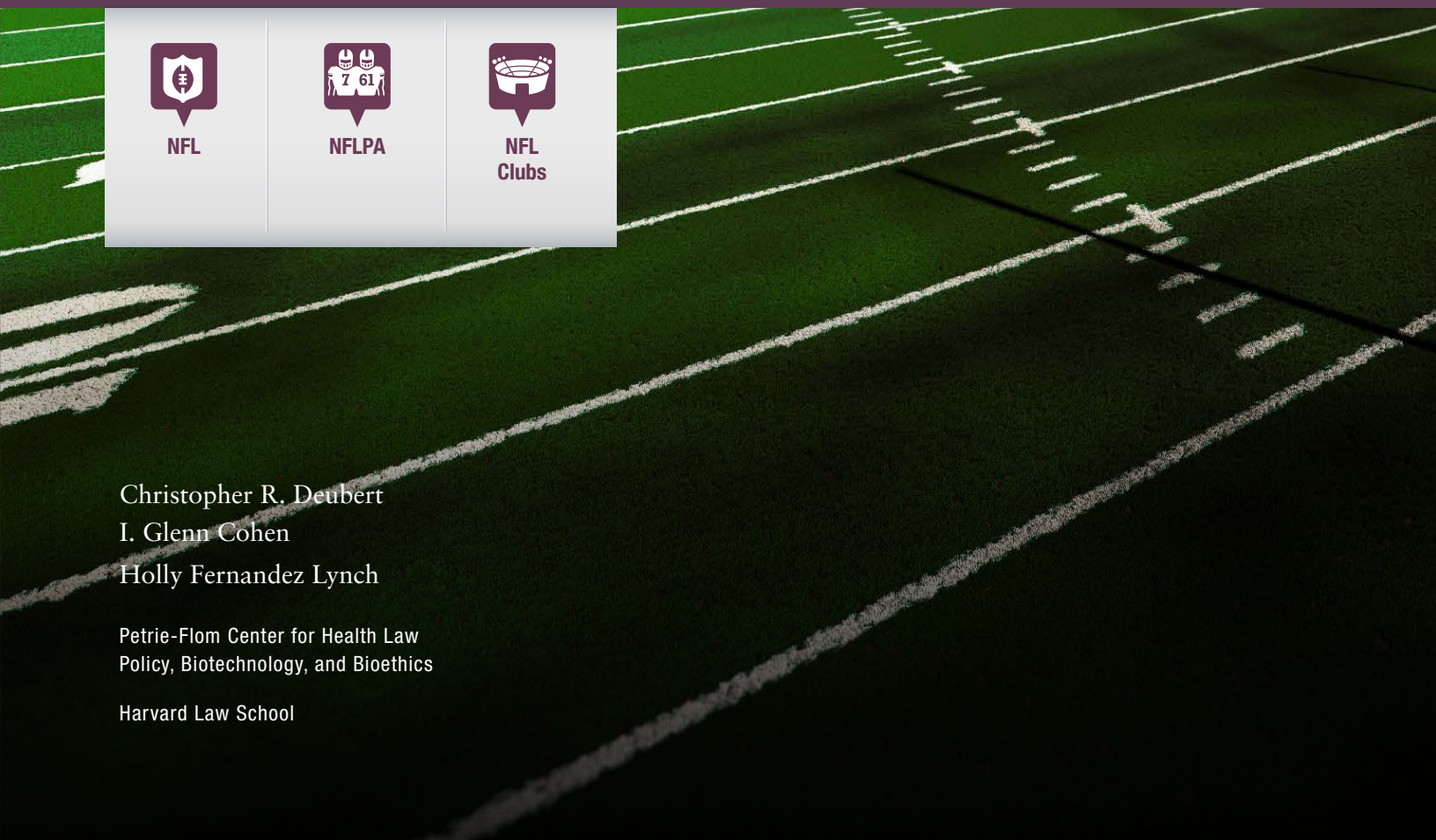
THE FOOTBALL PLAYERS HEALTH STUDY AT HARVARD UNIVERSITY

Protecting and Promoting the Health of NFL Players:

Legal and Ethical Analysis and Recommendations

Part 3: The NFL, NFLPA, and NFL Clubs



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Part 3 discusses those stakeholders with the greatest ability to positively affect NFL player health: the NFL; the NFLPA; and, NFL clubs.

The NFL has been the world's premier professional football league since its inception in 1920. Through its 32 member clubs the NFL largely makes the rules of professional football, both on and off the field.

In the management/labor dyad, the counterbalance to the NFL is the NFLPA, the labor union that represents current players. The players elect the NFLPA's leadership, and, as is discussed in more detail below, the association's principal purpose is to protect and advance current player interests.

Together, the NFL and NFLPA negotiate the terms and conditions of NFL player employment in the form of the collective bargaining agreement (CBA). Thus, both organizations have a crucial role to play in protecting and promoting player health. There has been improvement on player health matters in recent years, which should be commended. Nevertheless, there are still changes to be made, as we discuss below. Because the roles of the NFL and NFLPA are so intertwined, it is best to address them collectively.

We also include NFL clubs in this part of the Report. As will be further explained below, the NFL generally acts according to the desires and interests of the clubs (and their owners) and the clubs' actions concerning player health are generally directed by the CBA agreed to by the NFL and NFLPA. Thus, the NFL and its member clubs are best considered, and analyzed, in the same part of this Report.

Chapter 7

The NFL and NFLPA

The NFL and NFLPA are clearly lead stakeholders in protecting and promoting player health. The parties nonetheless have a long and complicated history on the issue and with each other. The most straightforward way to implement many of the changes we recommend to protect and promote player health will be to include them in the next CBA between the parties. That said, whenever change is possible outside of the CBA negotiating process, it should not wait — the sooner, the better. Moreover, although the CBA will often be the most appropriate mechanism for implementing our recommendations, we do not want to be understood as suggesting that player health should be treated like just another issue for collective bargaining, subject to usual labor-management dynamics. This is to say that as an ethical matter, players should not be expected to make concessions in other domains in order to achieve gains in the health domain. To the contrary, we believe firmly the opposite: player health should be a joint priority, and not be up for negotiation.

We begin with a brief historical overview of the activities of the NFL and NFLPA on player health since 1960. As we stressed in the Introduction to this Report, this historical information is being provided as background and context for understanding the current state of play and paths forward. Our goal is not to judge the historical record, but rather to focus on forward-looking recommendations for positive change.

(A) Background on the NFL

The NFL is an unincorporated association of 32 member clubs.[1] The NFL was historically a non-profit association,[2] but chose to give up that status in 2015.[3] Each member club is a separate and distinct legal entity,[4] with its own legal obligations as discussed in Chapter 8: NFL Clubs. However, the NFL also serves as a centralized body for obligations and undertakings shared among the member clubs.[5] This chapter focuses on the NFL as an entity, rather than on the individual clubs.

To lead the NFL, the NFL's Constitution and Bylaws dictate that club owners "select and employ a person of unquestioned integrity to serve as Commissioner[.]"[6] The Commissioner is "the principal executive officer of the League and shall have general supervision of its business and affairs."[7] The Commissioner has broad authority to conduct the business of the NFL, including but not limited to: incurring necessary expenses;[8] entering into contracts on behalf of the NFL,[9] including broadcasting agreements;[10] disciplining players, coaches, club employees, clubs, club owners or others working in the NFL for "conduct detrimental to the welfare of the League or professional football"[11]; and, resolving disputes between or among those same groups of individuals working in the NFL.[12]

Before we review the background of the NFLPA, we begin with brief discussions of the role of NFL club owners and the history of League-wide rule changes affecting player health in the NFL.

1) NFL CLUB OWNERS

It is important to understand that when we are talking about the 32 member clubs, it is the men and women who own these clubs who largely dictate their operations, and thus the NFL's operations. For all intents and purposes, when discussing the NFL, it is the 32 club owners being discussed.

The NFL's Constitution and Bylaws require individual persons, and not corporations, to own NFL clubs (holding companies created solely for the purposes of operating the club are permitted).[13] Thus, each NFL club is controlled by, and sometimes becomes synonymous with, its owner.[a]

The power of club owners cannot be understated. The owners are responsible for not only hiring the most important club employees, *e.g.*, general managers and head coaches, but also hiring the NFL Commissioner and dictating the Commissioner's duties, obligations, and scope of authority.[14] All of the owners meet multiple times a year, when they discuss and then vote on the most important issues concerning the NFL at that time.[15] For example, during the 2015 owners' meetings, the owners discussed the possibility of a club moving to Los Angeles (which happened in 2016) and possible playoff expansion, and voted to end the NFL's "blackout" policy that required television broadcasts to be blacked out in a club's home market if attendance for that day's game was below 85-percent capacity.[16]

Owners also play a critical role in determining the culture of their club and the pressures placed on the players. The owner's attitude toward player health and safety will often be a factor in the way that the club, and ultimately the NFL, looks at the issue.[17] Unsurprisingly, there has been significant variation in how owners address and perceive player health.

On one extreme, a particularly unflattering portrait of former Oakland and Los Angeles Raiders owner Al Davis was painted in the 1994 book by former Raiders doctor Rob Huizenga, entitled *"You're Okay, It's Just a Bruise": A Doctor's Sideline Secrets About Pro Football's Most Outrageous Team*. Huizenga described Davis as placing winning above all else, including player health, and routinely pressuring players and the doctors to do anything to get a player back on the field, regardless of the risks.[18] From his perspective, Davis reportedly believed the book to be "ludicrous and untrue."[19] Huizenga's anecdotes are several decades old, but there is reason to believe that at least some owners still impose substantial pressure on injured players.

a For example, George Halas founded the organization now known as the Chicago Bears in 1920, and today that Club is controlled by George McCaskey, Halas' grandson. Similarly, Tim Mara founded the New York Giants in 1925, and today that Club is controlled by his grandson, John Mara. The one notable exception is the Green Bay Packers. The Packers, as a vestige from the league's earliest days, are community-owned by individual shareholders, *i.e.,* fans. *See Birth of a Team and a Legend*, Packers.com, http://www.packers.com/history/birth-of-a-team-and-a-legend.html (last visited Aug. 7, 2015), *archived at* http://perma.cc/DQ2F-U2GJ. Entering the 2015 season, there were 5,011,558 shares of stock owned by 360,760 stockholders. The Packers operate through Green Bay Packers, Inc., a Wisconsin corporation governed by a seven-member executive committee, elected from a board of directors. *Executive Committee and Board of Directors,* Packers, http://www.packers.com/team/executive-committee.html (last visited Aug. 7, 2015), *archived at* http://perma.cc/KW7D-MQS2.

For example, during the 2014 season, Cowboys quarterback Tony Romo suffered a back injury on Monday Night Football on October 27, after having had back surgery in the prior offseason. Two days later, Cowboys' owner Jerry Jones, who has no medical training, said on a radio station that the only thing that would prevent Romo from playing in the next week's game was "pain tolerance." Romo had already received a pain-killing injection in an effort to return to the October 27 game.[20]

Conversely, other owners have taken a different approach. For example, the San Francisco 49ers are owned by Dr. John York, a former cancer pathologist,[21] and Chairman of the NFL's Health and Safety Advisory Committee. During the 2015 offseason, several 49ers players retired due to health concerns. York generally responded with understanding and supportive statements, and has discussed the need for a culture change concerning player health.[22]

As will be shown below, the CBA serves as an important constraint on the potential variations in club owners' approaches toward player health. The CBA creates rules concerning player health, which then narrow the permissible practices by clubs.

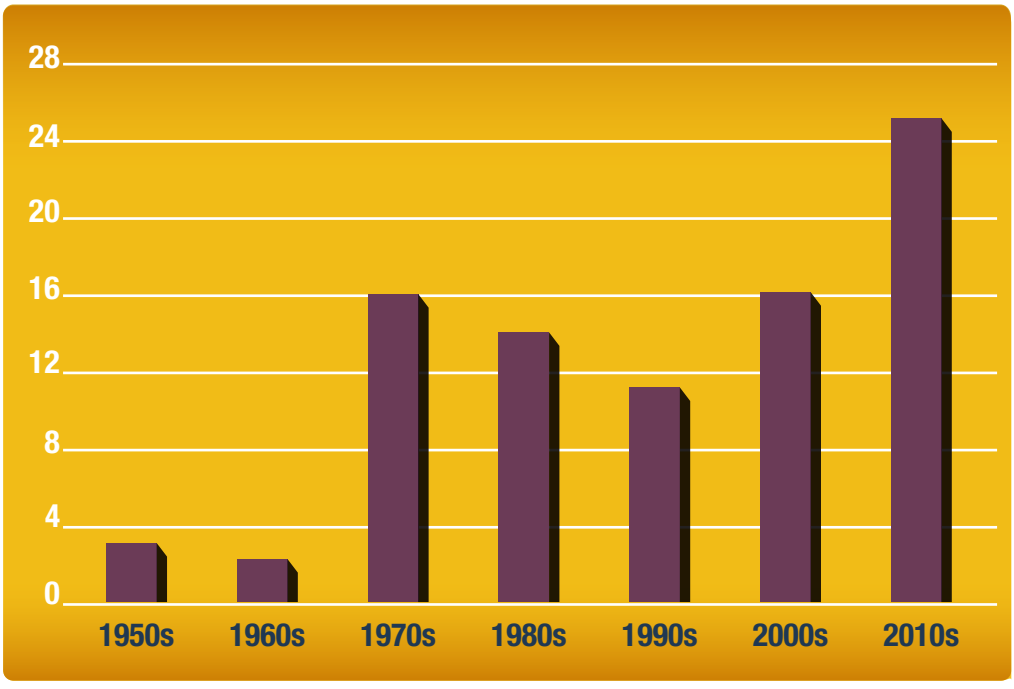
2) PLAYING RULES CHANGES

It is frequently remarked that the NFL has significantly added or changed rules concerning and promoting player health and safety in recent years. This is certainly true, but it is important to recognize that the NFL has generally added and changed rules concerning player health and safety *throughout* its modern history (after the merger with the American Football League in 1970). Included as Appendix I of this Report is a history of NFL rule changes concerning player health and safety, and below is an illustration of the number of changes over time.

NFL rule changes are proposed by the Competition Committee, which consists of club owners, executives, and coaches.[23] In addition, the NFLPA has the right to appoint two persons to attend meetings of the Competition Committee and one of the appointees can vote on all matters related to the Playing Rules.[24] If the proposed rule change passes in the Competition Committee, the owners then vote on the proposed rule changes at their annual meeting.[25] The Competition Committee also seeks insight from outside experts, including scientists and doctors, concerning proposed rule changes.[26] "If the NFLPA believes that the adoption of a playing rule change would adversely affect player safety," then it can pursue a change through the Joint Committee on Player Safety and Welfare and arbitration.[27] The NFLPA has not brought any such challenges since 2010.[28]

Having discussed some of the key features of the NFL, we now turn to the NFLPA.

Figure 7-A: Health-Related On-The-Field Rule Changes in the NFL



(B) Background on the NFLPA

The NFLPA in its present form is a Virginia nonprofit corporation and a tax exempt labor organization.[29] Pursuant to the National Labor Relations Act, the NFLPA is "the exclusive representative[] of all the employees in [the bargaining] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[30]

As will be explained in more detail below, the NFLPA represents all current players, regardless of whether they are members of the union. Also, as will be explained in more detail below, the NFLPA does not represent former players, even though the NFLPA has taken actions concerning former players and might continue to do so in the future. In a lawsuit between former players and the NFLPA (discussed in more detail below), the Honorable Susan Richard Nelson of the United States District Court for the District of Minnesota was adept in describing the relationship and tension between the NFLPA and current players and former players:

> *[T]he NFLPA negotiates with the League on behalf of the active players, and the interests of the active players, if not necessarily antagonistic towards the retired players, are not consistent with that of the retired players insofar as the League offers a single compensation pie to the players, such that any slice allocated to the retired players results in a smaller slice for the active players.*[31]

The NFLPA, based in Washington, D.C., has a staff of approximately 100 people, led by its Executive Director.[32] The Executive Director is the "principal administrative officer of the NFLPA" and is responsible for the "day-to-day affairs of the NFLPA."[33] In many respects, the NFLPA Executive Director is the counterpoint to the NFL Commissioner. The Executive Director is elected to a three-year term by the NFLPA's Board of Representatives (discussed in more detail below),[34] which can be renewed without limit.

The NFLPA's purpose, according to its Constitution, is as follows:

> to provide professional football players employed by Clubs of the NFL with an organization dedicated to the promotion and advancement of all players and of the sport of professional football; the improvement of economic and other working conditions of players; the betterment and maintenance of relations between players, owners, coaches and staffs; the furnishing of information and the providing of membership services; the negotiation, execution and administration of collective bargaining agreements; the resolution of player grievances, disputes and arbitrations arising under collective bargaining agreements; the representation of members in connection with common problems; the development of enterprises aimed at developing further benefits for the NFLPA and its members; assistance in providing educational advancement and training for members; encouragement of cultural, civic, legislative, charitable and other activities which further the interest of the NFLPA and its members, directly or indirectly; cooperation with and assistance to other organizations having purposes or objectives in whole or in part similar to those of the NFLPA; and the performance of all other actions consistent with this Constitution and appropriate to implement and fulfill the purposes, rights and responsibilities of the NFLPA.[35]

Each NFL club's players elect a Player Representative and an Alternate Player Representative to represent them in NFLPA matters.[36] The Executive Director, Player Representatives, and the NFLPA President collectively make up the Board of Representatives.[37] In addition, the Board of Representatives elects 10 Player Representatives as Vice Presidents.[38] The Board of Representatives is responsible for voting on matters concerning the NFLPA's business.[39]

The NFLPA President is an NFL player elected to a two-year term by the Board of Representatives,[40] and is the "principal executive officer of the NFLPA" responsible for "supervis[ing] and direct[ing] the business and affairs of the NFLPA."[41] Collectively, the President and the Vice Presidents make up the Executive Officers of the NFLPA, to whom the Executive Director is principally responsible for reporting.[42]

(C) A History of the NFL's and NFLPA's Approaches to Player Health

We briefly describe the history of the NFL's and NFLPA's efforts on player health up to the present day as background for understanding the current state of play. In order to understand the context of player health issues, we also provide the relevant background of labor relations between the parties. As will be shown, for many years, player health does not appear to have been a priority. Our treatment is far from exhaustive, but will provide a reasonable background in which to ground our forward-looking recommendations.

1) PRE-1970

Former Los Angeles Rams general manager Pete Rozelle was named NFL Commissioner in 1960.[43] For much of the 1960s, the NFL was primarily concerned with its business operations. In 1961, the NFL steered the passage of a federal antitrust exemption, the Sports Broadcasting Act, concerning NFL television broadcasts that serves as the basis for approximately two-thirds of the NFL's revenue today (see Chapter 17: The Media). Also in the 1960s, the NFL faced significant competition from the recently formed American Football League (AFL). In 1966, the AFL and NFL agreed to merge operations and play beginning with the 1970 season. Also, beginning with the 1966 season, the NFL and AFL champions played against one another in the Super Bowl.

To counter the NFL, in 1956, players formed a loosely associated NFLPA to pursue their interests.[44] The NFLPA's initial efforts to increase salaries and to require clubs to pay injured players were largely unsuccessful, but did result in the first ever professional football CBA in 1968.[45] The 1968 CBA established the players' Retirement Plan,[46] group medical insurance,[47] workers' compensation benefits,[48] a form of Injury Protection,[b] and the right to have a neutral physician assess and resolve the extent of a player's injury.[49]

2) 1970s

The year 1970 was an important turning point for the NFLPA. In that year, the NFLPA merged with the American Football League Players Association and gained formal union recognition from the National Labor Relations Board (NLRB).[50] The NFLPA and NFL also negotiated a new CBA that year, which for the first time required NFL clubs to provide disability benefits,[51] life insurance,[52] and dental benefits.[53] In 1971, the NFLPA hired labor attorney Ed Garvey, who had assisted in the CBA negotiations, to become the NFLPA's first Executive Director.[54]

The 1970 CBA expired at the end of the 1974 season. The players continued playing without a CBA, except for a 41-day strike during the 1974 preseason and a 3-day strike during the 1975 season.[55] Both strikes failed due to a lack of solidarity among the players.[56]

Finally, the parties agreed to a new CBA in 1977. The 1977 CBA made modest increases in previously agreed-upon benefit and insurance programs, such as retirement, medical, disability, life, and dental. Players had previously gained the right to grieve terminations resulting from injuries as well as Injury Protection (the right to 50 percent of his salary if a player was injured in the prior season and still unable to play). In addition, the 1977 CBA created the Joint Committee on Player Safety and Welfare, established "for the purpose of discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, drug abuse prevention programs and other relevant subjects."[57] The Joint Committee consisted of three club representatives and three NFLPA representatives.[58] However, the CBA was very clear that the Joint Committee would "not have the power to commit or bind either the NFLPA or the [NFL] on any issue."[59] The Joint Committee continues to exist today in substantially the same form.

Although progress was made on basic medical issues during the 1970s, the principal items of negotiation between the NFL and NFLPA at the time were compensation issues and free agency.

In the NFL context, any progress on player health issues must be viewed through, and come as a result of, the process of collective bargaining. Although progress was made on basic medical issues during the 1970s, the principal items of negotiation between the NFL and NFLPA at the time were compensation issues and free agency. Importantly, the 1977 CBA did not provide NFL players with the right to unrestricted free agency,[c] even though players in Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) by then enjoyed that right due to a variety of legal proceedings.[60]

b The 1968 CBA provided that "[p]layers who are removed from the active roster by reason of injury between the beginning of training camp period and the first regular season game and who have not signed new contracts, shall be guaranteed 100% of their salaries as stated on the front side of their contracts for the contract year immediately preceding the year in which they are injured." 1968 CBA, Art. XI, § 5. Under the 2011 CBA, a player who is unable to play due to an injury suffered in the prior season, is entitled to 50 percent of his salary up to a maximum of $1.1 million in the 2015 season. If the player is still unable to play in the second season following the injury, the player is entitled to 30 percent of his salary up to a maximum of $525,000 for the 2015 season. *See* 2011 CBA, Art. 45.

c An Unrestricted Free Agent is a player "with four or more Accrued Seasons, who has completed performance of his Player Contract, and who is no longer subject to any exclusive negotiating rights, Right of First Refusal, or Draft Choice Compensation in favor of his Prior Club." 2011 CBA, Art. 1.

3) 1980s

The players engaged in a 57-day strike during the 1982 preseason, following the expiration of the 1977 CBA.[61] The players began the season without a new CBA, but reached a new one in December 1982.[62] Entering negotiations for the 1982 CBA, the NFLPA sought important changes concerning players' healthcare rights:

> *[T]he union wants players to have the right to be treated and examined by a physician of their choice, not the team doctor. Decisions on whether a player is healthy enough to play or when he needs an operation should not be made by a physician whose primary allegiance is to the team's management . . . . 'Team physicans (sic) . . . should be chosen jointly by the players and management and should be subject to firing by either.'*[63]

The NFLPA made some progress on these issues in the 1982 CBA. The 1982 CBA required: all clubs to have a board certified orthopedic surgeon as one of its club doctors;[64] the club to pay for the cost of medical services rendered by club doctors;[65] club doctors to advise players about their condition when they have also advised the club;[66] all full-time trainers to be certified by the National Athletic Trainers Association;[67] and, for clubs to pay for education and treatment related to chemical dependence.[68] The 1982 CBA also granted players' certain rights, including: the right to a second medical opinion paid for by the club;[69] the right to choose their own surgeon at the club's expense;[70] and, the right to review their medical records twice per season.[71,d]

The 1982 CBA did not include any right of the players to choose or have input regarding club physicians, nor has any CBA since. Additionally, the NFLPA was again unable to gain free agency as part of the 1982 CBA negotiations.[72]

One of the biggest health issues in the NFL in the early 1980s was illegal drug use.[73] This was an era of escalating and worrisome drug use throughout the country,[74] and the NFL was not immune to the problem.[75] As the 1982 CBA negotiations were taking place, former star defensive end Carl Eller estimated that 20 to 25 percent of players were abusing drugs and/or alcohol.[76] Many players rejected those estimates and refused to permit drug testing.[77] The 1982 CBA ultimately included the first ever drug testing policy,[78] permitting club physicians, "upon reasonable cause," to direct a player to a treatment facility for drug testing, but also forbidding clubs from randomly conducting drug tests on players.[79] The policy also provided for education and treatment for players.[80] Despite the new policy, drug use continued through the 1980s, as did the NFL's efforts to discipline players who had failed tests.[81]

After the 1982 CBA negotiations, Garvey chose to cede his Executive Director position to then-NFLPA President Gene Upshaw in 1983.[82] Upshaw had been an offensive lineman for the Oakland Raiders from 1967 to 1981.[e]

The expiration of the 1982 CBA in 1987 marked a dramatic and litigious turning point in NFL labor relations.[83] The players went on strike for 23 days during the 1987 season, during which time the NFL used replacement players.[84] Between 1987 and 1993, the NFLPA, NFL players and the NFL engaged in multiple courtroom battles over the NFL system, particularly the share of revenues and players' rights to free agency.[85] The NFLPA dissolved itself as the players' official bargaining representative in 1989 to improve the players' antitrust claims.[f] NFL play nevertheless continued during these years without a CBA.

With no hope of a CBA during these years, there was limited opportunity to address player health issues. The one issue that reverberated for years without much resolution was drug testing. The NFLPA successfully blocked the NFL's attempts to unilaterally impose random drug testing in 1986,[86] before ultimately agreeing to a policy in 1990.[87]

Finally, Rozelle retired as NFL Commissioner in November 1989, amid stalled CBA negotiations and extensive litigation concerning player compensation, and died in 1996 at the age of 70.[88]

d During the 1982 CBA negotiations, the NFL's chief attorney, Jack Donlan, admitted that players were entitled to a doctor-patient relationship with club physicians, but refused to commit that understanding to writing and fought to prevent players from receiving their own medical records. *See* Bart Barnes and Paul Attner, *No Progress in Talks; Secret Meeting Confirmed,* Wash. Post, Oct. 1, 1982, *available at* 1982 WLNR 603101.

e During his career, Upshaw made the Pro Bowl six times and helped the Raiders win two Super Bowls. Upshaw was elected to the Pro Football Hall of Fame in 1987. *See Hall of Famers – Gene Upshaw,* Pro Football Hall of Fame, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=220 (last visited Aug. 7, 2015), *archived at* http://perma.cc/EWF2-V3TV.

f To simplify a complex issue for purposes of this Report, generally speaking, when NFL clubs, as separate and distinct legal entities and competitors, agree on restrictions concerning the labor market for NFL players, *e.g.,* via free agency rules, the Salary Cap, and the NFL Draft, they may be violating Section 1 of the Sherman Antitrust Act's prohibition against unreasonable restraints of trade. *See* Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Jackson v. Nat'l Football League, 802 F. Supp. 226 (D. Minn. 1992). However, the clubs' restrictions are exempt from antitrust laws under what is known as the non-statutory labor exemption when the clubs negotiate the restrictions with a labor organization as part of the collective bargaining process. *See* Brown v. Pro Football, Inc., 518 U.S. 231 (1996). But, if the players dissolve the union's authority, *i.e.,* remove the union's authority to negotiate on behalf of the players pursuant to the NLRA, the clubs are no longer in a bargaining relationship with a labor organization and their restrictions are no longer immune from antitrust laws. *See id.;* Powell v. Nat'l Football League, 764 F. Supp. 1351 (D. Minn. 1991). Dissolution is a powerful weapon because the Sherman Antitrust Act provides plaintiffs with treble damages. 15 U.S.C. § 15.

