delegated to both the teams and their medical staff. Many of which relate to when a player can "return to play." The major issue in this case is the long-term effect of multiple concussions. The CBA requires the team physician to inform a player in writing if the player has a physical condition that will be "significantly aggravated by continued performance."[82] The CBA places the primary responsibility for identifying such physical conditions on the team physicians who, by virtue of medical school training, need not rely on guidelines from the NFL. This provision, as it relates to other injuries sustained while playing, must then be taken into account in determining the degree of care owed by the NFL and what was reasonable under the circumstances.[83] Accordingly, proof of the claim requires substantial dependence on, or is inextricably intertwined with, an analysis of certain provisions of the CBA.

It may also be problematic for the plaintiffs that the cases brought against the NFL where courts did not find preemption would not compel a different result. In each of those cases, the court held the CBA was not applicable. For example, *Brown* was not preempted because the court held the scope of the NFL's duty to train and oversee referees was not part of the CBA and no actual provisions were considered relevant.[84] Here, in direct contrast, the general provisions

---

[80] *Id.*

[81] *Id.*

[82] 1993 NFL Collective Bargaining Agreement, Art. XLIV § 1.

[83] *Stringer*, 474 F. Supp. 2d 894.

[84] *See Jurevicius*, 2010 WL 8261220 (holding the health and safety provision of the CBA did not extend to the maintenance of a training facility); *Hackbart*, 601 F.2d 516 (holding a player did not consent to assault);

relating to player health and safety are directly relevant, and likely required, to prove the state-law tort claim. As referenced, in order to judge the reasonableness of the NFL's conduct, a comparative standard is necessary.[85] In this instance, like *Stringer*, the general health and safety provisions set the comparable standard for determining reasonable care under the circumstances.

As a policy issue, if the former players are allowed to pursue a tort action and circumvent the exclusive remedies provided in the CBA, it would likely cause an undue financial hardship on the individual teams. The players would essentially be "double dipping" as they have already been compensated for their injuries through the various benefits guaranteed by the CBA.[86] The league has multiple programs to provide medical care to retirees and has spent more than $1 billion on player pensions and medical disability benefits while the individual teams have paid worker's compensation claims.[87] Accordingly, the teams would likely be required to contribute to any award for damages in tort where they would be compensating players a second time for the injuries sustained over the course of their career.

Based upon the aforementioned, the court will likely decide the claims are preempted pursuant to Section 301 of the LMRA and subject to the exclusive remedies provided under the CBA. To rule otherwise would likely subvert Congress's goal of maintaining a unified body of labor law.

Part V: Potential Liability for the NFL

McPherson, 2007 WL 5445124 (holding no provisions of the CBA concerned mascots or field safety during halftime activities).

[85] *Stringer*, 474 F. Supp. 2d 894. *See* Mem. Op. and Order, *supra* note 35 (finding Duerson's claims, which are analogous to those here, are substantially dependent upon an interpretation of CBA terms). Though his decision is not binding, it may be persuasive.

[86] Nicole M. Bryson, Esq., *Workers Compensation Rules May Preclude Latest Concussion Lawsuits*, Sports Litigation Alert (March 9, 2012). www.sportslitigation-alert.com.

[87] Daniel Fisher, *NFL Concussion Suit Likely to Get Sacked by Employment Law,* Forbes (June 12, 2012, 9:49 AM) http://www.forbes.com/.

In 2010, the NFL eclipsed $9 billion in revenues.[88] If the court permits the plaintiffs to proceed in tort, the NFL could be facing the possibility of paying out "tobacco-like" damages.[89] Many are beginning to speculate that if the former players start winning judgments, the awards are likely to be significant.[90] With the number of plaintiffs growing by the day, and more retired players watching with a careful eye, the lawsuits will continue. If the players keep winning, the payouts from the NFL will keep coming.

However, some opine the payouts wouldn't be enough to eliminate the NFL as it likely generates enough revenue to handle the liability.[91] Instead, the lawsuits would cause insurance companies to cease insuring colleges and high schools against football-related lawsuits.[92] As a result, many will stay away from the game. Coaches, referees and team physicians will want to avoid liability. Parents may have second thoughts about letting their children play. The trickle down effect could potentially cause the NFL to lose its feeder system.[93] By default, if there are no players, there is no league. The level of liability would likely bring the NFL to an end.

---

[88] *League, Players Disagree on Interpretation of Revenue Figures,* NFL.com (Mar. 21, 2011, 2:45 PM) http://www.nfl.com/.

[89] Darren Heitner, *NFL Faces Tobacco=Like Damages Reaching Billons of Dollars in Concussion Litigation,* Forbes (June 12, 2012, 8:19 AM) http://www.forbes.com/sites/.

[90] Gregg Doyel, *If Lost Lawsuits Start Piling Up, NFL Could Some Day Face End Game,* CBS Sports (May 14, 2012, 8:26 AM) http://www.cbssports.com/ .

[91] Will Oremus, *After Further Review: Why Concussion Lawsuits Won't Bring an End to Football,* Slate (May 10, 2012, 1:17 PM) http://www.slate.com/.

[92] Tyler Cowen and Kevin Grier, *What Would the End of Football Look Like,* Grantland (Feb. 9, 2012) http://www.grantland.com/.

[93] This doesn't even entertain what may occur if science conclusively connects CTE with football. If a link is made, Congress or state legislatures could move to ban the sport for safety purposes. Though this may be less likely, it is not out of the realm of possibility and could have the same debilitating effect.