4) 1990s

To replace Rozelle, the NFL hired Paul Tagliabue, its chief outside counsel from the Washington, D.C. law firm of Covington & Burling LLP.[89] Compared to the NFL of 1960—with only 13 clubs, prior to the merger with the AFL, and at the beginning of the television-broadcasting era—the 1989 NFL was a different League entirely. It now included 28 clubs, worth approximately $80 million each,[90] and had television revenues of approximately $1 billion per year.[91]

In 1993, after several legal victories for the players, the NFL and the players settled the outstanding lawsuits as part of constructing a new, comprehensive CBA.[92] The NFLPA also recertified itself as the players' bargaining representative.

The 1993 CBA was groundbreaking and set the framework for every NFL-NFLPA CBA since. The players gained the right to unrestricted free agency for the first time in exchange for a hard Salary Cap. Players could become unrestricted free agents after five years of experience and clubs' payrolls were limited to a range of 62 percent to 64 percent of Defined Gross Revenue,[g] depending on the year.[93] In terms of player health provisions, the 1993 CBA increased benefit amounts (*e.g.,* medical and life insurance, Injury Protection, and disability) but otherwise made no major changes.

A significant study concerning NFL player health was published in 1994. In the late 1980s, concern began to develop that NFL players might have shorter life spans than the general population.[94] In response, the NFLPA commissioned a study by the National Institute for Occupational Safety and Health ("NIOSH").[95] In a 1994 report, NIOSH reported somewhat reassuring results related to the health status of players. Using information from NFL pension fund databases, commercial publications, and death certificates, NIOSH examined all players who played in the NFL for at least five seasons between 1959 and 1988, 3,439 players in total.[96] NIOSH compared the death rates of the NFL players to men of similar age and race in the general population and found that 46 percent fewer NFL players had died as compared to the general population.[97] Based on the general population, NIOSH had expected that 189 NFL players would have died, but, in fact, only 103 had.[98] NIOSH acknowledged that the study contained a "relatively young group of men, only a few of which ha[d] reached the age of 50" and "[r]esearchers therefore [would] not be able to determine their average age of death for several years."[99] NIOSH updated the study's results in 2012, as will be discussed below.

The 1993 CBA was extended in 1996 and 1998, but player health provisions remained largely the same with the exception of a new Player Annuity Program in 1998,[100] discussed in further detail in Appendix C.

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This extended era of labor peace resulted in some public criticism of the NFLPA. Critics routinely pointed out that NFL players lacked the guaranteed contracts customary to other major professional sports leagues, and surmised that Upshaw was too close with Tagliabue.[101] Upshaw's responded to his critics by highlighting the financial gains the NFLPA had made:

> *"What [Commissioner Paul Tagliabue] and I try to do as stewards of the game is to try to ensure that we have stability and growth," Upshaw said. "My job is to make sure we get our fair share. I've told the players and I've told the owners the same thing. The only chance we have of not having labor peace is if either side gets greedy. For the first time the owners realize the enemy is not the union."*
>
> *"We've had ugly, nasty clashes" with owners, said Upshaw, who has led the union since 1983 and earns about $2 million a year. "We've had lockouts. We've had strikes. We've done everything everyone else does. We still do. It's just not as public as it might have been at one time. . . . To me, the test is, how much do we get of the revenues we generate? In 1987 we were getting 30 percent of the revenues and the owners were getting 70. Now we're getting two-thirds and they are getting a third. For us to do what we've been able to do has just been unbelievable."*[102]

g From 1993 to 2006, Defined Gross Revenue (DGR), was defined as "the aggregate revenues received or to be received on an accrual basis, for or with respect to a League Year during the term of [the CBA], by the NFL and all NFL Clubs (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games," with a few specific exceptions. 1993 CBA, Art. XXIV, § 1(a)(i). In the 2006 CBA, the term was changed to Total Revenue (TR), and changed again to All Revenue ("AR") in the 2011 CBA.

While some continued to focus on the financial issues in the game, by the mid-1990s, concussions in the NFL had started to become an issue of concern to players and were gaining attention in the media.[103] The most comprehensive source for understanding the evolution of this issue in the NFL is the 2013 book *League of Denial: The NFL, Concussions and the Battle for Truth*, by ESPN writers Mark Fainaru-Wada and Steve Fainaru.[104] The NFL has never publicly disagreed with any of the factual assertions in *League of Denial*, and instead touted its past and present initiatives designed to address head injuries in sports.[105]

The media began to pay more attention to concussions around 1994.[106] Tagliabue called the concussion issue a "pack journalism issue" and insisted that concussions occurred only once every three or four games.[h] Nevertheless, by the end of year, the NFL established the Mild Traumatic Brain Injury Committee (MTBI Committee) to study concussions.[107]

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The creation, constitution, and work product of the MTBI Committee would become extremely controversial. Tagliabue personally selected New York Jets Club doctor Elliot Pellman as Chairman of the Committee.[108] Although a neurologist would have seemed like the logical choice, Pellman is a rheumatologist,[109] specializing in the treatment of arthritis, and was later found to have exaggerated his resume.[110] Years later, Tagliabue insisted that he chose Pellman based on his experience in sports medicine and his recent involvement with Jets wide receiver Al Toon's concussion-related retirement.[111] Additionally, beginning in 1997, Pellman was one of Tagliabue's personal doctors, a relationship that would continue until 2006.[112]

Beyond just Pellman, the MTBI Committee seemed to many to lack appropriate expertise and independence. It consisted of several club doctors, two club athletic trainers, a consulting engineer, a club equipment manager, neurologist Ira Casson (who had studied boxers), and Hank Feuer, an Indianapolis neurosurgeon who worked with the Indianapolis Colts.[113] The MTBI Committee did not include any NFLPA or player representation.[i] The MTBI Committee's initial composition would later be described as "comical" and "bizarre" by Kevin Guskiewicz,[114] a former athletic trainer and sports medicine academic who pioneered some of the early research into sports and concussions, and who, in 2010, joined the NFL's MTBI Committee, when it was renamed the Head, Neck and Spine Committee.[115]

5) 2000s

The CBA was extended again in 2002 and 2006. Again, player health provisions remained largely the same with the addition of a Tuition Assistance Plan in 2002,[116] the redefinition of "disability" to be in line with the American Medical Association's Guides to the Evaluation of Permanent Impairment,[j] a reduction in off-season workout programs from 16 weeks to 14 weeks;[117] and, the right of the NFLPA to commence an investigation before the Joint Committee on Player Safety and Welfare.[k] However, as is discussed in more detail below, there are important questions about the effectiveness of the Joint Committee.

In October 2003, the MTBI Committee published its first piece of work, after having gathered data with the assistance of club doctors.[118] Nevertheless, the NFL made some

h Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions and the Battle for Truth 74 (2013). According to the NFL's Injury Surveillance System, players suffered a mean of 158.9 concussions during regular season games per season between 2009 and 2015, a rate of about .62 concussions per game. See Chapter 1: Players, Table 1-F.

i Reports have indicated that the NFLPA played some role in the MTBI Committee, but that role is unclear. *See* Mike Florio, *League of Denial fails to tell the whole story on concussions,* ProFootballTalk (Oct. 9, 2013 9:48 PM), http://profootballtalk.nbcsports.com/2013/10/09/league-of-denial-fails-to-tell-the-whole-story-on-concussions/, *archived at* http://perma.cc/8LHU-PNNL; Mike Florio, *NFLPA finally sued for concussions,* ProFootballTalk (July 18, 2014 3:01 PM), http://profootballtalk.nbcsports.com/2014/07/18/nflpa-finally-sued-for-concussions/, *archived at* http://perma.cc/T35H-YDHP. Indeed, when former players sued the NFLPA concerning concussions in 2014, discussed *infra*, they alleged the NFLPA was involved in some way with the MTBI Committee, but provided no details of the involvement. *See* Class Action Complaint, Ballard v. Nat'l Football League Players Ass'n, ¶¶ 33, 56–58, 69, 82, 128, 159–60 (E.D.Mo. 2014) (No. 14-cv-01267). Attorneys for the plaintiffs in the *Ballard* case did not respond to an email requesting further information concerning the possible link between the NFLPA and the MTBI Committee.

j 2002 CBA, Art. XLVII, § 6. The American Medical Association's Guides to the Evaluation of Permanent Impair instructed that a permanent disability occurs where the condition: "(1) results in a 50% or greater loss of speech or sight; or (2) results in a 55% or greater loss of hearing; or (3) is the primary or contributory cause of the surgical removal or major functional impairment of a vital organ or part of the central nervous system; or (4) for orthopedic impairments . . . is (a) a 55% or greater loss of the use of the entire lower extremity; or (b) a 30% or greater loss of use of the entire upper extremity; or (c) an impairment to the spine that results in a 29% or greater whole body impairment." *Id.* The NFL changed the definition again in the 2011 CBA. *See* 2012 Bert Bell/Pete Rozelle NFL Player Retirement Plan, § 5.2 (a player "will be deemed to be totally and permanently disabled if the Retirement Board or the Disability Initial Claims Committee finds (1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country, and (2) that such condition is permanent.")

k 2002 CBA, Art. XIII, § 1. In 2012, the NFLPA commenced the first and only Joint Committee investigation. The nature and results of that investigation are confidential per an agreement between the NFL and NFLPA. This information was provided by the NFLPA.

progress concerning concussions prior to that point. In the early 1990s, Mark Lovell—a Pittsburgh Steelers Club doctor and an original member of the MTBI Committee—had developed a neuropsychological testing program designed to diagnose players with concussion symptoms.[119] With the NFL's strong recommendation, by the end of 2001, all but three clubs (Minnesota Vikings, Carolina Panthers, and Dallas Cowboys) were using some form of Lovell's test.[120]

The MTBI Commitee's first two papers were well received by sports medicine doctors.[121] They focused on the biomechanics of NFL helmet collisions, specifically where concussive blows were actually delivered.[122] The papers were published in *Neurosurgery*,[123] the official journal of the Congress of Neurological Consultants.[124] The editor-in-chief of *Neurosurgery* was Michael Apuzzo, a professor of neurology at the University of Southern California and an NFL consultant.[125]

In total, between 2003 and 2009, the MTBI Committee published 16 articles in *Neurosurgery.*[126] By and large, the MTBI Committee's research claimed that concussion rates in the NFL were extremely low, that the number of concussions suffered by a player bears no relation to future injuries, and, that there is no link between football and brain damage.[127] The MTBI Committee's research often cited the fact that players returned to play very quickly (92 percent within seven days) after suffering a concussion as proof that concussions were not a major concern.[128] Importantly, the MTBI Committee assumed that the club doctors would not have cleared players to return to play unless they were healthy enough to do so, and thus that all of the players who returned to play after having suffered a concussion were healthy.[129]

The last 14 papers from the MTBI Committee were repeatedly and strongly criticized by the scientific community. The principal peer reviewers were Guskiewicz, Julian Bailes, a neurosurgeon who worked with the Pittsburgh Steelers, and Robert Cantu, a Boston University neurosurgeon. Cantu was also the editor of *Neurosurgery*'s sports section and responsible for the review of the MTBI Committee's publications.[130] Despite Guskiewicz', Bailes', and Cantu's criticisms and insistence that the MTBI Committee's work not be published, Apuzzo reportedly ignored standard peer-reviewed publication guidelines and published the work anyway, permitting the reviewers an opportunity to append their criticisms.[131] The criticisms generally focused on the MTBI Committee's failure to recognize that concussions were often unreported or undiagnosed and that players routinely returned to play before they were healthy.[132] Those critical of the work believed the MTBI Committee was essentially creating data designed to protect and serve the interests of the NFL.[133]

In 2005, the MTBI Committee's work came under increased scrutiny when *Neurosurgery* published an article authored by Bennet Omalu, a forensic pathologist in Pittsburgh.[134] Omalu happened to have been responsible for performing the autopsy on deceased Pittsburgh Steelers Hall of Fame center Mike Webster after Webster's death in 2002.[135] Omalu examined Webster's brain and, with the assistance of colleagues, diagnosed the brain with what Omalu labeled chronic traumatic encephalopathy ("CTE"),[l] a form of brain damage.[136] Omalu's paper claimed Webster's brain damage had been caused by "repetitive concussive brain injury" from playing football.[137]

Pellman, Casson and Dr. David C. Viano, another member of the MTBI Committee, unsuccessfully requested that Omalu's paper be retracted.[138] The doctors insisted that there was no evidence that football caused brain damage.[139]

The year after Omalu's article, the NFL and NFLPA agreed to a new CBA. The 2006 CBA made some changes concerning player health, including a Health Reimbursement Account, [140] and the "88 Benefit" to compensate retired players suffering from dementia.[141] These and other benefit programs are discussed in further detail in Appendix C. After completing negotiations of the 2006 CBA, Tagliabue announced in March 2006 that he would retire before the 2006 season.[142] The owners selected Roger Goodell, the current NFL Commissioner, to replace him.[143]

Attention to the issue of concussions continued to grow in Goodell's first year on the job, as additional deceased players were diagnosed with CTE.[144] The NFL, through Pellman and Casson, continued to deny there was any connection between brain damage and related conditions (such as depression, dementia, or Alzheimer's disease) and football.[145] Despite the denials, the board responsible for overseeing the NFL's Retirement Plan had, on several occasions, granted disability benefits to NFL players for brain damage.[146]

To assist Goodell in understanding the issues, in June 2007, the NFL held a summit of all club doctors, athletic trainers, the MTBI Committee, and those who had disagreed with the MTBI Committee's work for a variety of presentations on concussion issues.[147] The MTBI Committee members and their dissenters presented their work amid sharp disagreement.[148] Guskiewicz has said the summit was "the turning point" in the NFL's longstanding denial of the relationship between brain injuries and football,[149] and that

l For a longer discussion on the issues surrounding CTE, see the Introduction.

it led Goodell and NFL General Counsel Jeff Pash to recognize the seriousness of the problem at hand.[150] Indeed, at the conclusion of the summit, Pash encouraged Guskiewicz to continue to challenge the MTBI Committee's work.[151]

The NFLPA was also facing scrutiny concerning player health issues, amid increasing stories of retired NFL players suffering from debilitating injuries and conditions.[152] Despite his own playing career, Upshaw—still NFLPA Executive Director at the time—had developed a contentious relationship with other retired players. For example, in response to criticism from retired players that the CBAs did not provide sufficient benefits to retired players, Upshaw responded: "The bottom line is I don't work for them. They don't hire me and they can't fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote."[153] Additionally, according to former Seattle Seahawks club doctor Pierce Scranton and former President of the NFL Physician Society (NFLPS), the NFLPS invited Upshaw to its meetings to discuss player health but Upshaw declined to meet with or engage the NFLPS.[154]

Despite the NFL's 2007 concussion summit, the MTBI Committee continued its work and Goodell's attention shifted toward CBA negotiations. In May 2008, NFL clubs unanimously voted to opt out of the 2006 CBA, accelerating the CBA's expiration date from March 2013 to March 2011. The clubs' decision to opt out centered on their desire to receive a share of revenues beyond the approximately 50 percent to which they were entitled pursuant to the 2006 CBA.[155]

Any chance of jump starting CBA negotiations was halted when Upshaw died unexpectedly on August 21, 2008 after a brief battle with pancreatic cancer,[156] only three months after the clubs' decision to opt out of the 2006 CBA.[157] On March 16, 2009, the NFLPA elected Washington, D.C.-based litigation attorney DeMaurice Smith as its new Executive Director.[158]

As Smith began his new position, it became increasingly clear that player health issues would be a major component of the new CBA. Indeed, on October 28, 2009, the House Judiciary Committee held a hearing on football player head injuries at which both Smith and Goodell testified.[159] At that hearing, Goodell declared that in his three years as Commissioner, he had spent more time devoted to player health issues, particularly concerning retired players, than any other issue.[160] Goodell testified that the NFL had routinely increased benefit amounts, expanded benefit programs as part of collective bargaining, and had recently streamlined the benefits process for former players.[161]

Goodell, in a prepared statement, emphasized the NFL's commitment to additional research and education concerning brain injuries.[162] Moreover, he stressed that the NFL's newest guidelines concerning players suspected of having suffered a concussion returning to play:

> *All return-to-play decisions are made by doctors and doctors only. The decision to return to the game is not made by coaches. Not by players. Not by teammates. If a player suffers a concussion and loses consciousness, he cannot return to the same game under any circumstances. That was not the rule as recently as 2006. Moreover, our doctors have developed guidelines that we believe are consistent with best medical practice. A player may not return to a game or practice unless he is fully asymptomatic both at rest and after exertion.*[163]

Smith's prepared testimony at the same hearing emphasized his intention to focus on player health issues while also acknowledging the NFLPA's perceived past failures in this regard:

> *As Executive Director, my number one priority is to protect those who play and have played this game. There is no interest greater than their health and safety. Let me say this again: Safety of the Players is Paramount.*
>
> * * *
>
> *I have one simple declaration on behalf of those who play and those who played this game:*
>
> *WE ARE COMMITTED TO GETTING THE RIGHT ANSWERS, TO WORK WITH EVERYONE WHO HAS THE GOAL OF PROTECTING OUR PLAYERS AND TO SERVE AS A MODEL FOR FOOTBALL AT EVERY LEVEL.*
>
> *Given that commitment, I acknowledge that the Players Union in the past has not done its best in this area. We will do better.*
>
> * * *
>
> *Finally we, the players, will not bargain for medical care; we will not bargain for health and safety; and we will not bargain for basic provisions of the law as patients. We will continue to work with the League but medical care is not and will never be a Collective Bargaining issue.*[164]

The hearing occurred approximately six months after the NFL hosted Dr. Ann McKee, a Boston University neuropathologist, who had begun to take the lead in studying the brains of deceased NFL players and diagnosing chronic traumatic encephalopathy (CTE).[165,m] Some of the attendees indicated that the meeting was combative, including multiple interruptions.[166,n]

Also at the NFL's meeting was Peter Davies, a Long Island-based expert in Alzheimer's disease and neurological conditions.[167] At the NFL's request Davies reviewed Omalu's conclusion that brain tissue from several former NFL players demonstrated brain damage.[168] Davies substantially confirmed Omalu's findings.[169]

At the October 2009 House Judiciary Committee hearing, when pressed as to whether there was a link between football and brain injuries, Goodell deferred to the ongoing debate among the scientists.[170] Nevertheless, the October 2009 hearing marked the end of the MTBI Committee as it had previously existed. Pellman, Casson and Viano left the Committee,[171] and it was re-named the Head, Neck and Spine Committee. The NFL brought in Richard Ellenbogen and Hunt Batjer, respected neurosurgeons with no previous ties to the NFL, as co-chairmen.[172] According to Mitch Berger, a prominent San Francisco neurosurgeon who joined the Committee at that time, the Committee "essentially started from zero."[173] Guskiewicz joined the Committee in 2010, convinced that Goodell was committed to addressing the concussion issue properly.[174]

In reviewing a draft of this Report, the NFL requested that we add additional context for "the disbanding of the MTBI Committee and establishment of the Head, Neck and Spine Committee."[175] Citing a *New York Times* article, the NFL noted that Dr. Ellenbogen and Dr. Batjer "concurred that data collected by the NFL's former brain-injury leadership was 'infected' [and] that their committee should be assembled anew. The doctors said the old committee's ongoing studies on helmets and retired players' cognitive decline—whose structure and data were strongly criticized by outside experts—would not be used in any way moving forward."[176]

Eventually, several of the authors of the predecessor MTBI Committee's research later repudiated the Committee's findings and tried to distance themselves from the work.[177]

The October 2009 hearing marked the end of the MTBI Committee as it had previously existed.

The October 2009 hearing did not result in any legislation but served as a precursor for the 2011 CBA negotiations.

6) 2010–PRESENT

The 2011 CBA negotiations ultimately resembled a condensed version of what took place between 1987 and 1993, when the NFL operated without a CBA and the parties engaged in extensive litigation.[o] On March 11, 2011, after CBA negotiations centering around the split of revenues broke down, the NFLPA dissolved its status as the bargaining representative of NFL players and filed a class action antitrust lawsuit (*Brady v. NFL*).[178] After extensive litigation and public politicking, the NFLPA and NFL reached a new CBA in July 2011 (which included the NFLPA again reconstituting itself as the players' bargaining representative).[179]

The 2011 CBA substantially amended and supplemented player health and safety provisions. The most important changes include:

m More information about Dr. McKee's work on CTE is provided in the Introduction.

n Colonel Michael Jaffee, a neurologist with the Defense and Veterans Brain Injury Center who attended the meeting said "Casson interrupted the most . . . . He was the most challenging and at times mocking." Similarly, McKee said "I felt that they were in a very serious state of denial . . . . I felt like they weren't really listening. That's honestly what I thought. That's how it felt, like they had their heads in the sand. They didn't want to see it, so they didn't see it." *See* Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions and the Battle for Truth 268–70 (2013).

o The 1982 CBA expired after the 1986 season. When the parties were unable to reach a new CBA, the players engaged in a failed 57-day strike followed by several lawsuits claiming that various NFL policies concerning compensation and free agency violated antitrust laws. In 1989, at the suggestion of the United States Court of Appeals for the Eighth Circuit, *see* Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989), the players voted to dissolve the NFLPA as the official bargaining representative of NFL players to eliminate the NFL's immunity from antitrust scrutiny while there was still an ongoing collective bargaining relationship. The players thereafter won two antitrust lawsuits seeking injunctive relief, *see* McNeil v. Nat'l Football League, 790 F. Supp. 871, 876 (D. Minn. 1992); Jackson v. Nat'l Football League, 802 F. Supp. 226, 228 (D. Minn. 1992), before filing a larger antitrust lawsuit seeking over $1 billion in damages, *see* White v. Nat'l Football League, 822 F. Supp. 1389, 1395 (D. Minn. 1993). The case was settled in 1993 with the creation of the modern day CBA and the recertification of the NFLPA. *See* Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1, 9–12 (2012) (discussing NFL-NFLPA labor relations between 1987 and 1993).

- The availability of "Extended Injury Protection," permitting players to earn 50 percent of their salary up to $500,000 for the second season removed from the season in which the player suffered an injury that prevented the player from continuing to play;[180]
- An overhauled disability plan providing for increased benefits depending on the cause and nature of the disability;[181]
- A reduction of offseason workouts from 14 weeks to 9 weeks in three phases of varying intensity, including new prohibitions on the use of pads during practice (contact was already prohibited);[182]
- A limit of 14 padded practices and three hours of on-field activities per day during the season with all practices filmed for possible compliance review;[183]
- A requirement that clubs have an orthopedic surgeon and an internist, family medicine, or emergency medicine physician;[184]
- A requirement that all club physicians have a Certification of Added Qualification in Sports Medicine;[185]
- A requirement that clubs have neurological, cardiovascular, nutritional, and neuropsychological consultants;[186]
- A requirement that the game-day neutral physician be experienced in rapid sequence intubation and be board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery;[187]
- The NFL's agreement that "each Club physician's primary duty in providing player medical care shall be not to the Club but instead to the player-patient";[188]
- The NFLPA Medical Director's inclusion as a voting member on all NFL health and safety committees with the same access to data as the NFL Medical Advisor;[189]
- The creation of an Accountability and Care Committee to advise on player medical issues, as well as conducting a confidential survey every two years to solicit players' input regarding the adequacy of their medical care (discussed further below);[p]
- The establishment of the Legacy Benefit program for retired players with a contribution from the NFL of $620 million over the life of the CBA, to be disbursed as part of increased benefits under the Retirement Plan;[190] and,
- The creation of the Neuro-Cognitive Disability Benefit, permitting qualifying players to receive no less than $3,000 per month for a maximum of 180 months.[191,q]

In addition, the 2011 CBA allocates $22 million per year to healthcare and related benefits, funds, and programs for retired players, increasing at 5 percent annually, at the NFLPA's discretion.[192] The NFLPA used the money to create "The Trust," a program intended to be a "set of resources, programs and services designed to provide former players with the support, skills and tools to help ensure success off the field and in life after football."[193] The Trust and other programs supported by the NFLPA are discussed in further detail in the section on Current Practices of the NFLPA, below.

The 2011 CBA also allocates $11 million annually for the duration of the CBA (10 years) for medical research.[194] In 2012, the NFL announced it would be donating $30 million of these funds for brain injury research at the National Institutes of Health (NIH).[195] As discussed previously in this Report, by agreement dated February 2014, the NFLPA chose to fund The Football Players Health Study at Harvard University.

The 2011 CBA nevertheless failed to appease some former players. Former player Carl Eller filed a class action lawsuit against the NFLPA, Smith, and several players involved in the CBA negotiations alleging that they had no authority to bargain with the NFL about the terms of pension, retirement, and disability benefits.[196] Eller had previously filed a similar lawsuit against the NFL while the *Brady* case was proceeding,[197] which was settled shortly after *Brady*.[198] In his case against the NFLPA, Eller sought to have any issues relating to NFL retirees in the 2011 CBA "excised from that agreement and . . . renegotiated between Plaintiffs and the League."[199] Eller's case against the NFLPA was dismissed in May 2012.[200] The United States District Court for the District of Minnesota held that: (1) the plaintiffs could not state a claim for tortious interference; (2) that the NFLPA does not owe a fiduciary duty to former players; and, (3) the plaintiffs' claims to renegotiate the CBA were not judiciable controversies.[201]

Outside of the CBA, the NFL and NFLPA also agreed to a revised Concussion Protocol and infectious disease prevention standards. There may also be other changes to player health policy that the NFL and NFLPA have made but about which information is not publicly available. Concerning infectious disease prevention standards, the NFL and

p 2011 CBA, Art. 39, § 3. Despite the provisions of the CBA, the first survey was not conducted until 2015. Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 AM), http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/, *archived at* http://perma.cc/GE9A-RMRC.

q For a detailed summary of the benefits available to players, including the Neuro-Cognitive Disability Benefit, *see* Appendix C.

NFLPA have partnered with the Duke Infection Control Outreach Network (DICON) Program.[202] The DICON Program has visited all of the clubs' training facilities and created a best practices manual for their use.[203]

At the same time a new CBA was being negotiated with a focus on player health issues, NIOSH was updating the results from its 1994 report that showed NFL players died at lower rates than men of similar demographics in the general population, as discussed above. By 2012, out of the 3,439 players in the study, NIOSH expected that 625 would be deceased. However, only 334 were deceased (53 percent of the expected number). NIOSH also reported that players generally died of cancer and heart disease at lower rates than the general population. Yet, NIOSH also determined that defensive linemen and players with a Body Mass Index of 30 or more were more likely to die of heart disease than the general population.[204]

As part of the 2012 update, NIOSH also examined the number of deaths caused at least in part by the neurodegenerative conditions of dementia, Alzheimer's disease, Parkinson's disease, or amyotrophic lateral sclerosis (ALS).[205] 17 of the 334 deceased former players had a neurodegenerative condition included as either the underlying or contributing cause of death listed on their death certificates, a rate three times higher than that of the general population according to the study's authors.[206] The study acknowledged that due to the low incidence of neurodegenerative conditions and deaths, it was required to adopt broad confidential intervals.[207] As an additional limitation, the study acknowledged it did not have information on environmental, genetic, or other risk factors for neurologic disorders.[208]

In July 2014, the NFLPA for the first time was sued by former NFL players for allegedly intentionally and negligently concealing the risks of traumatic brain injury from playing football.[209] Also named as defendants in the lawsuit were three former NFLPA Presidents: Trace Armstrong (1996–2003); Troy Vincent (2004–2008); and Kevin Mawae (2008–2012). The players' case was dismissed in 2015 as is discussed in more detail below.

The NFL has similarly continued to face scrutiny concerning NFL player health, including multiple lawsuits discussed in more detail below.

At the 2015 Super Bowl, the NFL announced that it had hired cardiologist Dr. Elizabeth Nabel as its first ever Chief Health and Medical Advisor. In the new role, according to the NFL, Nabel provides "strategic input to the NFL's medical, health and scientific efforts; participate[s] as an ex-officio member on each of the NFL's medical advisory committees; and identif[ies] areas for the NFL to enhance player safety, care and treatment."[210] At the time of her appointment, Nabel was president of Brigham and Women's Hospital in Boston and a professor of medicine at Harvard Medical School. Nabel continues in both positions in addition to her work with the NFL. Additionally, The Leadership Team of The Football Players Health Study at Harvard University has met with Nabel, but she is not nor has she ever been affiliated with The Football Players Health Study. According to the NFL, Nabel's appointment did not replace Pellman, who, at the time, remained an "advisor" to the NFL and provided "administrative functions" in a role that was "subordinate to Dr. Nabel."[211] Pellman retired from the NFL in July 2016.[212]

Having provided a chronological history of player health issues in the NFL, for both the NFL and NFLPA, we now explain their current legal obligations, relevant ethical codes, current practices, and possible enforcement mechanisms.

> The programs and benefits available to NFL players are extraordinary, and both the NFL and NFLPA should be commended for this fact.

(D) Current Legal Obligations of the NFL[r]

The NFL is frequently sued, and often the plaintiffs are NFL players themselves. Emerging from all these lawsuits are many different theories about the NFL's legal responsibilities to players. Ultimately, the clearest source for understanding the relationship between players and the NFL are collectively bargained documents, including the 2011 NFL-NFLPA CBA, the Policy and Program on Substances of Abuse (Substance Abuse Policy), and the Policy on Performance-Enhancing Substances (PES Policy).

r The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

1) COLLECTIVELY BARGAINED AGREEMENTS

The 2011 CBA contains multiple provisions governing the NFL's health obligations to its players.

The NFL is responsible for funding and administering (sometimes in conjunction with the NFLPA) various player health-related programs and benefits, including:

- Retirement Plan (created in 1968);
- Group Insurance (1968);
- Disability Plan (1970);
- Severance Pay Plan (1982);
- Second Career Savings Plan (1993);
- Player Annuity Plan (1998);
- Tuition Assistance Plan (2002);
- The 88 Plan (2006);
- Health Reimbursement Account (2006);
- Former Player Life Improvement Plan (2007);
- Legacy Benefit (2011);
- Long Term Care Insurance Plan (2011); and,
- Neuro-Cognitive Disability Benefit (2011).

These programs and benefits are discussed in detail in Appendix C. The programs and benefits available to NFL players are extraordinary, and both the NFL and NFLPA should be commended for this fact. Nevertheless, access to the programs and benefits appears to be an issue,[s] and questions remain whether players are sufficiently made aware or avail themselves of these programs and benefits, as discussed in Chapter 1: Players. The NFL stated that in 2015 that it spent $1,084,118,072 on these health-related programs and benefits.[213]

These benefits are funded by NFL and NFL club revenues and are different from health-related programs offered and funded by the NFL or the NFLPA respectively, detailed in Appendices D and E. The more than $1 billion amount mentioned above does not include the costs of these programs.[214]

In addition to the above-mentioned benefits and programs, the NFL participates in two committees with the NFLPA concerning player health (additional committees not involving the NFLPA are discussed in Section D: Current Practices).

First, as noted above, the Joint Committee on Player Safety and Welfare ("Joint Committee"), established in 1974, consists of three club representatives and three NFLPA representatives and discusses "player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects."[215] The Joint Committee is merely advisory and has no binding decision-making authority.[t]

Second, the NFL participates in the Accountability and Care Committee (ACC), created in 2011. The ACC consists of the NFL Commissioner (or his designee), the NFLPA Executive Director (or his designee), and six additional members "experienced in fields relevant to healthcare for professional athletes," three appointed by the Commissioner and three by the NFLPA Executive Director.[216] The ACC is obligated to: (i) encourage and support programs for outstanding professional training by club medical staffs; (ii) develop a standardized preseason and postseason physical examination and education protocol to inform players of the risks associated with playing football; (iii) conduct research into prevention and treatment of illness and injury commonly experienced by professional athletes; (iv) conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care; (v) assist in the development and maintenance of injury surveillance and medical record systems; and, (vi) undertake such other duties as the Commissioner and Executive Director may assign.[217] Additionally, players can make complaints about

s Former Player 3 explained former players' frustrations with the various benefit programs: "I think that a lot of guys get frustrated with the system . . . . I don't think guys necessarily trust when they're done playing that the PA's going to take care of them. They don't trust that the league is going to take care of them. . . . They get bombarded with paperwork. They get frustrated. They deserve better. They become bitter. Maybe they just give up on the process." As a solution, Former Player 3 explained "I would like to see a third party sort of take over the process, just somebody who really has no vested interest in anything other than serving the players and helping them. And really understands all the different things that former players go through — emotionally, mentally, physically, spiritually — experts on former players to take control."

t *See* 2011 CBA, Art. 50, § 1(a). In Stringer v. Nat'l Football League, the Court also expressed concerns about the effectiveness of the Joint Committee: "While the NFL is required to give "serious and thorough consideration" to recommendations of the Joint Committee, the CBA imposes no independent duty on the NFL to consider health risks arising from adverse playing conditions, or to make recommendations for rules, regulations or guidelines for the clubs to follow." 474 F.Supp.2d 894, 896 (S.D. Ohio 2007).

their medical care to the ACC, but the ACC then refers those complaints to the NFL and Club involved.[u]

Since its creation, the ACC procured a third-party vendor, Synernet, to verify all club medical staff credentials and licensing, including with states and the Drug Enforcement Administration,[218] and also facilitated the first survey of players concerning a range of health and safety-related topics.[219] The results of that survey are not public and it is unclear whether they will ever be made public. We address this issue further in our recommendations below.

It is also important to understand the source and relative amount of funding for the various player benefits and programs mentioned above. NFL players, as a group, are entitled to different percentages of different revenue sources: (1) 55 percent of League Media, which consists of all NFL broadcasting revenues;[220] (2) 45 percent of NFL Ventures/Postseason revenue, which includes all revenues arising from the operation of postseason NFL games and all revenues arising from NFL-affiliated entities, including NFL Ventures,[221] NFL Network,[222] NFL Properties,[223] NFL Enterprises,[224] NFL Productions,[225] and NFL Digital;[226] and, (3) 40 percent of Local Revenues, which includes those revenues not included in League Media or NFL Ventures/Postseason, and specifically includes revenues from the sale of preseason television broadcasts.[227] These revenues are collectively known as All Revenue or AR.[228] AR in 2015 was approximately $12.4 billion.[229]

The players' share of AR is referred to as the Player Cost Amount.[230] The Player Cost Amount is one of two essential components for calculating the Salary Cap—the "absolute maximum amount of Salary that each Club may pay or be obligated to pay or provide to players . . . at any time during a particular League Year."[231] The other essential component of the Salary Cap calculation is Player Benefit Costs. Player Benefit Costs are the total amounts the NFL and its clubs spend on all the above-described programs and benefits, in addition to the costs of providing medical care to NFL players.[232] The Salary Cap is determined by subtracting Player Benefit Costs from the Player Cost Amount and dividing by the number of clubs in the NFL.[233] In other words, the Salary Cap equals Player Cost Amount minus Player Benefit Costs divided by 32. *Thus, the more that is paid to NFL players, including retired players, in the form of benefits and medical care, i.e., Player Benefit Costs, the less they are able to receive in the form of salary.* Indeed, in 2015, when the Salary Cap was $143,280,000 per club, each club was charged $37,550,000 in Player Benefit Costs. Thus, out of a possible $180,830,000 that could have been spent on player salaries by each Club, 26.2 percent was allocated to player benefits.

It is important to clarify these figures. As Figure 7-B shows below, about 50 percent of a club's revenue is allocated to the players. The club keeps the other 50 percent. Of the 50 percent allocated for the players (the Player Cost Amount), in 2015, 26.2 percent of that was used on player benefits. Thus, in 2015, we can estimate that each club had approximately $361,660,000 in revenue, $180,830,000 of which would be available for players. Thus, $37,550,000 was spent on player benefits. The $37,550,000 is 26.2 percent of the Player Cost Amount and 10.4 percent of the club's revenue.

In 2015, when the Salary Cap was $143,280,000 per club, each club was charged $37,550,000 in Player Benefit Costs. Thus, out of a possible $180,830,000 that could have been spent on player salaries by each club, 26.2 percent was allocated to player benefits.

u The three NFL-appointed members of the ACC are: Dr. Matthew Matava, Club doctor for the St. Louis Rams and former President of the NFLPS ; Rick Burkholder, athletic trainer for the Kansas City Chiefs and President of the Professional Football Athletic Trainers (PFATS); and, Dr. Elliott Hershman, Chairman of NFL Injury and Safety Panel, Department of Orthopaedic Surgery, Lenox Hill Hospital and Team Orthopedist, New York Jets. The three NFLPA-appointed members of the ACC are: Dr. Anthony Alessi, neurologist and Associate Clinical Professor of Neurology, University of Connecticut; Dr. Ross McKinney, Director, Trent Center for Bioethics, Humanities & History of Medicine, Duke University & School of Medicine; and, Dr. Johnny Benjamin, orthopedist and Director, Pro Spine Center.

In addition to the CBA, the Substance Abuse Policy contains important provisions concerning player health. The Substance Abuse Policy prohibits players from using common street drugs, such as cocaine, marijuana, amphetamines, opiates, opioids, phencyclidine (PCP), and 3,4-methylenedioxymethamphetamine (MDMA, or "ecstasy").[234] Players are subject to pre-employment tests and one test during the pre-season.[235] Players are not subject to regular season testing unless they have agreed to be or have previously failed a drug test.[236] Importantly, players who fail tests are not immediately disciplined but instead enter an intervention program where they are assessed and treated by medical personnel.[237] Players are only disciplined if they fail to comply with their treatment plans, for example, by failing additional drug tests.[238]

In contrast, players who test positive for performance enhancing drugs under the Performance-Enhancing Substance (PES) Policy are immediately disciplined and no treatment is mandated.[239] Discipline includes: a 2-game suspension for a first positive test result for diuretics or masking agents; a 4-game suspension for a first positive test for stimulants during the season or anabolic steroids; a 6-game suspension for positive test result plus a diuretic, masking agent, or attempt to substitute or dilute; a 10-game suspension for a second violation; and a 2-year ban for a third violation.[240]

Ten players per club are randomly tested for performance enhancing drugs each week of the preseason, regular season, and postseason.[241] In addition, the 2014 PES Policy initiated blood testing for human growth hormone (HGH), with a limit of six tests per player per calendar year.[242]

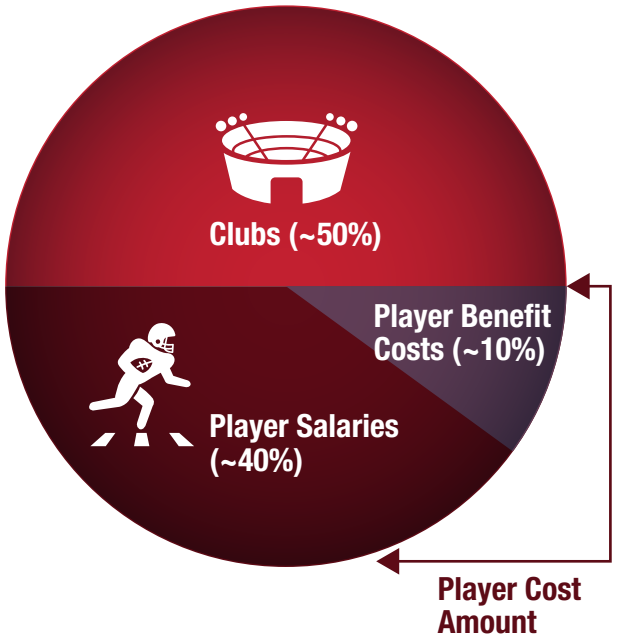
In our forthcoming report *Comparing the Health-Related Policies and Practices of the NFL to Other Professional Sports Leagues*, we provide an in-depth analysis of both the Substance Abuse and PES Policies. However, our research has not revealed any reliable data on the usage of recreational or performance-enhancing drugs by NFL players. Additionally, in Chapter 2: Club Doctors, Section I: The Special Case of Medications, we discuss prescription and painkilling medications as they concern NFL players at length.

2) STATUTORY OBLIGATIONS

The 2010 Patient Protection and Affordable Care Act (ACA) obligates employers who employ an average of at least 50 full-time employees on business days to provide some basic level of health insurance to its employees or pay a financial penalty,[243] more commonly known as the employer mandate. After several delays, the employer mandate went into effect in 2015. The CBA provides health insurance to NFL players, so this is not a concern at present, but for the sake of completeness, we note that the question remains whether in the absence of the CBA, the NFL would have any obligation to provide health insurance to NFL players. While the NFL might not be considered an employer of players for purposes of the ACA,[244] the clubs certainly would be. Again, however, the issue is purely hypothetical.

The NFL also has obligations under other statutes, such as the Occupational Safety and Health Act,[245] the Americans with Disabilities Act (ADA)[246] and the Genetic Information Nondiscrimination Act (GINA). An analysis of the NFL's intersection with these statutes are the subject of future work of the Law and Ethics Initiative of The Football Players Health Study at Harvard University.[247]

Figure 7-B: Division of All Revenue[w]



3) COMMON LAW OBLIGATIONS

The existence and extent of common law[w] obligations of the NFL toward promoting and protecting the health of NFL players are debatable. *In re National Football League Players' Concussion Injury Litigation*, 12-md-2323 (E.D.Pa.) ("Concussion Litigation") concerned exactly those duties. On July 19, 2011, 75 former NFL players, led

v In reviewing a draft of this Report, the NFL stated that "the roughly 50%-50% split in revenue as depicted in the chart is generally accurate, with the understanding that the revenue split does not reflect the owners' substantial costs incurred subsequent to the split of revenue." Letter from Larry Ferazani, NFL, to authors (July 18, 2016).

w Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009).

by former NFL linebacker Vernon Maxwell, filed a lawsuit against the NFL in California Superior Court, Los Angeles County, alleging that the NFL had negligently and fraudulently concealed the risk of brain injury associated with playing football.[248] The *Maxwell* case was the first of many concussion-related lawsuits against the NFL.

In total, former and current NFL players have filed more than 240 lawsuits against the NFL in federal and state courts all across the country.[249] On January 31, 2012, the cases existing as of that time were transferred and consolidated into the "Concussion Litigation."[250] On July 17, 2012, the plaintiffs filed an Amended Master Administrative Long-Form Complaint summarizing the various claims at issue.[251] After that date, many more lawsuits were filed, transferred, and consolidated into the Concussion Litigation.[252] In sum, more than 5,500 players filed Short-Form Complaints in the Concussion Litigation.[253]

The Concussion Litigation plaintiffs alleged the NFL owed a variety of common law and assumed duties to NFL players. These duties can generally be grouped into three categories: (1) the NFL's alleged duty to inform or disclose the risks associated with brain injuries in football;[254] (2) the NFL's alleged duty to protect NFL players;[255] and, (3) the NFL's alleged duty to competently study the risks of brain injuries in football.[256]

Whether the NFL actually owed any of these duties as a matter of law may never be resolved, *i.e.*, a court may never have to rule on whether the NFL had to actually do any of the things the Concussion Litigation plaintiffs claimed they had to do. In April 2015, the United States District Court for the Eastern District of Pennsylvania approved a settlement between the parties that provided all former NFL players the opportunity to undergo baseline neurological and neuropsychological examination and the opportunity for monetary awards (subject to various adjustments) for the following conditions:

- Amyotrophic lateral sclerosis (ALS): $5 million;
- Death with CTE prior to the date of the settlement (diagnosed after death): $4 million;
- Parkinson's disease: $3.5 million;
- Alzheimer's disease: $3.5 million;
- Level 2 Neurocognitive Impairment (*i.e.*, moderate Dementia): $3 million; and,
- Level 1.5 Neurocognitive Impairment (*i.e.*, early Dementia): $1.5 million.[257]

The players are not required to prove that their conditions are related to having played in the NFL to obtain an award. Additionally, the NFL did not admit any wrongdoing or liability as part of the settlement. In approving the settlement, the Court cited numerous expert opinions in noting that "[a] consensus is emerging that repetitive mild brain injury is associated with [the conditions covered by the settlement]."[258,x] The NFL's financial obligations under the settlement are not capped, except that the settlement expires after 65 years.

In April 2016, the United States Court of Appeals for the Third Circuit affirmed the District Court's approval of the settlement.[259] In August 2016, some of the plaintiffs petitioned the Supreme Court of the United States to review the case.[260] At that time, approximately 169 former players and 20 former player family members had chosen to opt out of the settlement, providing them the opportunity to press their claims and the NFL's alleged duties in new lawsuits.

(E) Current Ethical Codes Relevant to the NFL

There are no known codes of ethics currently applicable to the NFL and player health.

(F) Current Practices of the NFL

As discussed in the background to this chapter, the NFL's practices and policies concerning player health have improved dramatically over the decades. Moreover, those improvements have accelerated in recent years following leadership changes at both the NFL and NFLPA and with the execution of the 2011 CBA. Table 7-A below lists NFL committees that perform player health-related work, as of the 2016 season.[261] It is important to note that these committees are created and facilitated by, and principally serve in an advisory capacity to, the NFL. As a result, it is difficult to fully evaluate their work.

x The Court, however, denied the argument that CTE after the date of the settlement should be covered, noting that the study of CTE is in its early stages and much is still unknown, including its symptoms. *In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 397–401 (E.D. Pa. 2015) ("Beyond identifying the existence of abnormal tau protein in a person's brain, researchers know very little about CTE."). The Court also denied arguments that mood and behavioral disorders should be covered by the settlement. *See id.* at 401 (*quoting* the Declaration of Dr. Christopher Giza: "While medical literature and clinical practice has *associated* psychological symptoms such as anxiety, depression, liability, irritability and aggression in patients with a history of concussions, this association has not led to *conclusive causation*.") (Emphasis in the Court's opinion).

Table 7-A: NFL Health and Safety Committees[z]

Committee	Areas of Focus	Membership
General Medical Committee	• Behavioral health • Cardiovascular • Environmental • Infectious disease • Pain management • Miscellaneous	• Dr. Andrew Tucker • Dr. Deverick Anderson • Rick Burkholder • Dr. Doug Casa • Dr. Rob Heyer • Dwight Hollier • Dr. Patrick Strollo • Dr. Robert Vogel • Dr. Elizabeth Nabel • Dr. Thom Mayer
Musculoskeletal Committee	• Foot and ankle • Lower extremity trauma • Upper extremity trauma • Studies	• Dr. Robert Anderson • Dr. Ed Wojtys • Dr. Asheesh Bedi • Dr. Robert Brophy • Rick Burkholder • Dr. Mike Coughlin • Dr. Rob Heyer • Dr. Thomas Hunt • Dr. William Levine • Joe Skiba • Dr. Kurt Spindler • Dr. Elizabeth Nabel • Dr. Thom Mayer
Head, Neck and Spine Committee	• Concussion • Moderate and severe brain injury • Neck and spine	• Dr. Hunt Batjer • Dr. Rich Ellenbogen • Dr. Mitch Berger • Dr. Javier Cardenas • Dr. Russell Lonser • Dr. Margot Putukanian • Dr. Robert Cantu • Dr. Joseph Maroon • Dr. Elizabeth Nabel • Dr. Thom Mayer

z Also of note, according to former Seattle Seahawks club doctor Pierce Scranton, at some point in the 1990s, the NFL did establish a Safety Committee that included the NFLPS President as a member and began to study issues affecting player health and safety, including playing surfaces and concussions. Pierce E. Scranton, Jr., Playing Hurt: Treating and Evaluating the Warriors of the NFL 145–46 (2001).

Thom Mayer, the NFLPA's Medical Director, is a voting member on all NFL health and safety committees.[262] In addition, the NFLPA has "the right to appoint two persons to attend those portions of the annual meeting of the NFL Competition Committee dealing with playing rules to represent the players' viewpoint on rules. One of the appointees shall have a vote on all matters considered at the meeting which relate to playing rules."[263] A history of health-related rule changes in the NFL is included as Appendix I.

We were unable to extensively document all of the information the NFL, through these committees or otherwise, provides to NFL players concerning health and safety issues. Nevertheless, it is clear that the NFL does provide at least some information. Prior to the 2015 season, for the first time ever, each club's medical staff held a one-hour preseason meeting with the club's players to discuss health and safety issues.[264] In addition, NFL clubs post a large poster in their locker room detailing facts about concussions, including symptoms and recommended steps in the event a player suspects he has a concussion.[265] The poster was developed in conjunction with the NFLPA, NFL Physicians Society, Professional Football Athletic Trainers Society, and the Centers for Disease Control and Prevention.

In addition to the above committees and the collectively bargained benefits and programs mentioned earlier, the NFL has a Player Engagement Department[266] that provides a number of programs designed to help players as well as others involved in the world of football, including:

- NFL Prep 100;
- Prep Leadership Program;
- NFL Prep Sports Career Expo;
- NFL-NCAA Summit;
- NFL-NCAA Life Skills Roundtable;
- 1st & Goal Program;
- Broadcast Boot Camp;
- Business Management and Entrepreneurial Program;
- Business of Music Boot Camp;
- Financial Education;
- Franchising Boot Camp;
- Hospitality & Culinary Management Workshop;
- NFL-NCAA Champion Forum;
- NFL-NCAA Coaches Academy;
- NFL-NCAA Future Football Coaches Academy;
- Rookie Transition Program;
- Pro Hollywood Boot Camp;
- Sports Journalism & Communications Boot Camp;
- Consumer Products Boot Camp;
- Bill Walsh NFL Minority Coaching Fellowship;
- Transition Assistance Program; and,
- Legends Community.

Each of these programs offesred by the NFL's Player Engagement Department is discussed in detail in Appendix D. In addition, the NFL's Player Engagement Department works with players to place them in off-season or post-career internships in a wide variety of industries.[z]

Moreover, in 2007, the NFL and NFLPA jointly created the NFL Player Care Foundation, which funds research into issues affecting NFL players, provides grants to former players in need, and otherwise assists former players in obtaining support for a healthy life.[267] Entering the 2015 season, the NFL Player Care Foundation had arranged for 3,599 former players to undergo a series of private and comprehensive medical examinations.[268]

Despite these extensive programs, committees, and other attention from the NFL, in discussing the NFL's approach to player health, players, contract advisors and financial advisors generally (but not universally) had a negative reaction:[aa]

- **Current Player 1:** *"[I]t would seem that they're more concerned about making money than protecting their players."*
- **Current Player 2:** *"I think that the changes are more for public image . . . . I don't really think that player safety and health is as big a concern for them and has as much importance to them as they portray. I think at the end of the day, it's still big business and they're still trying to put a product out there that's going to be profitable."*

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z The industries include: advertising/media; consulting; consumer products; corporate finance; financial services; gaming/digital media; hospitality management; mortgage banking; the National Football League; non-profit/advocacy; public relations; real estate; scouting; sports marketing; television production and development; and, youth football.

aa We reiterate that our interviews were intended to be informational but not representative of all players', contract advisors', or financial advisors' views, and should be read with that limitation in mind.

- **Current Player 3:** *"[The NFL is] trying to do a good job to make the game safer at the end of the day."*
- **Current Player 4:** *"I think they're trying to avoid the hundred million dollar settlements like they recently had more than they are generally concerned with player safety. I think it's more about public image more than it is really caring about players' health and safety."*[ab]
- **Current Player 5:** *"As far as the Concussion Protocol, I think that they're doing a great job . . . . I don't think there has been an interest in player safety from the league besides the Concussion Protocol."*
- **Current Player 6:** *"I think the NFL is more concerned about the appearance of taking care of players more than actually taking care of players."*
- **Current Player 8:** *The NFL takes player health "as serious as the [Concussion] lawsuit indicates . . . . I think the NFL is concerned with player health as far as they can afford it."*
- **Current Player 9:** *"I would say the NFL's approach is, to me, reactionary . . . . [T]he bottom line for the NFL is to increase revenues. So when it comes to player safety, sometimes that's an afterthought[.]"*
- **Current Player 10:** *"I think [the NFL] has been great . . . . [T]he changes that I've seen in the last 10 years, I think they've really made it a priority. And I think that has changed."*
- **Former Player 1:** *"[F]or sure they want to have this great product just for the fans, all the revenue that they can, also just like any business . . . I mean they want to have the best product and what does that mean? Keeping their top superstar athletes in the best health."*
- **Former Player 2:** *"I think they've done an okay job. I wouldn't say great."*
- **Former Player 3:** *"I don't think anybody is out there saying 'hey, screw the players.' I think they have honestly invested significant resources into it."*
- **Contract Advisor 1:** *"I think it's mixed . . . . You can say I don't want to blow up the NFL with how much we're going to have to pay in litigation and on the other side of it . . . Roger Goodell is not going to want to watch every player he's come to know have issues ten years after they're playing."*
- **Contract Advisor 3:** *"[The NFL's approach] has definitely gotten a lot better as the NFL teams made it a bigger issue, but to say that they do it just because they want to be good guys, I wouldn't put it in that category."*
- **Contract Advisor 4:** *"[T]he NFL is strictly a business. People always say that there's a business side. There is no business side. It is a business."*
- **Contract Advisor 5:** *"They don't care . . . . They're going to keep it under the rug as long as they can until something really comes into play."*
- **Contract Advisor 6:** *"Litigation avoidance."*

Multiple contract advisors specifically identified the NFL's interest in expanding the regular season from 16 to 18 games[ac] as evidence that the NFL's financial interests are more important than player health.[ad]

A 2014–2015 survey of former players by *Newsday* garnered responses from 763 individuals, 85 percent of whom did not feel that the NFL adequately prepared them for the transition to post-football life.[269] However, 48 percent of respondents believed the NFL is doing enough to make the game safer, as compared to only 31 percent who do not.[270] The survey did not ask the former players whether they felt the NFLPA had adequately prepared them for the transition to post-football life. There are also several other limitations to the survey: (1) the survey was sent via email and text message by the NFLPA to more than 7,000 former NFL players, thus eliminating former players that were less technologically savvy and also possibly skewing the sample towards those former players closer to the NFLPA; (2) the response rate for the survey was low (approximately 11 percent); and, (3) the study does not discuss the demographics of those that responded, making it difficult to ascertain whether those who responded are a representative sample of all former players. Nevertheless, we provide the reader with the best existing data.

For more specific guidance, the NFL's current practices concerning health are best understood by examining the practices of the NFL-affiliated stakeholders discussed in this Report: Chapter 2: Club Doctors; Chapter 3: Athletic Trainers; Chapter 8: NFL Clubs; Chapter 9: Coaches; Chapter 10: Other NFL Club Employees; and, Chapter 11: Equipment Managers.

ab Current Player 4 also praised the NFL for its rules protecting "defenseless players" but also thought more needed to be done to protect defensive linemen from cut blocking and blocks on interceptions.

ac The NFL cannot increase the length of the regular season without the NFLPA's approval. 2011 CBA, Art. 31.

ad In reviewing a draft of this Report, the NFL clarified that any proposal to increase the regular season from 16 to 18 games would also reduce the preseason from 4 to 2 games. NFL Comments and Corrections (June 24, 2016).

(G) Enforcement of the NFL's Legal and Ethical Obligations[ae]

As discussed above, the NFL's principal legal obligations concerning player health, as opposed to those of the clubs, are to fund and administer various benefit programs. In the event any player is dissatisfied with his benefits, *i.e.*, believes he is entitled to more than he is receiving, he can commence an arbitration before the neutral Benefits Arbitrator.

Aside from the NFL's benefit-related obligations, if a player believes the NFL has violated some other obligation he could commence a Non-Injury Grievance.[af] The 2011 CBA directs certain disputes to designated arbitration mechanisms[271] and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.[272] Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."[273] Many of the NFL's above-described legal obligations could be the subject of a Non-Injury Grievance. However, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based."[274] Additionally, it is possible that under the 2011 CBA, the NFL could argue that complaints concerning medical care are designated elsewhere in the CBA and thus should not be heard by the Non-Injury Grievance arbitrator.[275]

Lawsuits against the NFL are another possible enforcement method, but face significant barriers. This is because the Labor Management Relations Act (LMRA)[276] bars or "preempts" state common law[ag] claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.*, where the claim is "inextricably intertwined with consideration of the terms of the" CBA."[277] In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance), rather than through litigation. Next, we provide a summary of some important lawsuits involving the NFL that also exemplify the preemption defense.

In *Williams v. NFL*, the United States Court of Appeals for the Eighth Circuit held that common law claims by Minnesota Vikings players Kevin Williams and Pat Williams against the NFL concerning a failed test under the NFL's Policy and Program on Anabolic Steroids and Related Substances ("Steroid Policy")[ah] were preempted by the LMRA. However, non-common law claims brought pursuant to Minnesota state *statutes* were not.[278,ai] The most important outcome of the "StarCaps" case, as it has become known, is the clear message that the CBA, Steroid Policy, and any other collectively bargained agreement, such as the NFL's Policy and Program for Substances of Abuse, must comply with each individual state's laws. The NFL argued that "subjecting the [Steroid] Policy to divergent state regulations would render the uniform enforcement of its drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible."[279] The Eighth Circuit rejected this argument, explaining that deference to collective bargaining does not "grant the parties to a CBA the ability to contract for what is illegal under state law."[280] Indeed, throughout the StarCaps case, "the NFL concede[d] that its steroid testing procedures do not comply with the letter of Minnesota state law."[281]

Another prominent case concerning the NFL and the defense of preemption is *Stringer v. Nat'l Football League*.[282] In 2001, Minnesota Vikings Pro Bowl offensive tackle Korey Stringer died of complications from heat stroke after collapsing during training camp.[283] Stringer's family filed two lawsuits: one against the Vikings, Vikings coaches, trainers, and affiliated doctors;[284] and a second against the NFL and Riddell, the equipment manufacturer. In the second suit, Stringer's family alleged that the NFL was negligent in its regulation and control of training camps, equipment, and working conditions, and that Riddell sold defectively designed equipment.[285] In a February 2007 decision, the United States District Court for the Southern District of Ohio held that Stringer's common

ae Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA can seek to enforce them on players' behalves.

af The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care that are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

ag Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution] that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

ah In 2014, the Steroid Policy was renamed the "Policy on Performance-Enhancing Substances."

ai Christopher R. Deubert, an author of this Report, formerly practiced at the law firm of Peter R. Ginsberg Law, LLC, which represented the Williamses in the StarCaps case. However, the case decisions discussed here occurred prior to Deubert joining the firm. Also of note, the StarCaps case involves multiple decisions in both state and federal courts, with varying degrees of success for the parties.

law wrongful death claim was "inextricably intertwined and substantially dependent upon an analysis of certain CBA provisions" and thus preempted.[286] However, the Court held that Stringer's negligence claims against the NFL concerning equipment safety were not preempted, since the CBA imposes no obligations concerning equipment.[287] Stringer's family and the NFL settled the lawsuit in January 2009.[288]

Prior to settlement of the Concussion Litigation, courts in a handful of cases had decided whether players' concussion-related claims were preempted. In December 2011, in three related cases, the United States District Court for the Central District of California determined that at least some of the plaintiffs' claims were preempted and thus denied the plaintiffs' motion to remand the action back to state court (the Court, at that stage of the legal proceedings, did not have to consider whether all the claims were preempted).[289] Similarly, in a lawsuit brought by the estate of former Chicago Bear and suicide victim David Duerson, the United States District Court for the Northern District of Illinois held that Duerson's estate's concussion-related claims were "substantially dependent on the interpretation of CBA provisions" and thus preempted.[290] All of these cases were later transferred and consolidated into the Concussion Litigation. The NFL's principal defense in the Concussion Litigation—as it has been in almost any case brought by players alleging common law violations—was preemption.

In contrast, in *Green v. Arizona Cardinals Football Club LLC*, the United States District Court for the Eastern District of Missouri held that a former player's concussion-related claims against the Arizona Cardinals (but not the NFL) merely required reference to, and not interpretation of, the CBA and thus were not preempted.[291] As a result, the plaintiffs in the *Green* case potentially had the unique opportunity to pursue discovery against an NFL club on his claims.[292] However, in December 2015, after some of the plaintiffs left the case and the remaining plaintiffs filed an amended complaint, the Cardinals removed the case from Missouri state court to federal court and successfully had it consolidated with the Concussion Litigation.[293] Thus, the unique opportunity presented by the initial decision of the Eastern District of Missouri court seems to have dissolved.

In addition to the concussion-related litigation, in May 2014, several former players, led by former Chicago Bear Richard Dent, filed a class action lawsuit alleging that the NFL and its clubs negligently and fraudulently prescribed and administered painkilling medications during their careers.[294] The lawsuit generally focused on three types of medications: opioids, which "act to block and dull pain"; non-steroidal anti-inflammatory medications, such as Toradol, which have "analgesic and anti-inflammatory effects to mitigate pain"; and, local anesthetics, such as lidocaine.[295] In December 2014, the United States District Court for the Northern District of California ruled that the players' claims were preempted by the LMRA.[296] Effectively, the court found that to determine the validity of the players' claims would require interpretation of the CBA, and thus the players should have pursued grievances as opposed to lawsuits.[297] In Chapter 2: Club Doctors, Section I: The Special Case of Medications, we discuss issues concerning painkilling and prescription medication in the NFL.[aj]

The above cases demonstrate the difficulty players are likely to have in pursuing health-related lawsuits against the NFL. Generally speaking, if a player's common law claim requires the Court to analyze the terms of the CBA, the player will be unable to pursue that claim in a lawsuit.[ak] The concept of preemption effectively forces parties to settle their disputes via collectively bargained arbitration procedures rather than in lawsuits.[al]

While arbitration can provide meaningful recourse for the players, the short statute of limitations makes it difficult to pursue claims.

aj In that section, we discuss a case related to the *Dent* lawsuit, led by former player Chuck Evans. The *Evans* plaintiffs alleged substantially the same allegations as in the *Dent* case, but alleged *intentional* wrongdoing by the clubs, as opposed to merely negligent conduct. For reasons discussed in that section, the court denied a motion to dismiss by NFL clubs and the case is ongoing as of the time of this publication. *See* Evans v. Arizona Cardinals Football Club, 16-cv-1030, 2016 WL 3566945, *1 (N.D.Ca. July 1, 2016).

ak Nevertheless, it is important to note that, in May 2016, in a lawsuit substantially similar to the NFL's Concussion Litigation, the United States District Court for the District of Minnesota denied the National Hockey League's motion to dismiss concussion-related claims on preemption grounds. In many respects, the Court held that the issue would have to be decided on summary judgment after additional discovery in the case. *See* In re Nat'l Hockey League Players' Concussion Injury Litigation, 14-md-2551, 2016 WL 2901736 (D. Minn. May 18, 2016).

al Arbitration generally minimizes costs for all parties and leads to faster and more accurate resolutions of legal disputes. *See* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209 (2000); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1 (1995). We recognize that arbitration also raises potential concerns for claimants, including the upfront costs of the arbitration and bias in favor of repeat parties, typically the defendant. *See* David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014). However, these concerns are not present in arbitrations involving NFL players where the NFL and NFLPA (and not the player) generally bear the costs of the arbitration equally, the NFL and NFLPA are involved in nearly all of the arbitration proceedings, and both generally retain the ability to remove arbitrators with whom they are dissatisfied.

(H) Current Legal Obligations of the NFLPA[am]

It is important to situate the NFLPA's legal obligations within its role as a labor union, which requires clarifying the difference between the NFLPA's membership and the bargaining unit it is bound to represent. First, in terms of membership, the NFLPA Constitution declares that "[t]here shall be three types of membership in the NFLPA: active, retired and associate membership."[an] However, "[o]nly active members in good standing shall be eligible to vote in elections of Player Representatives and Alternates, contract ratification or any other matter which affects active players."[298] In 2013, there were 5,430 total members: 2,006 active (nearly all active players in the NFL); 3,230 former (out of an estimated 20,000); and 194 associate.[299]

Membership in the NFLPA must be differentiated from the bargaining unit, *i.e.*, the persons the NFLPA represents in collective bargaining negotiations and other NFL-employment matters. The bargaining unit consists of:

"(1) All professional football players employed by a member club of the National Football League; (2) All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club; (3) All rookie players once they are selected in the current year's NFL College Draft; and (4) All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player."[300] In contrast, the union only consists of those players within the bargaining unit that choose to be members of the union, which almost all do. It is important to note that the bargaining unit does not include players until the NFL Draft takes place, *i.e.*, players at the NFL Combine are not within the bargaining unit and thus are not protected or represented by the NFLPA.

Importantly, players who previously played in the NFL but are no longer seeking employment with an NFL club, *i.e.*, retired or former players, are not part of the bargaining unit. Former players remain NFLPA members, in their limited capacity, only so long as they pay NFLPA dues.[301]

Active NFL players, *i.e.*, those within the bargaining unit, similarly remain an NFLPA member only so long as they pay their dues.[302] As part of the CBA, NFL clubs agree to provide "check-off" authorization forms to the players,

am The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

an When asked, the NFLPA was uncertain as to what an "associate" member was and such membership is not described in the NFLPA Constitution.

Figure 7-C: NFLPA Membership and Bargaining Unit

permitting the clubs to directly withhold a portion of the players' paychecks to be sent to the NFLPA for dues.[303] In the event a player chooses not to join the NFLPA, he still must pay "an annual service fee in the same amount as any initiation fee and annual dues required of members of the NFLPA."[304] This is essentially a protection against non-member players receiving the benefits the NFLPA negotiates on behalf of the entire bargaining unit, which cannot be segregated from benefits available only to members. If the player refuses to pay the initiation fee, the NFLPA has the right to request that the player be suspended without pay until the fee is paid.[305] Nevertheless, even if an active player is not an NFLPA member, he is still within the bargaining unit and thus entitled to the rights, benefits, and obligations provided for in the CBA.[306]

All of this is to say that, even though retired players can be "members" of the NFLPA, they are not in the same legal relationship with the NFLPA as those players in the bargaining unit ("Active Members" for purposes of this chapter). The differences in these legal relationships are discussed below.

The NFLPA has legal obligations towards those players in the bargaining unit (generally, current players and those actively seeking employment in the NFL). Specifically, the NFLPA owes a duty of fair representation to those in the bargaining unit.[307] A union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[308] Although a union has wide discretion in representation of its the bargaining unit, it must exercise that discretion in good faith.[309] If players believe the NFLPA had failed to make a good faith effort to protect their health or otherwise abide by its obligations under its Constitution, they could seek legal recourse against the NFLPA.[310] Situations in which players have sued the NFLPA are discussed later in this chapter.

Unions in any industry do not owe a duty of fair representation to former members, *i.e.,* anyone outside of the bargaining unit.[311] Thus, the NFLPA does not owe a duty of fair representation to former NFL players.

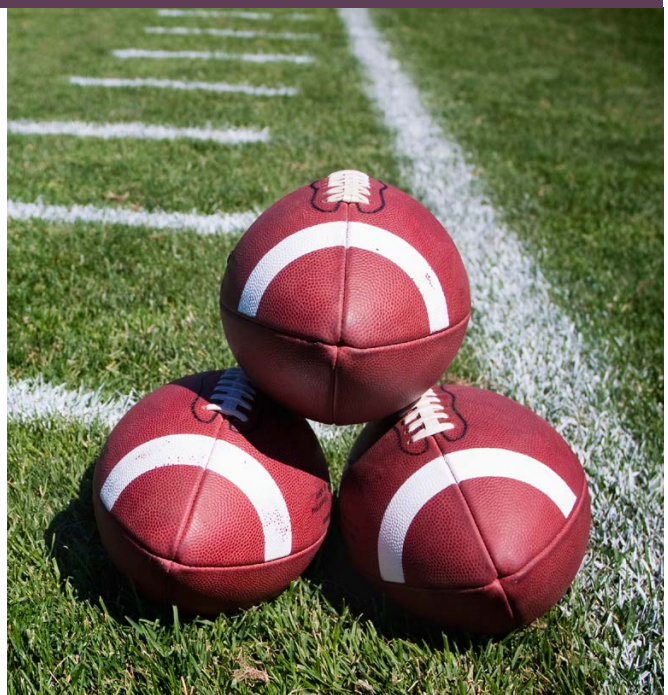
The NFLPA might also have fiduciary obligations towards those in the bargaining unit. A fiduciary duty obligates the fiduciary "to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."[312] Determining whether a fiduciary relationship exists between two parties requires a fact-based inquiry into the relationship.[313] The duty of fair representation is considered a fiduciary duty[314] and thus there exists a strong argument that the NFLPA owes a fiduciary duty to players in the bargaining unit, which would include looking out for their best interests.

On multiple occasions, courts have found that the NFLPA did not owe a fiduciary duty to retired players,[315] but the courts have not addressed that question as it concerns current players.

(I) Current Ethical Codes Relevant to the NFLPA

The NFLPA does not have a governing code of ethics. This is not unusual for a labor organization. Nevertheless, the NFLPA Constitution does contain some statements of ethical responsibility, as discussed in the background to this chapter.

Generally speaking, if a player's common law claim requires the court to analyze the terms of the CBA, the player will be unable to pursue that claim in a lawsuit.



(J) Current Practices of the NFLPA

Despite the NFLPA's structural challenges, discussed in more detail below, substantial progress on player health issues has been made during NFLPA Executive Director Smith's tenure, particularly as part of Article 39 of the 2011 CBA, as previously discussed. Appendix C summarizes the various health-related programs and benefits available to players, Appendix D summarizes the various programs available to players through the NFL's Player Engagement Department, and Appendix E summarizes programs available to players through the NFLPA.

In addition to the above-mentioned programs, the NFLPA offers several programs to help current and former players, including: (1) an externship program with a variety of companies; (2) business classes through Indiana University's Kelley School of Business; (3) a college coaching internship; (4) The Trust—a "set of resources, programs and services designed to provide former players with the support, skills and tools to help ensure success off the field and in life after football";[316] and, (5) the Gene Upshaw Player Assistance Trust Fund, which provides former players facing financial hardship or who wish to finish their undergraduate degrees with financial grants.[317]

The NFLPA also employs five former players as Player Advocates to assist players.[318] The Player Advocates are assigned to specific regions and are responsible for the players of the clubs in their region. The Player Advocates are generally available to the players to help them with club-related matters, to steer them to the appropriate resources such as the NFLPA, and to provide general support.

The NFLPA meets with players during training camp and during the season to discuss relevant issues, including injury trends, existing science, the Concussion Protocol and health-related rights under the CBA.[319] The NFLPA also sends players quarterly emails on these issues and a pamphlet concerning concussions created in collaboration with the American Academy of Neurology.[320] Finally, the NFLPA is currently in the process of creating a video concerning concussions for presentation to the players.[321]

In addition to the NFLPA's programs, beginning in 2014, the NFLPA has sponsored The Football Players Health Study at Harvard University, of which this Report is a part. The Study is a long-term research project with the goal of improving the health of NFL players, including by understanding the health consequences of an NFL career; identifying and supporting groundbreaking medical research that can benefit players; and, analyzing the legal and ethical issues affecting player health.

Finally, in 2009, the NFLPA created the Mackey-White Committee,[ao] consisting of current players, former players, doctors, and others for the purpose of "assist[ing] the NFLPA in its development of policies concerning workplace safety and the health of NFLPA members."[322] The Mackey-White Committee has four objectives:

> (1) identify and analyze the health and safety hazards in the NFL and recommend control measures to eliminate or reduce the risks to players from such hazards;
>
> (2) interpret the science related to work place injuries and conditions arising from employment in the NFL, including, without limitation, repetitive brain trauma, and to disclose the short and long term risks associated therewith, in an effort to better inform and protect NFLPA members, past, present and future;
>
> (3) change the culture of professional football by (i) educating players, coaches and members of the medical community about the short and long-term effects of concussions and other injuries and (ii) advocating for progressive changes, based on science, to the ways in which injuries are managed by the NFL and its Clubs whenever necessary; and
>
> (4) protect youth athletes by raising awareness of the risks associated with repeat concussions, and help educate our elected officials and the general public about health issues related to the professional football occupation.[323]

According to the NFLPA, the Mackey-White Committee has played an advisory role in essentially all of the NFLPA's accomplishments concerning player health and safety, including but not limited to the credentialing of medical staff, revisions to the Concussion Protocol, and the decision to fund The Football Players Health Study at Harvard University.[324]

Notwithstanding the programs and efforts described above, discussions and interviews with current and former players revealed a wide variety of reactions to the NFLPA. Some place the blame for any issues players face at the feet of the NFL and believe the NFLPA has fought hard to protect players. Some—former players in particular—think the

ao The Mackey-White Committee is named for Hall of Fame tight end John Mackey who was the first President of the NFLPA (1970–73), and Hall of Fame defensive end Reggie White. Both Mackey and White were lead plaintiffs in lawsuits challenging the NFL's player movement and salary restrictions.

NFLPA has failed and continues to fail to protect players.[ap] Players sometimes express concern that the NFLPA works much harder on behalf of star players than the rank and file.[aq] Of course, there are also many with a viewpoint somewhere in between. Below we offer a sampling of the perspectives of current players that we interviewed concerning the NFLPA,[ar]

- **Current Player 1:** *"I feel like they have our best interests at heart [but] I don't know if I would say they're that effective but I think . . . they're kind of limited as to what they can do for us."*
- **Current Player 2:** *"I think that they've certainly made strides in the right direction . . . but I still think that there's a long way for us to go in order to get where we'd all like to see it go."*
- **Current Player 3:** *"I think the NFLPA has done a good job because we've been in situations where we've been able to negotiate and get some things done with practice scheduling . . . . [W]hen you talk about the NFLPA, you're going to have some guys that love the PA and other guys who hate it . . . . There's no way you can make everything perfect for each individual. You just have to make it good for the whole . . . . That's just part of dealing with that many different people because if you've got 2,000 players, you've got 2,000 different situations and there's just no way that you can instantly cover each situation."*
- **Current Player 4:** *"I'm definitely not [happy with the NFLPA] . . . . It seems very disorganized . . . . I think it does not do enough to help players avoid problematic situations with financial advisors and agents . . . . I don't think they're very good as it relates to player health."*[as]
- **Current Player 5:** *"I believe in the union and everything like that but I think in general they're not seen as doing very much for the players."*
- **Current Player 6:** *"I think the PA is doing a really good job. Whether that's helping guys find out their rights, whether that's offering resources like through the PA office, I'm really happy with the PA's work."*
- **Current Player 8:** *"I think there are a lot of great ideas being thrown around. I think there's a lot of movement and momentum starting."* However, Current Player 8 also stated: *"I am frustrated with the lack of consensus [in medical information], but I wish the PA could provide a direct source to the information."*
- **Current Player 9:** *"I think the PA has done a good job protecting players . . . . I'm not going to sit here and say that the PA in the past has acted always as quickly as we needed them to."*
- **Current Player 10:** *"They've done well in that they can bring the issue up, they can talk to us in our meetings about it, but I don't think they are a very big player in it to be honest . . . . The NFLPA's whole tune is always anti-establishment, basically us against them . . . but I think the NFL, in general, has done a good job by themselves with player issues in the forefront . . . . [The NFLPA] is a lot about politics and I don't know if it's always necessarily about the players first more so than some of the people in the organization."*

The NFLPA's membership composition poses considerable challenges. As discussed above, the NFLPA has approximately 2,000 active members, only slightly less than the estimated 2,340 active members of the Major League Baseball Players Association, National Basketball Players Association and National Hockey League Players Association combined.[325] When coupled with the fact that the average NFL player's career is generally shorter than that of players in the other leagues,[326] it is clear that the NFLPA membership is a massive and constantly changing group. Members of this group are likely to have heterogeneous or in some cases conflicting interests.

There are also potential concerns about the enforcement of player health rights. Since the execution of the 2011 CBA, there have been no grievances concerning Article 39: Players' Rights to Medical Care and Treatment decided on the merits.[327] Additionally, the Joint Committee on Player Safety and Welfare has only conducted one investigation concerning the medical care of a club.[328] These facts suggest that either there are no problems, which seems unlikely considering the issues discussed in this Report and the contentious relationship between the NFL and NFLPA, or that there are opportunities for additional enforcement of player health provisions.

ap Former Player 1: "The NFLPA is the most inept organization in professional sports. That's my personal opinion. I've had multiple dealings with the NFLPA and I have never felt so underserved . . . . I think it is an incompetent body that's basically beholden to the ownership and the NFL and they do not have the players' best interests in mind regardless of what they say." Former Player 2: "I think it's a weak union, a very weak union. I think the NFL and the owners they dominate everything." Also, in a 2014–2015 survey of 763 former players by *Newsday*, *Newsday* reported "many" former players "blamed the union for not looking out for them during previous collective bargaining." *See* Jim Baumbach, *Life After Football*, Newsday (Jan. 22, 2015), http://data.newsday.com/projects/sports/football/life-football/, *archived at* http://perma.cc/77DP-LUUE.

aq Former Player 1: "They might have some of the top players, but they don't have every NFL player in mind and it's very obvious."

ar We reiterate that our interviews were intended to be informational but not representative of all players' views, and should be read with that limitation in mind.

as Current Player 4 did praise the NFL for offering "a number of different programs in the offseason for players."

Multiple contract advisors attributed the lack of enforcement to the NFLPA's relatively small legal staff. One contract advisor that we spoke with expressed the belief that "the NFLPA is severely understaffed," while another explained that in his opinion the NFLPA does a "terrible job" of policing club medical staff and enforcing player health and safety provisions of the CBA because, in part, it is "absolutely not" adequately staffed. He recommended the NFLPA have an attorney in every city where there is an NFL club to constantly monitor the club and its medical staff. Similarly, another contract advisor said it would help "100 percent" if the NFLPA hired more attorneys focused on health issues.[at]

In addition to enforcement, questions have been raised concerning potential conflicts of interest between the NFLPA and the players. By way of background, the NFLPA routinely negotiates (or attempts to negotiate) settlements of multiple players' grievances, for appeals for Commissioner discipline, and for appeals under the Policy and Program of Substances of Abuse ("Substance Abuse Policy") and the Policy on Performance-Enhancing Substances ("PES Policy"). For example, when the parties agreed to a revised Substance Abuse Policy and PES Policy in September 2014, they also agreed to amended discipline for six players.[329] Additionally, as part of the 2011 CBA, the NFL and NFLPA agreed to reduced discipline for four players involved in the "StarCaps" case, discussed above.[330] Moreover, the 2014 PES Policy specifically created an "Appeals Settlement Committee" consisting of the NFL Commissioner and NFLPA Executive Director (or their designees) that has "the authority to resolve any appeal under th[e] [Steroid] Policy, which resolution shall be final and binding." Importantly, the Appeals Settlement Committee does not mention requiring the potentially suspended player's input or preference concerning a possible settlement.

Some have suggested that these settlements raise concerns that the NFLPA might favorably settle one player's case at the expense of another player's, or that the NFLPA advances other bargaining agendas at the expense of potential settlements for players. For example, the conflict of interest issue was raised in 1996 by former Pro Bowl wide receiver Sterling Sharpe in an unsuccessful lawsuit against the NFLPA,[au] and again by Honorable Helen G. Berrigan of the United States District Court for the Eastern District of Louisiana in 2012. In response to the "bounty" allegations from the NFL, discussed at length in Chapter 9: Coaches, the NFLPA and three of the players alleged to have been involved filed a lawsuit against the NFL in the Eastern District of Louisiana.[av] The NFLPA and all three players were represented by the NFLPA's longtime outside counsel Jeffrey Kessler of Winston Strawn LLP (formerly of Dewey & LeBoeuf and Weil, Gotshal & Manges LLP). Judge Berrigan expressed concern that Kessler had a conflict of interest by representing both the NFLPA and the players and ordered Kessler to show cause why he and his firm should not be disqualified.[331] It would seem that Berrigan was concerned that Kessler's firm would be advocating for the interests of the NFLPA, including a potential settlement, which might not have corresponded with the interests of the players.

Kessler and the NFLPA responded by explaining that Kessler "has represented the NFLPA along with thousands of NFL players for more than 20 years in various disputes against the NFL," including "[m]ore than a hundred arbitrations . . . filed each year, plus occasional court cases."[332] Additionally, the NFLPA argued that, "[a]s a union, [it] is the exclusive collective bargaining representative of NFL players, and as such has the authority under federal labor laws to negotiate and resolve disputes on behalf of its members, both in negotiations with management and in the arbitral process."[333]

Ultimately, Judge Berrigan did not issue any reaction to the NFLPA's response and did not disqualify Kessler and his firm.

at A 2008 report prepared by the Congressional Research Service also questioned the NFLPA's ability to address player health matters at that time: "The subject of MTBI research and guidelines, in particular, raises several questions regarding whether the players association has sufficient capacity and authority to participate effectively in matters involving safety and health issues. For example, while members of the MTBI Committee have been involved in an ongoing dialogue with other professionals in the field of neurology (as documented above), it appears that the NFLPA has not commented publicly on any of the issues, such as the possible long-term effects of concussions and the possibility that multiple mild traumatic brain injuries could result in CTE." L. Elaine Halchin, Cong. Research Serv., RL34439, NFL Players: Disabilities, Benefits, and Related Issues (2008) *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/525, *archived at* http://perma.cc/FT92-ECEL.

au In 1994, Sharpe suffered a career-ending injury and filed a grievance against his Club, the Green Bay Packers, seeking payment for portions of his contract. Sharpe sued the NFLPA alleging it had breached its duty of fair representation by agreeing with the NFL that Sharpe's grievance would not be expedited and would not be treated as an Injury Grievance, creating the impression with the arbitrator that the NFLPA did not believe in the legitimacy of Sharpe's case. The United States District Court for the District of Columbia dismissed Sharpe's claim as premature, since no arbitration decision had yet been rendered. Sharpe v. Nat'l Football League Players Ass'n, 941 F. Supp. 8 (D.D.C. 1996). Sharpe later voluntarily dismissed the case. Oscar Dixon, *Sharpe, Dent Suits Dismissed By Court*, USA Today, Jun. 30, 1995, *available at* 1995 WLNR 2566365.

av Christopher R. Deubert, an author of this Report, and the firm at which he formerly practiced, Peter R. Ginsberg Law, LLC, represented former New Orleans Saints player Jonathan Vilma in the "Bounty"-related legal proceedings, but was uninvolved in the issue discussed here.

(K) Enforcement of the NFLPA's Legal and Ethical Obligations[aw]

A player's only recourse against the NFLPA is a civil lawsuit. While other claims might exist depending on the particular circumstances, lawsuits by union members against the union are generally framed as alleged breaches of the duty of fair representation. However, such claims are generally difficult to prove and have been rarely brought against the NFLPA. In addition to the *Sharpe* case mentioned above, research has only revealed two other lawsuits in which players alleged the NFLPA violated its duty of fair representation.

In *Chuy v. Nat'l Football League Players Ass'n*,[334] former player Donald Chuy alleged the NFLPA breached its duty of fair representation when it refused to process Chuy's Injury Grievance against his former club (the club refused to pay Chuy after he was injured during the 1969 season). The United States District Court for the Eastern District of Pennsylvania denied the NFLPA's motion to dismiss, holding that Chuy stated a viable claim.[ax]

The NFLPA made no public statement regarding the merits of the Concussion Litigation, provided no legal advice or guidance to players, and made no statement regarding the proposed or eventual settlement in the Concussion Litigation.

Former player James Peterson was less successful in his breach of the duty of fair representation claim against the NFLPA. In his case,[335] the United States Court of Appeals for the Ninth Circuit affirmed the vacatur[ay] of a jury verdict in Peterson's favor. Peterson alleged that, in 1977, the NFLPA and two of its lawyers failed to timely file an Injury Grievance on Peterson's behalf despite handling the matter for Peterson. The Ninth Circuit held that the NFLPA's conduct was not arbitrary, discriminatory, or in bad faith sufficient to state a claim. The court explained that, generally, acts of negligence by union officials will not state a claim for breach of the duty of fair representation.

The most significant lawsuit concerning the NFLPA's health obligations was brought in 2014. In *Smith v. Nat'l Football League Players Ass'n*,[336] former NFL players sued the NFLPA alleging that it had intentionally and fraudulently failed to protect them from the risk of concussions during their careers. The lawsuit was brought by some of the same attorneys involved in the Concussion Litigation against the NFL and substantially duplicated the allegations in that lawsuit. The NFLPA responded by having the case removed from Missouri state court to the United States District Court for the Eastern District of Missouri and asserting the same defense as the NFL in the Concussion Litigation – that the players' claims were preempted by the LMRA. Additionally, the NFLPA argued that the players' claims were preempted by the NLRA, *i.e.*, that the plaintiffs' claims had to be brought as breach of the duty of fair representation claims.

The NFLPA's defense in the *Smith* case was the first time the NFLPA had expressed publicly any opinion about concussion-related claims by former players. Ultimately, the court sided with the NFLPA on all counts, *i.e.,* agreed that the players' claims were preempted by the LMRA and the NLRA, and denied the plaintiffs' motion to remand the case to state court.[337] After denying the motion to remand, the court granted the NFLPA's motion to dismiss the case, again finding that the players' claims were preempted.[338]

This case is particularly important not only because it highlights the sometimes fractious relationship between the NFLPA and former players, but also because it reveals a potential structural tension the NFLPA's self-interest and its responsibility to players. The NFLPA made no public statement regarding the merits of the Concussion Litigation against the NFL, provided no legal advice or guidance to players deciding whether to join the class action or not, offered no guidance on legal strategies most likely to be successful against the NFL, and made no statement regarding the proposed or eventual settlement in the Concussion Litigation and its adequacy.[339] Some commentators opined that the NFLPA abstained from expressing any opinion about the Concussion Litigation for fear that it would highlight the NFLPA's own actions or inactions concerning concussions:

aw Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report.

ax The result of the lawsuit is unclear.

ay "Vacatur" refers to the judicial "act of annulling or setting aside." Black's Law Dictionary (9th ed. 2009). In this case, the United States District Court for the Southern District of California set aside a jury verdict in Peterson's favor, a decision affirmed by the Ninth Circuit.

The NFLPA has kept its head low throughout the concussion litigation, in large part because none of the plaintiffs had sued the players' union—but any, some, or all of them could have sued.[340]

***

At a time when some are lamenting the fact that the settlement of the concussion lawsuits will prevent the public from knowing what the NFL knew and when the NFL knew it, those same questions will never be answered regarding the NFLPA. What did the NFLPA know, when did the NFLPA know it, and why didn't the NFLPA do a better job of protecting its men? [. . .] The simple fact is that, under the late Gene Upshaw, the NFLPA was a major part of the problem.[341]

A final case worth mentioning concerns the NFLPA's Financial Advisor program (discussed at length in Chapter 13: Financial Advisors). In *Atwater v. Nat'l Football League Players Ass'n*,[342] six former players sued the NFLPA for losses they suffered by investing with NFLPA-registered financial advisors. The Court granted the NFLPA summary judgment,[az] holding that the players' claims were preempted by the LMRA.[ba]

az Summary judgment is "[a] judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law." Black's Law Dictionary (9th ed. 2009).

ba Similarly, in June 2015, former NFL player Richard Goodman sued the NFLPA alleging that it was negligent and breached its fiduciary duties in regulating Goodman's former contract advisor, causing Goodman financial damages. *See* Complaint, Goodman v. Nat'l Football League Players Ass'n, No. 15011396 (Fla. Cir. Ct. June 30, 2015). Less than two weeks after it was filed, Goodman and the NFLPA settled the lawsuit on confidential terms. E-mail with Darren Heitner, Heitner Legal, P.L.L.C., Counsel for Goodman (Aug. 25, 2015).

(L) Recommendations Concerning The NFL and NFLPA

The NFL and NFLPA are clearly in a position to protect and promote player health. There is also no doubt that both parties have made significant progress on this front in recent years, and that the NFL and NFLPA offer many benefits and programs intended to help current and former players. Nevertheless, there are still many important changes the NFL and NFLPA can make that will further advance player health and likely the game of football in the process.

Before explaining our recommendations for the NFL and NFLPA, it is important to review a key principle of labor law. The NLRA obligates employers and unions to collectively bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."[343] Within this obligation, there is ongoing legal debate as to which issues are mandatory subjects of bargaining and which are merely permissible subjects of bargaining, *i.e.*, which subjects the NLRA requires the parties to negotiate, and which the parties are not required to negotiate but may.[344] Some of our recommendations concern mandatory subjects of bargaining while others likely do not. We recognize the NFL and NFLPA might reasonably disagree about which issues are mandatory subjects of bargaining and thus do not intend to suggest that each of the below recommendations must be collectively bargained. We encourage collaboration between the parties but nonetheless urge progress first and foremost, including where that progress can be made unilaterally.

Additionally, it is again important to remember that the NFLPA's legal duties are to current players, not former players. This is true even though the NFLPA has negotiated increased benefits and additional programs for former players many times. Indeed, beyond the NFLPA's legal duties, we recognize that many former players rely on the NFLPA for information and assistance. Nevertheless, for reasons discussed in the Introduction, Section H: Scope of the Report, our recommendations focus on current players.

Finally, there are also recommendations directly concerning the NFL and NFLPA that are made in other chapters:

- Chapter 1: Players — Recommendation 1:1-G: Players should not sign any document presented to them by the NFL, an NFL club, or employee of an NFL club without discussing the document with their contract advisor, the NFLPA, their financial advisor, and/or other counsel, as appropriate.
- Chapter 2: Club Doctors — Recommendation 2:1-A: The current arrangement in which club (***i.e.***, "team") medical staff, including doctors, athletic trainers, and others, have responsibilitiefos both to players and to the club presents an inherent conflict of interest. To address this problem and help ensure that players receive medical care that is as free from conflict as possible, division of responsibilities between two distinct groups of medical professionals is needed. Player care and treatment should be provided by one set of medical professionals (called the "Players' Medical Staff"), appointed by a joint committee with representation from both the NFL and NFLPA, and evaluation of players for business purposes should be done by separate medical personnel (the "Club Evaluation Doctor").
- Chapter 2: Club Doctors — Recommendation 2:1-H: The NFL's Medical Sponsorship Policy should prohibit doctors or other medical service providers (MSPs) from providing consideration of any kind for the right to provide medical services to the club, exclusively or non-exclusively.
- Chapter 9: Coaches — Recommendation 9:1-B: The most important ethical principles concerning coaches' practices concerning player health should be incorporated into the CBA.
- Chapter 13: Financial Advisors — Recommendation 13:1-A: Players should be encouraged by the NFL, NFLPA, and contract advisors to work exclusively with NFLPA-registered financial advisors.
- Chapter 13: Financial Advisors — Recommendation 13:2-A: The NFLPA and NFL should consider holding regular courses on financial issues for players.
- Chapter 13: Financial Advisors — Recommendation 13:2-B: The NFL and NFLPA should consider amending the player payment schedule so that players, by default, are paid over a 12-month period.

Recommendations Concerning The NFL and NFLPA – continued

- Chapter 14: Family Members — Recommendation 14:1-A: Family members should be cognizant of the gaps in their knowledge concerning the realities of an NFL career, and the NFL and NFLPA should offer programs or materials to help them become better health advocates.

Goal 1: To make player health a priority.

Principles Advanced: Respect; Health Primacy; Empowered Autonomy; Transparency; Managing Conflicts of Interest; Collaboration and Engagement; and, Justice.

Recommendation 7:1-A: The NFL and NFLPA should not make player health a subject of adversarial collective bargaining.

As discussed throughout this Report, collective bargaining is the principal method by which changes are made to NFL player health policies. Pursuant to federal labor law, this will and should continue to be the case. However, we do not believe that collective bargaining over player health issues should be an *adversarial* process.

We acknowledge the realities of labor negotiations and do not mean to naively suggest that the one party accept at face value every player health proposal the other might make. Nevertheless, if as part of its research or otherwise the NFL knows a policy or practice should change, it should do so without waiting for the next round of bargaining or by forcing the NFLPA to concede on some other issue. Indeed, for the NFL to demand a quid pro quo in exchange for improving player health policies or practices would be ethically problematic. For player health to be maximized, it is important that the NFL view the issue as an independent obligation of its own, rather than an issue to be forced upon it. Similarly, the NFLPA should not delay on addressing player health issues in order to advance other collective bargaining issues. We hope the NFL and NFLPA have adopted and will in the future adopt this attitude toward collective bargaining.

Relatedly, the NFL should also more substantially engage with current players about player health issues, including incorporating their input on some of the NFL's committees.

Recommendation 7:1-B: The NFL and NFLPA should continue to undertake and support efforts to scientifically and reliably establish the health risks and benefits of playing professional football.[bb]

The MTBI Committee's work is widely considered to have been flawed and incorrect in many ways. Since overhauling that Committee in 2009, the NFL has committed funds to several external organizations primarily to study traumatic brain injury, including but not limited to providing $1 million to Boston University in 2010[345] and $30 million to the National Institutes of Health (NIH) in 2012, $6 million of which, according to the NFL, was eventually awarded to Boston University.[346,bc] In total, the NFL stated that "over the past six years the NFL has dedicated more than $93 million in funds for scientific and medical research."[347] Research concerning brain injuries is very important. In addition, as we have

bb Dr. Elizabeth Nabel, the NFL's Chief Health and Medical Adviser, has also recommended that the NFL continue to fund medical research concerning player health. *See* Ben Tinker, *CNN exclusive: NFL's first medical adviser sits down with Dr. Sanjay Gupta,* CNN (Aug. 4, 2015), http://www.cnn.com/2015/08/04/health/nfl-health-chief-interview/, *archived at* http://perma.cc/CR8S-898C.

bc The funds to NIH might also be used for studying health conditions other than brain injuries, but the focus of the study is clearly on brain injuries. *See The National Football League Commits $30 Million Donation to the Foundation for the National Institutes of Health to Support Medical Research*, Nat'l Insts. of Health (Sept. 5, 2012), http://www.nih.gov/news/health/sep2012/od-05.htm, *archived at* http://perma.cc/LR65-9CYR.

Recommendations Concerning The NFL and NFLPA – continued

emphasized in this Report, it is important to focus on the health of the whole player for the whole lifetime, which means also supporting research in other health domains. Without knowing the actual results of a football career, it is difficult to craft policies and practices that can maximize player health. On this point, the NFL has funded studies derived from data collected from medical screenings of 3,599 former players through the Player Care Foundation[348] and the NFLPA has awarded funding to Harvard University for The Football Players Health Study at Harvard University. Research on these issues should continue.

We also emphasize the importance of studying and better articulating the benefits of playing professional football. On this point, we agree with the NFL:

> Football is a sport that truly unites people. Our players feel connected to their team, their community and their fans. They are taking part in a cultural institution in this country that provides inspiration and joy to millions of people. While those are not financial benefits, those are benefits that provide our players with tremendous personal satisfaction and value, and should not be overlooked[.][349]

Better understanding of both the risks and benefits of playing professional football will help to empower players in making choices about football and their health.

Recommendation 7:1-C: The NFL, and to the extent possible, the NFLPA, should: (a) continue to improve its robust collection of aggregate injury data; (b) continue to have qualified professionals analyze the injury data; and, (c) make the data publicly available for re-analysis.

As explained in Chapter 1: Players, the NFL Injury Surveillance System (NFLISS) allows for the accumulation of current information about the nature, duration, and cause of player injuries. Also as stated in Chapter 1, we rely on NFLISS data in this Report because it provides the best available data concerning player injuries, although we cannot independently verify the data's accuracy. We acknowledge that the NFL's past injury reporting and data analysis have been publicly criticized as incomplete, biased, or otherwise problematic, although we are not aware of any criticism of the NFLISS specifically.[350] Without resolving the debate concerning the NFL's collection and use of injury data, we nonetheless stress the importance of accurate, comprehensive, and mandatory injury data collection—and meaningful disciplinary action for responsible parties (e.g., club medical staff) who fail to accurately record injury data.

If accurately collected, these datasets have the potential to improve player health through analysis by qualified experts, so long as they are made available to them. In particular, analysis can be performed to determine, among other things, the effects of rule changes, practice habits, scheduling, new equipment, and certain treatments, while also identifying promising or discouraging trends and injury types in need of additional focus.[351] Notably, the NFL already conducts this type of analysis through Quintiles, as explained in Chapter 1: Players.[bd] However, the NFL does not publicly release its injury data (nor does any other major professional league as far as we are aware). The NFL does release some data at its annual Health & Safety Press Conference at the Super Bowl. However, the data released at the Press Conference are minimal compared to the data available and the analyses performed by Quintiles. Also as explained in Chapter 1: Players, the NFL and NFLPA denied our request to incorporate additional data from the 2015 Quintiles report into this Report, for reasons with which we disagree. It is regrettable that both the NFL and NFLPA are not providing players with all data and information concerning player health that is in their possession.

bd The Football Players Health Study is also collecting data about former NFL players, their injury histories, and other factors that can help better elucidate the risks faced by players.

Recommendations Concerning The NFL and NFLPA – continued

For the data collected to have the potential meaningful applications mentioned above, it must be made available in a form as close to its entirety as possible. Such disclosure would permit academics, journalists, fans, and others to scrutinize and analyze the data in any number of ways, likely elucidating statistical events, trends and figures that have the opportunity to improve player health, as well as simply providing independent verification of any analysis done by Quintiles for added public trust. To be clear we are recommending the release of more *aggregate* data, not data that could lead to identification of the injuries of any particular player or cause problems concerning gambling (*see* Chapter 18: Fans).

Publicly releasing injury data, nevertheless, comes with complications that we must acknowledge. While more transparency in injury reporting is necessary, the nuances of such data can easily be lost on those without proper training. Sports injury prevention priorities in public health can be swayed by public opinion and heavily influenced by those with the most media coverage. Making injury data publically available may allow those with the media access to dictate the agenda regardless of the actual implications of the data. As a result, it may be harder for injury trends that may be more hazardous, but less visible in the media, to get the attention they need, even when the data clearly state their importance. Thoughtful, balanced, peer-review results may have difficulty competing against those statistics which garner the most media attention. For this and other reasons, in Chapter 17: The Media, we recommended that "[t]he media should be accurate, balanced, and comprehensive in its reporting on player health issues." The medical, scientific and legal issues concerning player health are extremely complicated, which demands that the media take care to avoid making assertions that are not supported or that do not account for the intricacies and nuance of medicine, science and the law.

In light of these concerns, one possible intermediate solution is to create a committee of experts that can review requests for data and determine whether or not the usage of the data is appropriate and will advance player health. Indeed, the Datalys Center for Sports Injury Research and Prevention performs this role concerning access to NCAA student-athlete injury data.[352] Moreover, such committees have also been formed in the clinical research setting.[353]

Recommendation 7:1-D: The NFL and NFLPA should publicly release de-identified, aggregate data from the Accountability and Care Committee's player surveys concerning the adequacy of players' medical care.

As discussed earlier, as part of the 2011 CBA, the NFL and NFLPA created a joint Accountability and Care Committee (ACC), which is to "provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players[.]"[354] Among the ACC's responsibilities is to "conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analysis of the results of such surveys." Despite the provisions of the CBA, the first survey was not conducted until 2015.[355] Moreover, no results of the survey have been made public.

We believe de-identified aggregate data from the results from the 2015 survey and all subsequent surveys should be made public, or at least made available to appropriate outside researchers. As discussed at length in Chapter 2: Club Doctors and Chapter 3: Athletic Trainers, there are serious questions concerning the relationship between club medical staff and players, including the possibility that at least some players do not trust the club medical staff—a serious concern for the efficacy of the patient-doctor relationship. Independent research on these issues is important, as it can allow qualified experts to analyze the data and identify potential areas of improvement. Nevertheless, as evidenced by the challenges in our own work, engaging players and club medical staff (including NFL permission) to participate in a research study is extremely difficult. The NFL and NFLPA have these data sets and thus can make them public to facilitate additional research.

Recommendations Concerning The NFL and NFLPA – continued

This recommendation is reiterated in a forthcoming Special Report from The Hastings Center Report, to be published in December 2016.

The NFL denied our request for this data, citing a confidentiality agreement between the NFL and NFLPA. The NFL explained

> [u]nder the terms of the confidentiality agreement, the results of the survey were provided to only certain, specifically-named individuals at the League and the Players Association and to certain individuals at each club, who are bound by the terms of the agreement. The results were collected, tabulated and analyzed by the survey company which then met with the NFL and NFLPA to discuss the results. Representatives of many of the clubs, the NFL and the NFLPA have also met to discuss the results of the survey and to share best practices regarding player medical care as part of their ongoing efforts in this realm. These best practices will be further discussed when the representatives of the NFL and NFLPA (including the NFLPA's Medical Director) visit training camps to meet with club medical staffs this summer, as they do every year.

For the reasons stated above, we believe it is important that this data be analyzed beyond a small group of people at the NFL, NFLPA and NFL clubs.

Recommendation 7:1-E: Players diagnosed with a concussion should be placed on a short-term injured reserve list whereby the player does not count against the Active/ Inactive 53-man roster until he is cleared to play by the Concussion Protocol (see Appendix A).

For each game, NFL clubs must divide their 53-man rosters into 46 active players, those eligible to play in the game, and 7 inactive players, those who cannot play in the game.[356] There is no limitation on how often a player can be declared inactive. While concussed players can be declared inactive for one or more games, we believe concussions present a unique situation that requires a unique approach.

According to the leading experts, 80 to 90 percent of concussions are resolved within 7 to 10 days.[357] Thus, concussion symptoms persist for longer than 10 days for approximately 10 to 20 percent of athletes. In addition, a variety of factors can modify the concussion recovery period, such as the loss of consciousness, past concussion history, medications, and the player's style of play.[358] Consequently, a player's recovery time from a concussion can easily range from no games to several. The uncertain recovery times create pressure on the player, club, and club doctor. Each roster spot is valuable and clubs constantly add and drop players to ensure they have the roster that gives them the greatest chance to win each game day. As a result of the uncertain recovery times, clubs might debate whether they need to replace the player for that week or longer. The club doctor and player might also then feel pressure for the player to return to play as soon as possible. By exempting a concussed player from the 53-man roster, the club has the opportunity to sign a short-term replacement player in the event the concussed player is unable to play. At the same time, the player and club doctor would have some of the return-to-play pressure removed.[359]

In fact, MLB already has such a policy. MLB has a 7-day Disabled List (as compared to its normal 15 and 60 day Disabled Lists) "solely for the placement of players who suffer a concussion."[360]

Why treat concussions differently than other injuries in this respect? This is a fair question to which there are a few plausible responses. First, in terms of the perception of the game by fans, concussions have clearly received more attention than any of the other injuries NFL players might experience and thus the future of the game depends more critically on adequately protecting players who suffer from them. Second, concussions are harder to diagnose than other injuries, such that there may be a period of uncertainty in which it would be appropriate to err on the side of caution.[361] Third, both players and medical professionals have more difficulty anticipating the long-term effects of concussions as compared

Recommendations Concerning The NFL and NFLPA – continued

to other injuries, given current scientific uncertainties concerning brain injury.[362] Fourth, and perhaps most importantly, it is harder to determine the appropriate recovery times for concussions as compared to other injuries.[363] These reasons all support a recommendation to exclude concussed players from a club's Active/Inactive roster, but we recognize that the key feature of players potentially feeling or facing pressure to return before full recovery may be shared across any injury a player may experience. Thus, it may also be reasonable to consider extending this recommendation beyond concussions.[be]

In reviewing a draft of this Report, the NFL argued that "[t]he current NFL roster rules actually provide greater flexibility" than is recommended here.[364] The NFL explained that because "[t]here is no limitation on how long a player may be carried on the 53-man roster throughout the season without being 'activated,' . . . a player who is concussed routinely is carried on his club's 53-man roster without being activated until he is cleared."[365] However, for the reasons explained above, we believe concussions should be treated differently. All 53 spots on the roster are precious to both the club and the players. The uncertainty surrounding recovery from a concussion presents unique pressures that can be lessened with the approach recommended here.

Recommendation 7:1-F: The NFL and NFLPA should research the consequences and feasibility of guaranteeing more of players' compensation as a way to protect player health.

Guaranteed compensation in the NFL is a complicated issue, and we are not making a recommendation that NFL player contracts be fully guaranteed, as is generally the case in MLB, the NBA and, to a lesser extent, the NHL. Many people, particularly some players, feel that fully guaranteeing a player's contract is a fair trade for the health risks players undertake, a notion consistent with our ethical principle of Respect. More important for our purposes here, focused on protecting and promoting player health, is that, if a player's contract were fully guaranteed, he would likely feel less pressure to play through injuries in an effort to continually prove himself to the club,[366] a notion consistent with our ethical principle of Health Primacy.[bf] Relatedly, job and income insecurity likely cause stress and psychological harm for some players. However, we have concerns about the possibility of unintended consequences, as well as the feasibility, of such a recommendation to fully guarantee player compensation.

To understand these concerns, a brief explanation of guaranteed compensation in the NFL is important. Generally, NFL clubs are permitted to terminate a player's contract without any further financial obligation to the player for five reasons:

(1) the player "has failed to establish or maintain [his] excellent physical condition to the satisfaction of the Club physician";

(2) the player has "failed to make a full and complete disclosure of [his] physical or mental condition during a physical examination";

(3) "[i]n the judgment of the Club, [the player's] skill or performance has been unsatisfactory as compared with that of other players competing for positions on the Club's roster";

(4) the player has "engaged in personal conduct which, in the reasonable judgment of the Club, adversely reflects on the Club"; and,

(5) "[i]n the Club's opinion, [the player is] reasonably anticipated to make less of a contribution to the Club's ability to compete on the playing field than another player or players whom the Club intends to sign or attempts to sign, or already on the roster of the Club, and for whom the Club needs Room."[367]

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be We recognize that this new injured reserve list is subject to gaming by clubs, whereby a club might designate a player as concussed in order to add another player and effectively expand the roster. We do not view this this concern to be sufficient to outweigh the health benefits of the proposal. Moreover, all injury lists are subject to some risk of being gamed in this manner, and thus the issue is not unique to what we propose.

bf In reviewing a draft of the Chapter 14: Family Members, the wife of a former NFL player stated: "if you don't have any guarantees in your contract and you are a game or practice away from being released/fired, you are less likely to take on the role of a change agent[.]"

Recommendations Concerning The NFL and NFLPA – continued

Players and their contract advisors seek to curtail the clubs' termination rights as to individual players by negotiating for some of the player's compensation to be guaranteed. Guaranteed compensation takes a wide variety of forms (most notably in signing bonuses),[368] but generally players and their contract advisors seek to guarantee the player's contract even where he is terminated for "injury," "skill" or "Salary Cap." An "injury" guarantee will protect against the first reason listed above for which clubs can generally terminate a player's contract; a "skill" guarantee will protect against the third reason, and a "Salary Cap" guarantee will protect against the fifth reason. A player might have all or just some seasons of his contract guaranteed for skill, injury and/or Salary Cap. In addition, there are other mechanisms in the CBA that can effectively guarantee some or all of a player's salary, including Injury Protection[bg] and Termination Pay.[bh]

Generally, players and their contract advisors seek to obtain as much guaranteed money as possible in contract negotiations. Guaranteed compensation provides the player with a secure income that is otherwise typically threatened by injury. However, there are times when a player might not want to sign the contract that offers him the most money, guaranteed or unguaranteed. Younger players might eschew the last year or two of a contract and the money that comes with it in favor of a shorter contract. In doing so, the player is hoping or expecting that he will be able to complete the shorter contract, re-enter the free agency market and sign another contract. Such decisions are obviously risky—the player's career might end for skill or health reasons under the shorter contract and the player will never have another chance at another contract. However, if the player is healthy, securing a second free agent contract can be lucrative.

From a club's perspective, guaranteed compensation is something to be avoided. Guaranteeing all or a portion of a player's contract commits the club to a player financially, regardless of whether the player performs poorly under the contract or suffers a career threatening injury. Nevertheless, clubs often agree to guarantee compensation to players to persuade them to join or stay with the club.

Changes to the Salary Cap rules as part of the 2011 CBA potentially increased the use of guaranteed money. Technically, whether a player's compensation is guaranteed has no effect on the Salary Cap—a club is limited to a certain amount of player compensation costs regardless of whether that amount is guaranteed or unguaranteed. Importantly, the amount of player salary that is counted against a club's Salary Cap does not necessarily reflect the amount actually being paid to players. As a result of the Salary Cap's accounting rules, in any given year a significant portion of a club's Salary Cap allocation might be consumed by charges that do not actually reflect a payment being made from the club to players. However, the 2011 CBA addressed this discrepancy by adding a requirement that clubs spend a certain amount of the Salary Cap in cash, that is, actual payments to the players, regardless of the accounting rules. Probably the easiest way for a club to ensure that it spends a sufficient amount in cash is to pay lump sum signing bonuses. Signing bonuses are the most traditional form of guaranteed compensation.

The website spotrac.com provides the most reliable publicly available data on player contracts. Using data from spotrac.com during week 2 of the 2015 regular season, approximately 44 percent of all contracted compensation was guaranteed. Importantly, this statistic represented the aggregate of player contracts, but does not necessarily reflect any single player's contract. On that front, approximately 70 percent of players had at least some guaranteed compensation in their contract and the average amount of guaranteed compensation in an NFL player contract was $3.4 million. Additionally, 251 players had a contract that included at least $10 million in guaranteed compensation and 740 players had a contract that included at least $1 million in guaranteed compensation.

In recent years, the percentage of an NFL player's contract that is guaranteed appears to have risen. Although the scope of the guarantees is sometimes debated,[369] it is not uncommon for marquee players to sign contracts that guarantee 50

bg Where a player is injured in one season, fails the preseason physical the next season because of that injury, and is terminated by the club as a result, the player is entitled to 50 percent of his salary for that season up to a maximum of $1.1 million in the 2015 season. If the player is still physically unable to play two seasons after the injury, he is entitled to 30 percent of his salary up to a maximum for $525,000 in 2015. A player is only entitled to Injury Protection once in his career. *See* 2011 CBA, Art. 45.

bh A player with at least four years of experience who has his contract terminated after the first game of the season is entitled to the remainder of his salary for that season once in his career. 2011 CBA, Art. 30.

Recommendations Concerning The NFL and NFLPA – continued

percent or more of their compensation.[370] Moreover, the 2011 CBA significantly curtailed rookie compensation, cutting the amount top draft picks earned by more than 50 percent.[371] In exchange, however, many first round draft picks' contracts are now fully guaranteed.[372]

The NFLPA has also expressed mixed views about the existence of guaranteed contracts. In a 2002 editorial in *The Washington Post*, then-NFLPA Executive Director Gene Upshaw acknowledged that the possibility of guaranteed contracts "is severely undermined by the risk of a career-ending injury" and touted the benefits available to players as an alternative.[373] Then, in two reports issued by the NFLPA in or about 2002 and 2007 respectively, the NFLPA asserted that NFL player compensation is, in fact, largely guaranteed by explaining that more than half of all compensation paid to players is guaranteed.[374] However, importantly, this statistic does not mean that half of all compensation contracted was guaranteed—indeed, as discussed above, approximately 44 percent of all contracted compensation is guaranteed. Players are often paid guaranteed money (*e.g.*, a signing bonus or roster bonus) in the first or second year of the contract only to have the base salaries (the unguaranteed portions) in the later years of the contract go unpaid because the player's contract was terminated.

With this background in mind, there are several reasons why fully guaranteed compensation might not be beneficial to players collectively. First, while fully guaranteed contracts might be good for the players that receive them, it could result in many players not receiving any contract at all. If clubs were forced to retain a player of diminishing skill because his contract was guaranteed, a younger or less proven player might never get the opportunity to sign with the club.[375] Relatedly, clubs might continue to provide playing opportunities to the players with larger contracts in order to justify those contracts, preventing younger players from establishing themselves as starting or star players and earning higher salaries. It is also likely that under a system of guaranteed compensation, player salaries would decrease (at least in the short-term), particularly the salaries of the highest paid players and players who are less certain to add value to a roster, as clubs would be more cautious about taking on the financial liabilities, especially given the Salary Cap in place in the NFL. Similarly, clubs also may seek to minimize their financial liabilities by reducing roster sizes, which might cost marginal players their jobs, while again reducing opportunities for young or unproven players to join a club.

Clearly this is a complex issue, with the potential for substantial unintended consequences. Thus, we recognize the likely health value of guaranteed contracts, while simultaneously recognizing that it may not be the right solution for all players. Importantly, as discussed above, players who value a contractual guarantee over potentially higher but uncertain compensation may negotiate for that protection individually, as many currently do. Moreover, we expect that other recommendations made throughout this Report, including key recommendations related to the medical professionals who care for players, will make great strides toward protecting and promoting player health such that guaranteed compensation will be less critical for that purpose.

There are also logistical challenges to implementing fully guaranteed contracts. The finances and operations of the NFL and its clubs are greatly intertwined with the fact that NFL contracts have never been fully guaranteed. Since 1993, NFL clubs have had to comply with a strict Salary Cap that necessarily influences the types of contracts clubs are willing to offer, including the possibility of guaranteed compensation. Fully guaranteed contracts would be a fundamental and monumental alteration to the current business of the NFL that, at a minimum, would require a gradual phasing in process.[bi]

It is possible that a rate of guaranteed contracts less than 100 percent but more than the current 44 percent is also optimal. Given the varying factors to be weighed and considered, it is not clear percentage of guaranteed compensation would maximize player health for the most NFL players.

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bi For example, one rule that would likely have to be removed is the NFL's requirement that clubs deposit into a separate account the present value, less $2 million, of guaranteed compensation to be paid in future years. 2011 CBA, Art. 26 § 9. Peer reviewer and former NFL club executive Andrew Brandt believes clubs "hide behind" the funding rule to avoid guaranteeing player compensation, and have been largely successful in doing so. Andrew Brandt, Supplemental Peer Review Response (Nov. 6, 2015).

Recommendations Concerning The NFL and NFLPA – continued

Ultimately, we recommend further research into this question, including player and club perspectives, economic and actuarial analysis, and comprehensive consideration of the relevant trade-offs, ramifications, and potential externalities. In the meantime, we note that the trend toward greater use of contractual guarantees can help promote player health and allow individual negotiation by players based on their own goals and priorities.

Goal 2: To ensure that there are effective enforcement mechanisms when players' rights related to health are violated.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 7:2-A: The CBA should be amended to provide for meaningful fines for any club or person found to have violated Sections 1 through 6 of Article 39 of the CBA.

Sections 1 through 6 of Article 39 contain a multitude of rules for clubs and club medical providers concerning player healthcare (*see* Appendix F). However, Article 39 does not contain any enforcement mechanisms. While the NFLPA or players could bring a Non-Injury Grievance or request an investigation before the Joint Committee (discussed in greater detail in Chapter 2: Club Doctors and Chapter 8: NFL Clubs), these processes are more likely to result in remedial and not financial action, particularly if no player has suffered distinct damage from the violation.[376] Additionally, Recommendation 2:2-A in the Club Doctors Chapter proposed a system of arbitration for resolving disputes between players and club doctors, *e.g.*, claims of medical malpractice. While this recommendation offers possible remedial benefit to players, it should not be viewed as the exclusive enforcement mechanism against club doctors and other employees. Clubs and club medical providers should be penalized for violating the player healthcare provisions regardless of whether their bad acts result in clear and compensable harm to a player.[bj] Indeed, the CBA contains many provisions that permit fines without evidence of actual harm.[377] If Article 39 is to be maximally effective, it should contain a fine system sufficient to deter violations and punish violators.[378]

There is precedent for our recommendation. Prior to the 2016 season, the NFL and NFLPA agreed to a disciplinary scheme and process for violations of the Concussion Protocol.[379] Under the agreement, both the NFL and NFLPA have the power to submit potential violations of the Concussion Protocol to a third-party arbitrator for evaluation.[380] The arbitrator then will issue a report to the Commissioner who can issue fines or strip the club of draft picks depending on the severity of the violation.[381] The Commissioner nevertheless retains "absolute discretion" to determine the penalties.[382] Article 39, like the Concussion Protocol, is deserving of meaningful discipline in the event of noncompliance.

Recommendation 7:2-B: The statute of limitations on filing Non-Injury Grievances, at least insofar as they are health-related, should be extended.[bk]

bj An instructive example occurred during the 2015 NFL season. During week 11, St. Louis Rams quarterback Case Keenum sustained a head injury and noticeably had trouble walking after a play. A Rams trainer went on to the field to check on Keenum but did not remove Keenum from the game to undergo a concussion evaluation. Keenum was later diagnosed with a concussion. The NFL investigated the incident and the Rams' apparent mishandling of the Concussion Protocol but did not impose any discipline against the Rams or their medical staff. *See* Mike Florio, *Report: Rams won't be penalized for concussion debacle*, ProFootballTalk (Nov. 29, 2015, 8:12 AM), http://profootballtalk.nbcsports.com/2015/11/29/report-rams-wont-be-penalized-for-keenum-concussion-debacle/, *archived at* http://perma.cc/WR62-VQT2; Darin Gantt, *NFL has conference call to remind all teams of concussion protocol*, ProFootballTalk (Nov. 25, 2015, 12:09 PM), http://profootballtalk.nbcsports.com/2015/11/25/nfl-has-conference-call-to-remind-all-teams-of-concussion-protocol/, *archived at* http://perma.cc/TS3D-M4S3. Weeks later, it was announced that clubs would be disciplined (including fines or suspensions) for future violations of injury protocols. Darin Gantt, *NFL to fine, suspend teams who don't follow injury protocols*, ProFootballTalk (Dec. 17, 2015, 6:00 AM), http://profootballtalk.nbcsports.com/2015/12/17/nfl-to-fine-suspend-teams-who-dont-follow-injury-protocols/, *archived at* https://perma.cc/8CH3-77F9.

bk The focus of this Report is on player health issues and thus we do not specifically address Non-Injury Grievances outside of the health context.

Recommendations Concerning The NFL and NFLPA – continued

The rights afforded to players under the CBA are only meaningful if there is meaningful enforcement. Nevertheless, there are at most a few health-related Non-Injury Grievances each year. This may be a result of few problems actually occurring, but it may alternatively reflect player concern about losing their job or status with the club. In particular, a player may fear that filing a Non-Injury Grievance would jeopardize the player's career, therefore causing him to forego the opportunity to pursue viable claims.[bl] Discussions with contract advisors confirmed that filing a Non-Injury Grievance is generally not considered a viable option because of the likely effect on the player.

Currently, players have 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based . . . or from the date on which the facts of the matter became known or reasonably should have been known" to file a Non-Injury Grievance.[bm] Setting a statute of limitations always requires trading-off protecting the injured party against the other side's interests in preserving evidence. There are tough judgment calls to be made in some cases, but the statute of limitations in this case is clearly too short to be fair. This statute of limitations is far shorter than the two- or three-year statute of limitations typical to negligence or medical malpractice actions under most states laws.[383] Moreover, unless the player has left the club very close to the date of the action or omission that gave rise to the grievance, the player is unlikely to pursue a timely grievance.

We propose that the statute of limitations for Non-Injury Grievances be the latest of: (1) one year from the date of the occurrence or non-occurrence upon which the grievance is based; (2) one year from the date on which the facts of the matter became known or reasonably should have been known; or, (3) 90 days from the date of the player's separation[bn] from the club, provided the Non-Injury Grievance is filed within three years from the date of the occurrence or non-occurrence upon which the grievance is based.

The problem with the current short statutes of limitations on grievances is evident in the Concussion Litigation. The NFL's principal defense in the Concussion Litigation was that the players' claims were preempted by the LMRA-–in other words, that the players' claims were required to be brought as grievances under the CBA and not in court. Had the NFL succeeded (the case was ultimately settled) and the players faced arbitration, they would have had great difficulty due to the short statute of limitations on Non-Injury Grievances, which would likely have barred their claims.[384] If the NFL's position is that these kinds of claims are preempted and should instead be arbitrated, it must allow for a fair Non-Injury Grievance process, including a fairer statute of limitations. The proposed statute of limitations would provide players a meaningful opportunity to consider their options and pursue claims for wrongs committed in arbitration without jeopardizing their often tenuous careers.

Goal 3: To improve player access to and understanding of their health rights and benefits.

Principles Advanced: Respect; Empowered Autonomy; Transparency; Collaboration and Engagement; and, Justice.

Recommendation 7:3-A: The NFL and NFLPA should continue and improve efforts to educate players about the variety of programs and benefits available to them.

bl Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me." . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]" While it is illegal for an employer to retaliate against an employee for filing a grievance pursuant to a CBA, *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 835–36 (1984), such litigation would involve substantial time and money for an uncertain outcome.

bm 2011 CBA, Art. 43 § 3. Other American professional sports leagues have similar statutes of limitations: the NBA provides 30 days, 2011 NBA CBA, Art. XXXI; MLB provides 45 days, 2012 MLB CBA, Art. XI; and, the NHL provides 60 days, 2013 NHL CBA, Art. 17. However, the CFL permits players one year to initiate grievance. 2014 CFL CBA, § 4.02.

bn Separation would include the club terminating the player's contract, the expiration of the player's contract or the player's filing of retirement papers with the NFL.

Recommendations Concerning The NFL and NFLPA – continued

As discussed above and detailed in Appendices C and D, the NFL and NFLPA offer many benefits and programs to current and former players to help them on a wide spectrum of issues, including most importantly healthcare and career-related guidance. However, it appears that many players are not taking full advantage of these programs.[bo]

The NFL and NFLPA both make some efforts to address this problem.

In comments provided to us, the NFL explained that "[t]he NFL Retirement Plan now sends out one mailing that summarizes all potential benefits. There is also one telephone number that will direct a player to the appropriate resource. Finally, retired players may access all of the relevant information at www.MyGoalLine.com."[385]

As for the NFLPA, at the conclusion of each season, the NFLPA provides the contract advisors an "End of Season Player Checklist." The Checklist is a multi-page document summarizing many of the players' important rights, benefits, and opportunities, such as obtaining medical records, obtaining second medical opinions, filing for workers' compensation, Injury Protection or disability benefits, understanding their insurance options, understanding off-season compliance with the Policies on Performance-Enhancing Substances and Substances of Abuse, and preparing for life after football by engaging the benefits and programs offered by the NFL and NFLPA. Contract advisors are required to provide the Checklist to all of their clients and certify in writing to the NFLPA that they have discussed the contents with their clients. In short, the Checklist is an excellent document and the NFLPA should be commended for its creation and use. Similarly, the NFLPA has on its website a Benefits Book, summarizing the various benefit plans. Nevertheless, it is unclear if these documents are ever provided directly to the player.

Each preseason every player should be given a manual that lists and explains all of the different programs and benefits for which they are eligible, either through the NFL, NFLPA, or otherwise. Players should receive the manual again whenever their contract is terminated and again at or near the conclusion of the season. Providing the manual near the conclusion of the season is important because many useful programs and seminars are conducted during the offseason. We further recommend that this manual be a joint creation of the NFL and NFLPA, and that an electronic copy be provided to every contract advisor and financial advisor so they can advise their clients accordingly.

The NFL already does create a document along these lines, entitled the Player Engagement Resource Guide, which lists and describes current and former player programs and resources.[386]

The above-mentioned efforts to inform players about these programs and benefits are steps in the right direction. However, they do not appear to have been fully successful, a problem with which many employers struggle. In interviews we conducted, current and former players were generally unclear and unsure about what information they had received. Although this is also a responsibility of the players, there is room for additional ideas and efforts in this area by the NFL and NFLPA.

We believe the NFL and NFLPA should make all benefit and retirement plans publicly available on their websites. Information about NFL player benefits is made available to players by the NFL and NFLPA through the website mygoalline.com, and to contract advisors and financial advisors through the NFLPA's website. However, players can only access mygoalline.com with a username and password, the full plan documents are not readily available to contract advisors and financial advisors, and neither the NFL nor the NFLPA websites otherwise make publicly available information about any of the various benefit and retirement programs that are available to NFL players. These plans should be readily available so that current, former, and future players, player family members, and other trusted advisors can review them to assist players. Public access will also allow academics, government officials, and others with an interest in the topic to review the plans and potentially make recommendations that would improve the plans and players' health.

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bo Indeed, in a 2014 interview, Troy Vincent, a former Pro Bowl cornerback and former President of the NFLPA who is now the NFL's Executive Vice President of Football Operations, explained that the NFL's Player Care Foundation offers former players comprehensive medical examinations free of charge but that "the lines are empty." Jim Baumbach, *Life After Football*, Newsday, Jan. 25, 2015, *available at* 2015 WLNR 2381142.

Recommendations Concerning The NFL and NFLPA – continued

Finally, bare provision of information and documents to the players is not sufficient. Although players are ultimately responsible for taking advantage of benefits available to them, we know from behavioral science that too much information can be overwhelming[bp] and that certain approaches are more likely to result in comprehension and action. The NFL and NFLPA must work together (including potentially with experts in behavioral science) to ensure that the information being provided to the players is understandable, digestible, and actionable and that the players are actually processing the information. This will likely require substantial investments in education along with attempts to monitor whether players understand what they are being told. For example, quizzes after providing information, as are sometimes used in clinical trial informed consent, are one method of ensuring players are taking the information provided to them seriously.

Recommendation 7:3-B: The NFL and NFLPA should undertake a comprehensive actuarial and choice architecture analysis of the various benefit and retirement programs to ensure they are maximally beneficial to players.

Choice architecture refers to the ways in which choices are presented to consumers.[387] A common and relevant choice architecture example is constructing retirement plans such that employees are automatically enrolled in them but allowed to opt out if they so choose, which has the effect of "nudging" individuals into more sensible amounts of retirement savings.[388] According to Aon Hewitt, one of the world's leading human resources consulting firms, 61.7 percent of firms automatically enroll employees in retirement plans.[389] In addition to auto-enrollment, there are several other relevant choice architecture constructs, including claims processes, required documentation, payment schedules, notifications and assumptions about age, marital and dependent status, income, and other information. A comprehensive analysis of how the NFL and NFLPA benefit and retirement programs are configured from a choice architecture perspective will help ensure that the maximum number of players are receiving the benefits to which they are entitled and in a manner that is most helpful to them.

Recommendation 7:3-C: The purpose of certain health-related committees should be clarified and their powers expanded.

As is discussed in the Enforcement section of various stakeholder chapters, players generally have three options within the confines of the CBA concerning healthcare-related problems they can file: (1) a Non-Injury Grievance; (2) a complaint with the ACC; or (3) a complaint with the Joint Committee. While a Non-Injury Grievance can provide a player the opportunity to be compensated for a wide variety of wrongs, the Joint Committee and ACC are both supposed to be responsible for player health matters, including the possibility of conducting investigations. However, the authority of these Committees is unclear.

The Joint Committee has the authority to initiate an investigation run by neutral doctors, but the Joint Committee is only obligated to "act[] upon" the doctors' recommendations, which is somewhat vague. It is unclear what it means for the Joint Committee to "act[] upon" the recommendations and there is nothing binding the NFL or the clubs to "act[] upon" the doctors' recommendations.

The ACC is even weaker than the Joint Committee. The ACC merely refers complaints to the NFL and the club involved and the NFL and the club are then free to "determine an appropriate response."

bp Current Player 10: "Unfortunately, advice from agents and especially the NFLPA in a long meeting with lots of information falls on deaf ears most times. Players don't care about this information until it pertains to them."

Recommendations Concerning The NFL and NFLPA – continued

At least one of the committees should have the ability to conduct a thorough investigation and/or hold a hearing and make binding their findings and recommendations. If the responsible parties fail to comply with the recommendations, they should be meaningfully fined until there is compliance.

The purpose of the committees should also be clarified to differentiate them from a Non-Injury Grievance. The current advantage of the committees from the players' perspective is that complaints to the committees are not subject to the strict 50-day statute of limitations for Non-Injury Grievances. Additionally, the committees consist generally of persons working in the medical field as opposed to the lawyer presiding over a Non-Injury Grievance. Although the arbitrator might consider expert medical testimony in deciding a Non-Injury Grievance, the committees might offer expertise or recommendations befitting their qualifications before matters reach the point of a Non-Injury Grievance.

Any change to the committees should also take into consideration other recommendations made herein, including the creation of a Medical Committee jointly selected by the NFL and NFLPA to hire, review, and terminate club doctors, as outlined in Chapter 2: Club Doctors, Recommendation 2:1-A. Our proposed Medical Committee may have overlapping areas of expertise and responsibilities as the committees discussed in this recommendation.

By reorganizing and clarifying the roles and authority of the committees, they will be more effective for all parties involved.

Goal 4: To hold players accountable for their own acts affecting their health and the health of other players.

Principles Advanced: Respect; Health Primacy; and, Justice.

Recommendation 7:4-A: The NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously.

As discussed in Chapter 1: Players, Section C: Current Practices, at least some players have sought to avoid undergoing the Concussion Protocol after suffering a suspected concussion. It is possible that players' non-cooperation is sometimes a result of the concussion suffered and diminished capacity. However, other players who do so either do not fully understand the risks of playing with a concussion or are so committed to playing and winning that they will continue to play no matter the possible health consequences. It is our understanding that both the NFL and NFLPA are providing players with information about the risks of concussions. Nevertheless, steps should be taken by the NFL and NFLPA, among others, to resolve issues concerning players' cooperation with the Concussion Protocol.

While the Concussion Protocol is generally helpful for ensuring players do not play with suspected or actual head injuries, it only works if players cooperate.[bq] Consequently, it is important that the NFL and NFLPA continue to educate players on the risks of concussions and the importance of the Concussion Protocol for both their short- and long-term health.

bq A positive example occurred during the 2015 season when Pittsburgh Steelers quarterback Ben Roethlisberger self-reported concussion symptoms during the fourth quarter of a close game. Mike Florio, *Roethlisberger self-reported concussion symptoms*, ProFootballTalk (Nov. 29, 2015, 10:15 PM), http://profootballtalk.nbcsports.com/2015/11/29/roethlisberger-self-reported-concussion-symptoms/, *archived at* http://perma.cc/52EZ-D2W9.

Recommendations Concerning The NFL and NFLPA – continued

If players do not cooperate with the Concussion Protocol even after substantial effort has been made to educate them on its importance, it may be in the interests of player health to adopt stronger deterrent mechanisms, including fines and/or suspensions.

Recommendation 7:4-B: The NFL and NFLPA should agree to a disciplinary system, including fines and/or suspensions, for players who target another player's injury or threaten or discuss doing so.

Prior to the 2015 Super Bowl, New England Patriots cornerback Brandon Browner said he would encourage his teammates to target and try to hit the injured shoulder of Seattle Seahawks safety Earl Thomas and the injured elbow of Seahawks cornerback Richard Sherman.[390] Similarly, in the 2012 NFC Championship game, New York Giants special teams players Jacquian Williams and Devin Thomas discussed targeting San Francisco 49ers kick returner Kyle Williams due to his history of concussions.[391] Generally, the NFL does not fine and/or suspend players unless they have violated the Playing Rules in an egregious way. However, when such threats are made, the NFL should not need to wait until the Playing Rules have been broken or a player is actually injured before taking action. The discussion or encouragement of targeting players' injuries increases the likelihood of players taking actions that unnecessarily harm other players and thus should not be tolerated. On this point, the threat to player health is too real not to act proactively.

i) NFLPA-Specific Recommendations

The below recommendations are NFLPA-specific. In other words, they are either within the NFLPA's unique control or potentially adverse to the NFL's interests.

Before getting to these recommendations, there are additional recommendations concerning the NFLPA that are made in other chapters:

- Chapter 1: Players — Recommendation 1:1-A: With assistance from contract advisors, the NFL, the NFLPA, and others, players should familiarize themselves with their rights and obligations related to health and other benefits, and should avail themselves of applicable benefits.
- Chapter 6: Personal Doctors — Recommendation 6:1-A: The NFLPA and clubs should take steps to facilitate players' usage of personal doctors.

Additionally, because the NFLPA regulates contract advisors and financial advisors, all recommendations made in those chapters also concern the NFLPA. NFLPA-specific recommendations are listed here.

Goal 5: For the NFLPA to take additional affirmative steps to hold accountable those stakeholders who do not meet their legal and ethical obligations concerning player health.

Principles Advanced: Respect; Health Primacy; Transparency; Managing Conflicts of Interest; and, Justice.

Recommendation 7:5-A: The NFLPA should consider investing greater resources in investigating and enforcing player health issues, including Article 39 of the 2011 CBA.

Recommendations Concerning The NFL and NFLPA – continued

The 2011 CBA contains many provisions and rules concerning player health and club and club doctors' obligations related thereto. Article 39 of the CBA houses many of these obligations. However, as discussed above, questions have been raised by some stakeholders we interviewed about the NFLPA's ability to investigate and enforce player health provisions through grievances. One possibility is for the NFLPA to hire additional attorneys with a focus on investigating and litigating player health, safety and welfare matters.

Goal 6: To provide current and former players with the resources necessary to maximize their health.

Principles Advanced: Health Primacy; Empowered Autonomy; and, Collaboration and Engagement.

Recommendation 7:6-A: The NFLPA should continue to assist former players to the extent such assistance is consistent with the NFLPA's obligations to current players.

As discussed above, the NFLPA's principal obligations are to current players, not former players. This legal reality creates tension between the NFLPA and former players. In recent years, the NFLPA has made efforts to smooth this tension by negotiating benefits and creating programs that help former players. It is admirable of the current players that they effectively agreed to give up a portion of their potential income to help the players that came before them. The NFLPA should continue to try and balance these, at times, incongruent interests. To do so, the NFLPA can remind current players of the sacrifices made by former players and the different circumstances under which they played. The NFLPA works to advance the interests of current players, many of whom quickly become former players. Thus, the NFLPA should try to continue and help those men as much as it can.

Endnotes

1 American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).

2 *See* 26 U.S.C. § 501(c)(6) (2012) (specifying "professional football leagues" as tax exempt).

3 Drew Harwell and Will Hobson, *The NFL is dropping its tax-exempt status. Why that ends up helping them out ends up helping them out.* Wash. Post, Apr. 28, 2015, http://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/, *archived at* http://perma.cc/XH58-QCKG.

4 *See* Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (listing each of the 32 different entities as defendants in lawsuit).

5 *See* 2012 NFL Constitution and Bylaws, Art. II, § 2.1 (the purpose of the NFL is "[t]o promote and foster the primary business of League members, each member being an owner of a professional football club located in the United States.").

6 *See* 2012 NFL Constitution and Bylaws, Art. VIII, § 8.1.

7 *See id.* at § 8.4(b).

8 *See id.* at § 8.4(a).

9 *See id.* at § 8.10.

10 *See id.* at § 8.9.

11 *See id.* at § 8.13(A).

12 *See id.* at § 8.3.

13 *See* 2012 NFL Constitution and Bylaws, Art. III (discussing eligibility of members). The NFL's rule has withstood legal challenges. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994) (reversing judgment of $51 million for former New England Patriots owner Billy Sullivan and remanding for a new trial). In 1998, Sullivan settled the case for $11.5 million, leaving the NFL's policy in effect. *See* Frank Litsky, *Billy Sullivan, 86, Founder Of Football Patriots, Dies*, N.Y. Times, Feb. 24, 1998, http://www.nytimes.com/1998/02/24/sports/billy-sullivan-86-founder-of-football-patriots-dies.html, *archived at* http://perma.cc/8V2F-Y8NU. *See also* Drew D. Kause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust Law to Preserve Traditional Ownership – Implications Arising from William H. Sullivan's Antitrust Suit*, 2 Seton Hall J. Sports L. 175 (1992).

14 *See* 2012 NFL Constitution and Bylaws, Art. VIII (describing the process for hiring the Commissioner and the Commissioner's responsibilities and authority).

15 *See* Lindsay H. Jones, *NFL Owners Have Lots to Tackle at Annual Meeting*, USA Today, Mar. 23, 2014, http://www.usatoday.com/story/sports/nfl/2014/03/23/nfl-owners-meetings/6804693/, *archived at* http://perma.cc/FY7A-BGZK (discussing agenda for March 2014 meeting including potential rules changes, selection of Super Bowl hosts, disciplining Colts' owner Jim Irsay for a DUI, and, determining the schedule); Monique N Jones, *Recap: NFL Commissioner Roger Goodell Recaps Owners Meetings*, USA Today, Oct. 9, 2014, http://www.usatoday.com/story/sports/nfl/teams/2014/10/08/roger-goodell-news-conference-owners-meetings/16938197, *archived at* http://perma.cc/MLQ9-C86M (discussing agenda for October 2014 meeting including the sale of the Buffalo Bills, a new drug program, Commissioner discipline and the NFL's personal conduct policy, domestic violence issues, and, the possibility of a club moving to Los Angeles).

16 Ben Volin, *Still No Timetable on 'Deflategate' Report*, Bos. Globe, Mar. 25, 2015, *available at* 2015 WLNR 8888394.

17 *See* Mike Freeman, Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive) 98 (2015) ("Some . . . owners see their teams simply as ATM machines, and players as interchangeable parts.")

18 *See* Rob Huizenga, You're Okay, It's Just a Bruise 124 (1994) (The Raiders orthopedist, Dr. Robert Rosenfeld, explaining to Huizenga "Al doesn't like us to use stretchers . . . [t]he team gets demoralized and plays less aggressively when they see a teammate getting carted off the field on a stretcher."); *id.* at 150, 166 (Davis pressuring players to take pain-killing injections); *id.* at 239 (Davis pressuring Club doctors not to tell players about the risks of playing football or the full extent of their injuries); *id.* at 76 (A Raiders' questionnaire to college athletic trainers asking: "Is the athlete injury prone?" "Does he recover quickly?" "Will he play when he's ailing?").

19 Carlton Thompson, *Raiders, Davis Takes a Hit from Former Internist: Huizenga's Book Details Some Questionable Medical Practices*, Hous. Chronicle, Oct. 15, 1995, *available at* 1995 WLNR 5230160.

20 Todd Archer, *Jerry: Romo Injury Not Season-ending*, ESPN (Oct. 29, 2014, 1:29 PM), http://espn.go.com/dallas/nfl/story/_/id/11784154/dallas-cowboys-owner-jerry-jones-says-qb-tony-romo-play-sunday-arizona-cardinals, *archived at* http://perma.cc/RQ2F-HUDM.

21 Mark Purdy, *Purdy: John York enjoys San Francisco 49ers' return to the Super Bowl from the background,* San Jose Mercury-News, Jan. 22, 2013, http://www.mercurynews.com/ci_22429014/purdy-john-york-enjoys-san-francisco-49ers-return, *archived at* http://perma.cc/7LGM-4YKV.

22 *See* Paul Gutierrez, *NFL health chair says game 'safer,'* ESPN, (Mar. 23, 2015), http://espn.go.com/nfl/story/_/id/12548062/john-york-nfl-health-safety-advisory-committee-cites-culture-change, *archived at* http://perma.cc/WTE9-QQUM; David Fucillo, *John York discusses concussions, recent 49ers retirement,* SB Nation (Jun. 17, 2015), http://www.ninersnation.com/2015/6/17/8797057/john-york-discusses-concussions-recent-49ers-retirements, *archived at* http://perma.cc/NM2A-YW3Q.

23 *See* Samer Kalaf, *The Colts' New Rule Proposal: Touchdown Drives Worth Up To Nine Points*, Deadspin (Mar. 18, 2015, 3:33 PM), http://deadspin.com/the-colts-new-rule-proposal-touchdown-drives-worth-up-1692203684, *archived at* http://perma.cc/UHV8-EFVY (providing NFL's internal summary document of proposed rule changes and describing 2015 Competition Committee as Atlanta Falcons President Rich McKay, St. Louis Rams Head Coach Jeff Fisher, Dallas Cowboys Chief Operating Officer Stephen Jones, Cincinnati Bengals Head Coach Marvin Lewis, New York Giants Owner John Mara, Green Bay Packers President Mark Murphy, Baltimore Ravens General Manager Ozzie Newsome, Houston Texans General Manager Rick Smith and Pittsburgh Steelers Head Coach Mike Tomlin).

24 CBA, Art. 50, § 2.

25 Michael David Smith, *Five Rules Changes Get NFL Owners' Approval at League Meeting,* ProFootballTalk (Mar. 26, 2014, 10:11 AM), http://profootballtalk.nbcsports.com/2014/03/26/five-rules-changes-pass-as-nfl-owners-vote-at-league-meeting/, *archived at* http://perma.cc/6Z49-4J3J.

26 *See* Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions and the Battle for Truth 344 (2013) [hereinafter, "*League of Denial*"] (describing how the NFL agreed to move the yard line from where kickoffs take place from the 30 yard line to the 35 yard line at the insistence of Kevin Guskiewicz, a University of North Carolina scientist and concussion expert).

27 CBA, Art. 50, § 1(c).

28 NFL Comments and Corrections (June 24, 2016).

29 *See* 26 U.S.C. § 501(c)(5) (listing labor organizations as those exempted from taxation). An additional aspect of the NFLPA's operations also bears mentioning. In 1994, the NFLPA formed a Virginia for-profit entity known as the National Football League Players Association, Incorporated, or "Players, Inc." Players, Inc. is responsible for group licensing of NFL player rights. In 2013, each NFL player received $8,800 in royalties from Players, Inc. *See* NFLPA Department of Labor Form LM-2 Labor Organization Annual Report (2013). *See also* Adderley v. Nat'l Football

League Players Ass'n, 07-cv-943, 2008 WL 3287030 (N.D. Cal. Aug. 6, 2008) (denying NFLPA's motion to dismiss lawsuit by former players concerning Players, Inc. royalties); David Elfin, NFLPA settles lawsuit with Adderly for $26.5M, Wash. Times, Jun. 6, 2009, *available at* 2009 WLNR 10883474; Grant v. Nat'l Football League Players Ass'n, 11-cv-3118, 2012 WL 1870974 (C.D.Cal. May 22, 2012) (rejecting former players' claims that NFLPA breached its fiduciary duty to them by having failed to seek licensing opportunities for them and by alleging having failed to distribute royalty income accurately), *aff'd* 566 Fed.Appx. 569 (9th Cir. 2014).

30 U.S.C. § 159(a).

31 Eller v. Nat'l Football League Players Ass'n, 872 F. Supp. 2d 823, 834 (D.Minn. 2012).

32 *See Department Contacts,* Nat'l Football League Players Ass'n, https ://www.nflplayers.com/about-us/Department--Contacts/ (last visited Aug. 7, 2015) (listing NFLPA employees in the following departments: Executive; Benefits; Communications; Finance and Asset Management; Former Player Services; Human Resources; Information Systems; Legal; Player Affairs and Development; Salary Cap and Agent Administration; Security and Operations; and Players, Inc.).

33 NFL Players Association Constitution, Art. 3 (2007), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/NFLPA%20Constitution%20-%20March%202007.pdf, *archived at* https://perma.cc/HAF5-24E8?type=pdf ("NFLPA Constitution").

34 NFLPA Constitution, § 4.01(b).

35 NFLPA Constitution, § 1.03.

36 NFLPA Constitution, Art. 3.

37 NFLPA Constitution, § 5.01.

38 NFLPA Constitution, §§ 4.01–02.

39 NFLPA Constitution, § 5.02.

40 NFLPA Constitution, § 4.01(a). "A person is not eligible for election or re-election as an Executive Officer [, including President,] unless he has been on the roster of an NFL Club during the previous twelve (12) months." NFLPA Constitution, § 4.03. There has been speculation that NFL Clubs intentionally refuse to sign NFLPA Presidents. *See, e.g.,* Mike Florio, *NFLPA president gets another NFL gig*, ProFootballTalk (Jul. 29, 2014, 10:31 AM), http://profootballtalk.nbcsports.com/2014/07/29/nflpa-president-gets-another-nfl-gig/, *archived at* http://perma.cc/RF2Q-D3C6.

41 NFLPA Constitution, § 4.06.

42 NFLPA Constitution, §4.01.

43 Bob Carter, *Rozelle Made NFL What It Is Today*, ESPN, http://espn.go.com/classic/biography/s/rozelle_pete.html (last visited Aug. 7, 2015), *archived at* http://perma.cc/9NS6-D4R2.

44 *History,* Nat'l Football League Players Ass'n, https://www.nflpa.com/about/history (last visited Aug. 7, 2015), *archived at* https://perma.cc/3D2R-8EQG?type=pdf [hereinafter "NFLPA History"].

45 *Id.*

46 CBA, Art. VII.

47 CBA, Art. VII, § 2(f). By the conclusion of Rozelle's tenure, medical insurance coverage increased to a maximum of $1 million. 1982 CBA, Art. XXXIV.

48 CBA, Art. XI, § 4.

49 CBA, Art. XI, § 5.

50 NFLPA History *supra* n. 44.

51 Players deemed to have suffered "substantial partial or total disablement as determined by the Retirement Board which is deemed to be permanent" eligible for $200/month in benefits for the duration of the disability. 1970 CBA, Art. VI § 2(c)(2). When Rozelle retired as Commissioner in 1989, the benefits were $4,000/month for football-related injuries and $750/month for non-football related injuries. 1982 CBA, Art. XXXIV, § 8.

52 CBA, Art. VI, § 4. The amounts of coverage were not identified. When Rozelle retired, a player could obtain a $50,000 life insurance policy plus $10,000 of coverage for each Credited Season up to $100,000. 1982 CBA, Art. XXXIII, § 1.

53 CBA, Art. VI, § 4.

54 NFLPA History *supra* n. 44.

55 *See* Glenn M. Wong, *Essentials of Sports Law*, § 11.3 (4th ed. 2010) (providing summary of NFL-NFLPA labor history).

56 *Id.*

57 CBA, Art. XI.

58 *Id.* at § 1.

59 *Id.* at § 3.

60 *See* Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA Ent. L. Rev. 179, 187 (2009) (describing the various legal proceedings leading to free agency in those sports).

61 *See* Wong, *supra* n. 55.

62 *Id.*

63 Bart Barnes, *Garvey: Players May Seek 65% of NFL Gross Income, NFLPA Will Seek Base Salary Scales,* Wash. Post, Nov. 25, 1981, *available at* 1981 WLNR 488341.

64 CBA, Art. XXI, § 1.

65 *Id.*

66 *Id.*

67 CBA, Art. XXXI, § 2.

68 CBA, Art. XXXI, § 6.

69 CBA, Art. XXXI, § 3.

70 CBA, Art. XXXI, § 4.

71 CBA, Art. XXXII, § 2.

72 NFLPA History, *supra* n. 44.

73 *See* Bart Barnes, *Players Adamant About Drug Test,* Wash. Post, July 15, 1982, *available at* 1982 WLNR 594666; Ken Denlinger, *Teamwork is the Solution,* Wash. Post, July 2, 1982, *available at* 1982 WLNR 587496; Bart Barnes, *Rozelle, Garvey: Different Views on Drug Abuse*, Wash. Post, June 19, 1982, *available at* 1982 WLNR 569668.

74 *See A Brief History of the Drug War,* DrugPolicy.org, http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war (last visited Aug. 7, 2015), *archived at* http://perma.cc/39W2-7PM5; *II. America's Drug Use Profile — Cocaine Abuse: We Are Still Paying The Price For The 1980s*, Office of National Drug Control Policy, https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/ii-e.html (last visited Aug. 7, 2015), *archived at* https://perma.cc/4X77-45E5 (discussing significant increases in cocaine usage during the 1980s).

75 *See Cocaine And A Super Bowl Team: The Last Straw: Drugs In The NFL: A Chronology,* L.A. Times, Jan. 29, 1986, http://articles.latimes.com/1986-01-29/sports/sp-1319_1_cocaine, *archived at* http://perma.cc/FGW9-QF9U (discussing drug-related incidents and policies in the NFL from 1972–86); Frank Litsky, *Player Tells of Wide Drug Use in the N.F.L.*, N.Y. Times, Jun. 10, 1982, http://www.nytimes.com/1982/06/10/sports/player-tells-of-wide-drug-use-in-nfl.html, *archived at* http://perma.cc/E9GA-V6JK (discussing allegations by former player that cocaine usage was rampant throughout the NFL); David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?* 2 Marq. Sports. L.J. 1 (1991).

76 Barnes, *supra* note 73, at 1982 WLNR 569668.

77 *Id.* at 1982 WLNR 594666.

78 *See* Sisson, *supra* note 75, at 3–10 (discussing evolution of drug testing in the NFL during the 1980s).

79 CBA, Art. XXXI, § 7.

80 *See* Sisson, *supra* note 75, at 3–10 (discussing evolution of drug testing in the NFL during the 1980s).

81 *Id.*

82 NFLPA History, *supra* n. 44.

83 *See* Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1, 9–12 (2012) (discussing NFL-NFLPA labor relations between 1987 and 1993).

84 *Id.*

85 *See id.* at 6–13; NFLPA History.

86 Gary Pomerantz, *Arbitrator Rejects NFL Drug Testing*, Wash. Post, Oct. 28, 1986, *available at* 1986 WLNR 1907666

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88 Bob Carter, *Rozelle Made NFL What It Is Today*, ESPN.com, http://espn.go.com/classic/biography/s/rozelle_pete.html (last visited Aug. 7, 2015), *archived at* http://perma.cc/9NS6-D4R2.

89 *Paul Tagliabue*, Covington & Burling, LLP, http://www.cov.com/ptagliabue/ (last visited Aug. 7, 2015), *archived at* http://perma.cc/P8QR-CCHA.

90 *See* Marty York, *Price Tag of $80 Million NFL Version of Hard Times*, Globe & Mail (Toronto, ON), Mar. 22, 1984, *available at* 1984 WLNR 830899.

91 *See* Prentis Rogers, *CBS Drops Another $1 Billion into the NFL's Coffers,* Atlanta J-Const. (GA), Mar. 8, 1990, *available at* 1990 WLNR 2057314 (discussing CBS' agreement to pay more than $1 billion for a four year deal; NBC paying between $700 and $900 million for a multi-year deal and club television revenues equaling $32 million per year); Michael Janofsky, *$1.4 Billion Deal Adds Cable to N.F.L. Picture*, N.Y. Times, Mar. 16, 1987, *available at* 1987 WLNR 995997 (on file with author) (discussing ESPN's agreement to pay $1.42 billion to television NFL games over a three-year period).

92 *See* NFLPA History *supra* note 44; Deubert, *supra* note 83.

93 Deubert, *supra* note 83.

94 Leonard Shapiro, *NFL Players Making More Money, Living Longer, Report Says,* Wash. Post, Jan. 28, 1994, *available at* 1994 WLNR 5690724; Paul Needell, *There Is Life After Football Study: NFL Players Don't Die Young,* N.J. Star-Ledger, Sept. 29, 2002, *available at* 2002 WLNR 12895808; Alan Greenberg, *Case of Ticker Shock: Down the Road, that Hulking Lineman is Likely to Have a Heart in Sad Shape,* Hartford Courant, June 17, 2001, *available at* 2001 WLNR 10659744.

95 *Id.*

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104 *League of Denial*, Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions, and the Battle for Truth 24 (2013).

105 Gary Mihoces, *Documentary: For Years, NFL Ignored Concussion Evidence*, USA Today, Oct. 7, 2013, http://www.usatoday.com/story/sports/nfl/2013/10/07/frontline-documentary-nfl-concussions/2939747/, *archived at* http://perma.cc/N8H2-WMWV.

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108 *See id.* at 131 (discussing Pellman's appointment as Chairman of the MTBI Committee).

109 *Id.*

110 *Id.* at 127–28.

111 *Id.* at 131.

112 *Id.*

113 *Id.* at 126.

114 *Id.* at 131.

115 *Kevin Guskiewicz, Senior Associate Dean for Natural Sciences,* Univ. of N.C., http://college.unc.edu/administrationcontacts/guskiewicznaturalsciences/ (last visited Aug. 7, 2015), *archived at* http://perma.cc/JN4T-KP4M.

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117 CBA, Art. XXXV.

118 *League of Denial, supra* note 104, at 131.

119 *Id.* at 132.

120 *Id.* at 138–39. The test, known as ImPACT, became widely used in all levels of sports and thus very profitable for Lovell. *Id.* at 183. The MTBI Committee even promoted its usage. *Id.*

121 *Id.* at 142–44.

122 *Id.*

123 *See id.* at 180 (mentioning that the MTBI Committee published a total of 16 articles in *Neurosurgery*); *id.* at 276 (discussing the MTBI Committee's sixteenth paper in June 2009).

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125 *Id.*

126 *See id.* at 180 (mentioning that the MTBI Committee published a total of 16 articles in *Neurosurgery*); *id.* at 276 (discussing the MTBI Committee's sixteenth paper in June 2009).

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129 *Id.* at 144; 167.

130 *Id.* at 146 (discussing Cantu's role as the sports section editor of *Neurosurgery*).

131 *Id.*; *id.* at 172.

132 *Id.* at 171–72.

133 *Id.*

134 *See id.* at 188–89 (discussing Omalu's article).

135 *Id.* at 9–10; 151–61.

136 *Id.*; *id.* at 163.

137 *Id.* at 164.

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139 *Id.* at 189–91.

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142 Ken Murray, *Tagliabue to Retire as NFL's Chief in July; He Made Baltimore Wait for a New Team,* Balt. Sun, Mar. 21, 2006, *available at* 2006 WLNR 4664231.

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146 *Id.* at 168.

147 Gary Mihoces, *Issues Debated on Concussions, Doctors Disagree at NFL Meeting,* USA Today, Jun. 20, 2007, *available at* 2007 WLNR 11537008; *League of Denial, supra* note 104, at 219 (describing concussion summit as "designed to get the new commissioner up to speed").

148 *League of Denial, supra* note 104, at 219–28 (describing meeting).

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150 *Id.*

151 *Id.* ("'Keep doing what you're doing,' he told Guskiewicz.")

152 *See* Harvey Araton, *Stealth Killer Puts Doctor On Mission With N.F.L.,* N.Y. Times, May 8, 2007, http://www.nytimes.com/2007/05/08/sports/football/08araton.html, *archived at* http://perma.cc/Y4EU-FRYW; Jodie Valade, *NFL Glories Come With A Price: A Career In Football Rewards Almost All Former Players With A Lifetime of Pain And Few Options To Deal With It*, Cleveland Plain Dealer, Aug. 17, 2003, *available at* 2003 WLNR 517073; Jeannine Stein, *This Sport Stays In Contact, Ailments Haunt NFL Retirees,* Chicago Trib., Jun. 15, 2003, *available at* 2003 WLNR 15259601.

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163 *Id.* at 34.

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166 *Id.*

167 *Id.* at 267 (mentioning Davis' presence); *id.* at 235 (discussing Davies' background).

168 *Id.* at 235.

169 *See id.* at 235–39 (discussing Davies' review and findings).

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171 *Id.* at 283–88.

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177 *See id.* at 210 (2013) (discussing Colt neurological consultant Hank Feuer and Cynthia Arfken, an associate professor at Wayne State University, stating there was no basis for the MTBI Committee's finding, in its seventh paper, that "it might be safe for college/high school football players to be cleared to return to play on the same day as [a concussion]."); *id.* at 178–79 (discussing Mark Lovell's disavowing responsibility for certain of the MTBI Committee's research).

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199 Class Action Complaint, Eller v. Nat'l Football League Players Ass'n, *supra* note 196 at ¶ 136.

200 Eller v. Nat'l Football League Players Ass'n, 872 F. Supp. 2d 823 (D. Minn. 2012), *aff'd* 731 F.3d 752 (8th Cir. 2013).

201 *See id.*

202 *Duke Provides Infection Control Steps to Keep Pro Football Players Healthy,* Duke Med. News & Comm., https://pdc.dukemedicine.org/news/duke-provides-infection-control-steps-keep-pro-football-players-healthy, (last visited Mar. 15, 2016), *archived at* https://perma.cc/FSY4-KKSC.

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204 *See Heart Health Concerns for NFL Players*, Nat'l Inst. Occupational Health-Safety, Mar. 2012 (discussing methodology and results of 1994 study), *available at* http://www.cdc.gov/niosh/pgms/worknotify/pdfs/NFL_Notification_01.pdf, *archived at* https://perma.cc/LCT5-K9UD?type=pdf.

205 Everett J. Lehman et al., *Neurodegenerative causes of death among retired National Football League players*, Neurology 2012;79:1970–74.

206 *See id.*

207 *Id.*

208 *Id.*

209 Class Action Complaint, Ballard v. Nat'l Football League Players Ass'n, (E.D.Mo. 2014) (No. 14-cv-01267).

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219 Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 PM), http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/, *archived at* https://perma.cc/P5NZ-XVS4.

220 The NFL currently has television broadcasting agreements with ESPN, NBC, CBS, FOX, NFL Network and DirecTV. In addition, the NFL has a radio broadcasting agreement with Westwood One. In total, the broadcasting agreements bring in approximately $7 billion in annual revenue to the NFL. Kurt Badenhausen, *The NFL Signs TV Deals Worth $27 Billion,* Forbes (Feb. 14, 2011, 6:13PM), http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/, *archived at* https://perma.cc/B64R-2GHV?type=pdf.

221 NFL Ventures is responsible for negotiating all of the league's major sponsorship, marketing, and media rights deals. NFL Ventures, which Commissioner Goodell ran before becoming Commissioner, includes four wholly-owned subsidiaries: NFL Enterprises, NFL Properties, NFL Productions, and NFL International. *See* Tommy Craggs, *Exclusive: Leaked Documents Show Operating Profits for NFL Ventures Rose 29 Percent Last Year*, Deadspin (July 15, 2011, 1:10 PM), http://deadspin.com/5821386/audited-financials-operating-profit-for-nfl-ventures-lp-rose-from-999-million-to-13-billion-last-year, *archived at* https://perma.cc/N9KB-7KGP?type=source.

222 NFL Network is the league-owned and operated television network devoted full-time to the NFL, including broadcasting select Thursday night games. For more information, see www.nfl.com/nflnetwork.

223 NFL Properties is responsible for licensing, sponsorship, and marketing. NFL Properties was the subject of Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010). NFL Properties was created by the 32 individual clubs to collectively market and license the clubs' individual intellectual property, such as names, colors, logos, and trademarks. In 2000, the clubs — through NFL Properties — granted Reebok an exclusive license to produce and sell trademarked headwear for the 32 clubs. American Needle, a former licensee and creator of NFL appareled headwear, could no longer create headwear with NFL logos and trademarks. American Needle challenged the exclusive license as an illegal restraint of trade by the 32 NFL clubs. The Northern District of Illinois granted the NFL summary judgment after finding that NFL Properties constituted a single entity for antitrust purposes, and therefore there was no contract, combination, or conspiracy to restrain trade. *See* Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007). The Seventh Circuit affirmed. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008). The Supreme Court reversed. *Am. Needle*, 560 U.S. 183. While the Court noted that NFL clubs "depend upon a degree of cooperation for economic survival," the necessity of cooperation does not transform concerted action into the independent action of a single-entity. *Id.* at 198. Furthermore, that "even if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football." *Id.* at n.7.

224 NFL Enterprises is responsible for advertising, publicizing, promoting, marketing, and selling broadcasts of NFL games.

225 NFL Productions, also known as NFL Films, is the league-owned film company that for more than 50 years has produced award-winning films about the NFL. For more information *see* www.nflfilms.com.

226 NFL Digital is responsible for the league's technology and new media ventures, including www.nfl.com and NFL Mobile.

227 CBA, Art. 12, § 6.

228 CBA, Art. 12, §1, § 6.

229 Mark Leibovich, *Roger Goodell's Unstoppable Football Machine,* N.Y. Times, Feb. 3, 2016, http://www.nytimes.com/2016/02/07/magazine/roger-goodells-unstoppable-football-machine.html?_r=0, *archived at* https://perma.cc/Y7L5-A99L.

230 CBA, Art. 12, § 6(c)(i).

231 CBA, Art. 1.

232 CBA, Art. 12, § 2.

233 CBA, Art. 12, § 6(c)(v).

234 Substance Abuse Policy, § 1.3.

235 Substance Abuse Policy, § 1.3.1.

236 *Id.*

237 *See generally* 2014 Substance Abuse Policy, § 1.

238 *See* 2014 Substance Abuse Policy, § 1.4 – 1.5.

239 *See generally* 2014 Steroid Policy.

240 Steroid Policy, § 6.

241 *Id.* at § 3.1

242 *Id.* at § 7.

243 *See* 26 U.S.C. § 4980H.

244 Courts have considered whether the NFL is an employer of NFL players with mixed results.

In *Williams v. Nat'l Football League*, a Minnesota trial court determined that the NFL was a joint employer of two members of the Minnesota Vikings for purposes of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA). Articulating the Minnesota Supreme Court's five-part test to determine whether an employment relationship exists, the court found that the NFL controlled the drug testing process, controlled the means and manner of performance and the location of team play, controlled the mode of payment to players, controlled the materials and tools used by players, and controlled the right to discipline and discharge players. Taken together, these factors supported the conclusion that the NFL is an employer for the purposes of DATWA and that DATWA applied in that case. 27-cv-08-29778, 2010 WL 1793130 (Minn.Dist.Ct. May 6, 2010).

Conversely, in *Brown v. Nat'l Football League,* the United States District Court for the Southern District of New York found that the NFL was not

a former player's employer. In *Brown*, a former NFL player brought a personal injury action in state court against the NFL, seeking damages for a career-ending eye injury he sustained during a game when a referee threw a penalty flag that struck the player in the eye. The Court observed, "[a]t the time of his injury, Brown worked not for the NFL, but for the Cleveland Browns Football Company, a Delaware limited partnership and an entirely separate entity which happens to be a member of the NFL." 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002).

245 *See* 29 U.S.C. § 651, et seq.

246 *See* 42 U.S.C. § 12101, et seq.

247 Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, Univ. Penn. L. Rev. (forthcoming 2017).

248 *See* Complaint, Maxwell v. Nat'l Football League, BC465842 (Cal.Sup.Ct. July 19, 2011), Dkt. No. 1.

249 *See Plaintiffs/Former Players*, NFL Concussion Litig., http://nflconcussionlitigation.com/?page_id=274 (last visited Aug. 7, 2015) (stating that as of June 1, 2013, there were more than 4,800 named player-plaintiffs in 242 concussion-related lawsuits).

250 *See* 28 U.S.C. § 1407 (describing grounds and process for transferring and consolidating multidistrict litigation).

251 Plaintiffs' Amended Master Administrative Long-Form Complaint, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D.Pa. July 17, 2012), ECF No. 2642.

252 *See generally* Docket, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D.Pa. July 17, 2012) (including many case transfer orders).

253 *See id.*

254 *See* Plaintiffs' Amended Master Administrative Long-Form Complaint at ¶ 6, In re Nat'l Football League Players' Concussion Injury Litig., 2:12-md-2323 (E.D.Pa. July 17, 2012), ECF No. 2642 ("to provide players with . . . information that protect them as much as possible from short-term and long-term health risks"); ¶ 90 ("to provide truthful information to NFL players regarding risks to their health"); ¶ 91 ("to keep the players informed of safety information they needed to know"); ¶ 99 ("to keep NFL players informed of neurological risks, to inform NFL players truthfully, and not to mislead NFL players about the risks of permanent neurological damage that can occur from MTBI incurred while playing football"); ¶ 222 ("to educate [the public] as to the risks of concussions due to the League's unique position of influence"); ¶ 248 ("to advise Plaintiffs of th[e] heightened risk" "that the repeated traumatic head impacts the Plaintiffs endured while playing NFL football were likely to expose them to excess risk to neurodegenerative disorders and diseases, including but not limited to CTE, Alzheimer's disease or similar cognitive-impairing conditions"); ¶ 304 ("to disclose accurate information to the Plaintiffs"); ¶ 324 ("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 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)").

255 *See id.* at ¶ 6 ("to provide players with rules . . . that protect them as much as possible from short-term and long-term health risks"); ¶ 90 ("to act in the best interests of the health and safety of NFL players"); ¶ 90 ("to take all reasonable steps necessary to ensure the safety of players"); ¶ 91 ("to make the game of professional football safer for the players"); ¶ 103 ("to govern player conduct on and off the field"); ¶ 323 ("to supervise how the game of football was played in the United States"); and, ¶ 324 ("to provide a safe environment for players and because of its superior knowledge of the risks of injury to players").

256 *See id.* at ¶ 17 ("to investigate, study, and truthfully report the medical risks associated with MTBI [(mild traumatic brain injuries)] in football"); ¶ 106 ("to provide truthful scientific research and information about the risks of concussive and sub-concussive injuries to NFL players"); ¶ 150 ("to use reasonable care in the study of concussions and post-concussion syndrome in NFL players; the study of any kind of brain trauma relevant to the sport of football; the use of information developed; and the publication of data and/or pronouncements from the MTBI Committee"); ¶¶ 340, 358 ("to exercise reasonable care in the MTBI Committee's work and the NFL and its agents' public statements about the substance of the Committee's work"); ¶ 372 ("to retain and employ persons within the MTBI Committee who were professionally competent to study and render opinions on the relationship between repetitive head impacts in football and brain injury and to ensure that those whom it hired had no conflict of interest and that each had the professional and personal qualifications to conduct those studies and render opinions that were scientifically rigorous, valid, defensible, and honest"); ¶ 378 ("not to allow those incompetent persons it had hired within the MTBI Committee to continue to conduct incompetent and falsified studies and render incompetent opinions on the relationship between repetitive head impacts in football and brain injury.")

257 *See* Class Action Settlement Agreement (As Amended), In re Nat'l Football League Players' Concussion Injury Litigation, 12-md-2323 (Feb. 13, 2015), ECF No. 6481-1.

258 *In re Nat'l Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351, 393 (E.D. Pa. 2015).

259 *In re Nat'l Football League Players' Concussion Injury Litigation,* 2016 WL 1552205 (3d Cir. Apr. 18, 2016).

260 Mike Florio, *Apparently, not all former players dropped their objection to the concussion settlement*, ProFootballTalk (Aug. 31, 2016, 12:05 PM), http://profootballtalk.nbcsports.com/2016/08/31/apparently-not-all-former-players-dropped-their-objection-to-the-concussion-settlement/, *archived at* https://perma.cc/R34V-3C8H.

261 This information was provided by the NFL prior to the 2016 season.

262 CBA, Art. 39, § 1(d); this information was also provided by the NFLPA.

263 CBA, Art. 50, § 2.

264 *Transcript – 2016 Injury Data Results Conference Call*, NFL Communications, Jan. 29, 2016, https://nflcommunications.com/Pages/Transcript---2016-Injury-Data-Results-Conference-Call.aspx, *archived at* https://perma.cc/RKC6-352G.

265 The NFL provided us with a copy of the poster.

266 Former New York Giants running back Charles Way is the Director of the NFL's Player Engagement Department. Michael Eisen, *Charles Way Named Head of NFL's Player Engagement Department*, Giants.com (Jul, 2, 2014), http://www.giants.com/news-and-blogs/article-1/Charles-Way-named-head-of-NFLs-Player-Engagement-Department/d98165b5-1b82-4243-a3d0-5746aae812e1, *archived at* http://perma.cc/QBN8-7Z2M.

267 *See Player Care Foundation,* NFL Player Care Found., http://www.nflplayercare.com/ (last visited Aug. 7, 2015), *archived at* http://perma.cc/93M6-XCN2.

268 Nat'l Football League, 2015 Player Health & Safety Report 30 (2015), http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf/, *archived at* https://perma.cc/Y4BN-TUP7?type=pdf.

269 *See* Jim Baumbach, *Life After Football,* Newsday (Jan. 22, 2015), http://data.newsday.com/projects/sports/football/life-football/, *archived at* http://perma.cc/77DP-LUUE.

270 *See* Jim Baumbach, *Life After Football*, Newsday (Jan. 22, 2015), http://data.newsday.com/projects/sports/football/life-football/, *archived at* http://perma.cc/77DP-LUUE.

271 For example, Injury Grievances, which occur when, at the time a player's contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

272 *See* 2011 CBA, Art. 43, § 1.

273 *See* 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").

274 CBA, Art. 43, § 2.

275 The Non-Injury Grievance arbitrator has the authority to determine whether a complaint against a doctor fit within his or her jurisdiction under Article 43. *See* 2011 CBA, Art. 43, § 1 (discussing scope of Non-Injury Grievance arbitrator's jurisdiction).

276 U.S.C. § 185.

277 Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 213, 200 (1985).

278 Williams v. Nat'l Football League, 582 F.3d 863, 870–72 (8th Cir. 2009). The case was subsequently remanded to Minnesota state court for resolution of the Williamses' state law claims on the merits. Williams v. Nat'l Football League, 10-cv-613, 2010 WL 760701 (D. Minn. Mar. 4, 2010). The case proceeded to trial after certain parts of the Williamses' statutory claims were dismissed on summary judgment. Williams v. Nat'l Football League, 27-cv-08-29778, 2010 WL 547537 (Minn. Dist. Ct. Feb. 18, 2010). At trial the court determined that the Williamses were not harmed by the NFL's state law violations and thus denied their request for a permanent injunction and dissolved a prior temporary restraining order. Williams v. Nat'l Football League, 27-cv-08-29778, 2010 WL 1793130 (Minn. Dist. Ct. May 6, 2010); *aff'd on different grounds*, Williams v. Nat'l Football League, 794 N.W.2d 391 (2011). As part of 2011 CBA, the NFL agreed to reduce the players' suspensions from four games to two. *See* Mike Florio*, StarCaps Suspensions Finally Are Finalized,* ProFootballTalk (Sept. 2, 2011, 5:07 PM), http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/, *archived at* http://perma.cc/BRR8-RPPL.

279 *Williams*, 582 F.3d 863.

280 *Id.* at 878, *quoting* Lueck, 471 U.S. at 211–12.

281 Nat'l Football League Players Ass'n v. Nat'l Football League, 654 F. Supp. 2d 960,972 (D. Minn. 2009).

282 F. Supp. 2d 894 (S.D. Ohio 2007).

283 *Id.* at 898.

284 *See* Stringer v. Minnesota Vikings Football Club, LLC, 705 N.W.2d 746 (Minn. 2005).

285 *See* Stringer v. Minnesota Vikings Football Club, LLC, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).

286 *Id.* at 909.

287 *Id.* at 912.

288 *NFL, Stringer's Widow Settle Lawsuit*, ESPN (Jan. 26, 2009, 4:25 PM ET), http://sports.espn.go.com/nfl/news/story?id=3861331, *archived at* http://perma.cc/UM7H-HD45. Following Stringer's death, the NFL now issues an annual memorandum to NFL Clubs warning them about the risks of players overheating during training camp. *See, e.g.,* Memorandum from NFL Injury and Safety Panel (Elliott Hershman, M.D., Chairman), to General Managers, Head Coaches, Team Physicians, and Team Athletic Trainers re: 2014 Training Camps – Adverse Weather Conditions (July 11, 2014) (on file with author). In addition, a preseason training camp presentation to players includes materials from the Korey Stringer Institute on the risks of overheating. The NFL provided us with a copy of the preseason training camp presentation.

289 *See* Order Denying Plaintiffs' Motion to Remand, Maxwell v. Nat'l Football League, 11-CV-08394 (C.D.Cal. Dec. 8, 2011); Order Denying Plaintiffs' Motion to Remand, Pear v. Nat'l Football League, 11-CV-08395, Dec. 8, 2011 (C.D.Cal Dec. 8, 2011.), ECF No. 61; Order Denying Plaintiffs' Motion to Remand, Barnes v. Nat'l Football League, 11-CV-08396, Dec. 8, 2011 (C.D. Cal. Dec. 8, 2011), ECF No. 58.

290 Duerson v. Nat'l Football League, 12-cv-2513, 2012 WL 1658353, *6 (N.D.Ill. May 11, 2012).

291 Green v. Arizona Cardinals Football Club LLC*,* 21 F.Supp.3d 1020 (E.D.Mo. May 14, 2014).

292 Mike Florio, *NFL Suffers Major Setback in Concussion Cases*, ProFootballTalk (May 14, 2014, 9:28 PM), http://profootballtalk.nbcsports.com/2014/05/14/nfl-suffers-major-setback-in-concussion-case/, *archived at* http://perma.cc/3VQD-DCH9.

293 *See* Transfer Order, *In re: Nat'l Football League Players' Concussion Injury Litigation*, 15-cv-1903 (E.D. Mo. Apr. 11, 2016), ECF No. 38.

294 *See* Complaint, Dent v. Nat'l Football League¸ 14-cv-2324 (N.D. Cal. May 20, 2014), ECF No. 1.

295 *Id.* at ¶ 15. In addition to state law claims sounding in fraud and negligence, the plaintiffs alleged the NFL violated several statutes. For example, the plaintiffs allege that the NFL violated: "the Controlled Substances Act's requirements governing the acquisition, storage, provision and administration of, and recordkeeping concerning, Schedule II, III and IV controlled substances"; the Food, Drug, and Cosmetic Act's "requirements for prescriptions, warnings about known and possible side effects, and proper labeling, among other violations"; and, "state laws governing the acquisition, storage and dispensation of prescription medications." *Id.* at ¶¶ 354–57.

296 Dent v. Nat'l Football League, 14-cv-2324, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014). *See also* Nelson v. Nat'l Hockey League, 20 F.Supp.3d 650 (N.D.Ill. Feb. 20, 2014) (claims by estate of deceased NHL player that NHL negligently failed to monitor the player's use of addictive medications and head trauma preempted by CBA).

297 Dent v. Nat'l Football League, 14-cv-2324, 2014 WL 7205048, *12 (N.D. Cal. Dec. 17, 2014) ("In ruling against the novel claims asserted herein, this order does not minimize the underlying societal issue. In such a rough-and-tumble sport as professional football, player injuries loom as a serious and inevitable evil. Proper care of these injuries is likewise a paramount need. The main point of this order is that the league has addressed these serious concerns in a serious way – by imposing duties on the clubs via collective bargaining and placing a long line of health-and-safety duties on the team owners themselves. These benefits may not have been perfect but they have been uniform across all clubs and not left to the vagaries of state common law. They are backed up by the enforcement power of the union itself and the players' right to enforce these benefits. Given the regime in place after decades of collective bargaining over the scope of these duties, it would be impossible to fashion and to apply new and supplemental state common law duties on the league without taking into account the adequacy and scope of the CBA duties already set in place. That being so, plaintiffs' common law claims are preempted by Section 301 of the Labor Management Relations Act of 1947. The motion to dismiss all of plaintiffs' claims based on preemption grounds under Section 301 is Granted.")

298 NFLPA Constitution, § 2.00.

299 *See* NFLPA Department of Labor Form LM-2 Labor Organization Annual Report (2013), p. 27.

300 CBA, Preamble.

301 *See* NFLPA Constitution, § 2.06 (discussing suspension of a member's membership for failure to pay dues regardless of type of membership); *see also* NFLPA Constitution, § 2.11 (providing all retired players with two years of membership in the NFLPA at no cost). The NFLPA Constitution never discusses what it means to an "associate" member.

302 *See* NFLPA Constitution, § 2.06 (discussing suspension of a member's membership for failure to pay dues regardless of type of membership).

303 CBA, Art. 47, § 2.

304 CBA, Art. 47, § 1.

305 CBA, Art. 47, § 6.

306 *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n. 22 (1984) ("Because a union so selected is the exclusive representative of all employees in a bargaining unit, the union bears a concomitant duty to represent the interests of each and every employee in that unit fairly"); *see also* Gilpin v. Am. Fed'n of State, Cnty, and Mun. Emps, AFL-CIO, 875 F.2d 1310, 1311 (7th Cir. 1989) ("A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who don't belong to the union.")

307 *See, e.g.*, Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985) (reviewing player's claim for a breach of the NFLPA's duty of fair representation); Sharpe v. Nat'l Football League Players Ass'n, 941 F.Supp. 8 (D.D.C. 1996) (same); Chuy v. Nat'l Football League Players Ass'n, 495 F.Supp. 137 (E.D.Pa. 1980) (same).

308 Vaca v. Sipes, 386 U.S. 171, 207 (1967).

309 Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); *see also* Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004) (discussing NFLPA's discretion in setting policy concerning NFL players).

310 *See, e.g.,* Wooddell v. Int'l Broth. of Elec. Workers, Local 71, 502 U.S. 93 (1991) (reinstating plaintiff union-members breach of union constitution claim).

311 Merk v. Jewel Co., 848 F.2d 761, 766 (7th Cir. 1988) ("because the 2,000 former workers are not statutory 'employees', the Union does not represent them. The Union owes no duty to those it does not represent. If it does not have a duty to represent them at all, it does not have a duty to represent them 'fairly'."); Anderson v. Alpha Portland Indus., 727 F.2d 177, 181 (8th Cir. 1984) (union did not have a duty to fairly represent former members who had retired even though the union had negotiated a collective bargaining agreement providing for retirement benefits); *Cooper v. Gen. Motors Corp.*, 651 F.2d 249 (5th Cir.1981) (union did not owe supervisors who were former members of the union a duty of fair representation with regard to their seniority rights); McCormick v. Aircraft Mechanics Fraternal Ass'n, 225 F. Supp. 2d 1131, 1135 (D.Minn. 2002) (denying former union members' claim for breach of the duty and fair representation and explaining that "courts have repeatedly rejected the notion that a union has a duty to fairly represent its former members").

312 Black's Law Dictionary, "Duty" (9th ed. 2009).

313 *See, e.g.,* Grant v. Nat'l Football League Players Ass'n, 11-cv-3118, 2012 WL 1870974, *2-6 (C.D.Cal. May 22, 2012) (examining relationship between retired player and NFLPA to see if fiduciary relationship existed); Parrish v. Nat'l Football League Players Ass'n, 07-cv-943, 2007 WL 3456988, *6-7 (N.D. Cal. Nov. 14, 2007) (same).

314 *See* Bell v. DaimlerChrysler Corp., 547 F.3d 796, 804 (7th Cir. 2008) (discussing history of cases recognizing "that a union owes a fiduciary duty to represent its members fairly").

315 *See* Grant *supra* 313 at 110; Eller v. Nat'l Football League Players Ass'n, 872 F. Supp. 2d 823 (D.Minn. 2012), *aff'd* 731 F.2d 752 (8th Cir. 2013) (NFLPA Executive Director DeMaurice Smith's public statement "that the NFLPA owes a fiduciary duty to retired NFL players" did not create any legal obligations for the NFLPA); *see also* Soar v. Nat'l Football League Players Ass'n, 438 F.Supp. 337, 345 (D.R.I. 1975) (NFLPA did not violate purported fiduciary duty to seek pension benefits on behalf of retired players).

316 *See* Emily Kaplan, *The Games Go On, And So Does Life,* MMQB (Dec. 26, 2013), http://mmqb.si.com/2013/12/26/nfl-nflpa-the-trust-player-retirement-benefits/, *archived at* http://perma.cc/Z2LH-V8PM (discussing creation of the Trust); *Frequently Asked Questions,* Trust, http://playerstrust.com/frequently-asked-questions (last visited Aug. 7, 2015), *archived at* http://perma.cc/7NLC-HDTB (describing The Trust and its purpose).

317 Gene Upshaw Player Assistance Trust Fund, https://www.yourpaf.com/gupat/#.VuhhvnOrLIU (last visited Mar. 15, 2016), *archived at* https://perma.cc/S9T8-RYHF.

318 *About NFLPA — Department Contacts*, NFLPA, https://www.nflpa.com/about/department-contacts (last visited May 18, 2016), *archived at* https://perma.cc/HK96-DQKA.

319 This information was provided by the NFLPA.

320 *Id.*

321 *Id.*

322 NFLPA Mackey-White Committee Charter, ¶ 2.

323 *Id.*

324 This information was provided by the NFLPA.

325 The 30 Major League Baseball Clubs each have a 40-man roster, *see* 2012–16 Basic Agreement between MLB and MLBPA, Art. XX, § A, resulting in 1,200 MLB players. Generally, each of the 30 NBA Clubs has a 15-man roster, *see* Constitution and Bylaws of the National Basketball Association, Bylaws § 6, resulting in 450 NBA players. Each of the 30 NHL clubs has a 23-man roster, *see* Collective Bargaining Agreement between National Hockey League and National Hockey League Players' Association (Feb. 15, 2013), § 16.4, resulting in 690 NHL players.

326 *See What is Average NFL Player's Career Length? Longer Than You Might Think, Commissioner Goodell Says*, NFL.com (Apr. 18, 2011), http://nflcommunications.com/2011/04/18/what-is-average-nfl-player%E2%80%99s-career-length-longer-than-you-might-think-commissioner-goodell-says/, *archived at* http://perma.cc/PX5U-9SFK (discussing dispute between NFLPA's assertion that the average career is 3.5 years and the NFL's assertion that the average career is 6 years); *Average NFL Career Length,* Sharp Football Analysis (Apr. 30, 2014), http://www.sharpfootballanalysis.com/blog/?p=2133, *archived at* http://perma.cc/KR58-R8DA (discussing disagreement between NFLPA and NFL and determining that the average drafted player plays about 5 years). The average career in the NBA is about 4.8 years according to the National Basketball Players Association, *see* Susan Koenig, *Financial Planning for the Pros,* Registered Rep. 34, Apr. 1, 2010, *available at* 2010 WLNR 26366417; the average career in MLB is about 5.6 years, *see* William D. Witnauer, Richard G. Rogers & Jarron M. Saint Onge, *Major League Baseball Career Length in the 20th Century,* 26 Popul. Res. Policy Rev., 371–386 (2007), *available at* http://link.springer.com/article/10.1007/s11113-007-9038-5/fulltext.html, *archived at* http://perma.cc/UY9E-HCHL; and the average career in the NHL is about 5.6 years, *see Average Length of an NHL Player Career,* QuantHockey.com, http://www.quanthockey.com/Distributions/CareerLengthGP.php (last visited Aug. 7, 2015), *archived at* http://perma.cc/9Q22-BNLF.

327 This information was provided by the NFLPA.

328 *Id.*

329 *See Joint NFL NFLPA Statement on Wide-Ranging Changes to Drug Programs* Nat'l Football League Communications, http://nflcommunications.com/2014/09/19/joint-nfl-nflpa-statement-on-wide-ranging-changes-to-drug-programs/ (last visited Aug. 7, 2015), *archived at* http://perma.cc/7JNE-GY4R. Wes Welker of the Denver Broncos, Eric Herman of the New York Giants, Orlando Scandrick of the Dallas Cowboys and Stedman Bailey of the St. Louis Rams, each formerly serving four game suspensions, were permitted to return to their teams immediately. Josh Gordon of the Cleveland Browns and free agent LaVon Brazill were eligible to return after 10 games. Mark Daniels, *Drug-Policy Tweaks Could Affect Pats*, Providence Journal (RI), Sept. 17, 2014, *available at* 2014 WLNR 25824590.

330 *See* Mike Florio, *StarCaps Suspensions Finally are Finalized,* ProFootballTalk (Sept. 2, 2011, 5:07 PM), http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/, *archived at* http://perma.cc/BRR8-RPPL.

331 Order, Vilma v. Goodell, 12-cv-1283 (E.D.La. Sep. 5, 2012), ECF No. 121.

332 Submission of the NFLPA and the Players in Response to the Court's Order Concerning Joint Representation, Vilma v. Goodell, 12-cv-1283 (E.D.La. Sep. 5, 2012), ECF No. 122.

333 *Id.* at 4, *citing* Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).

334 F.Supp. 137 (E.D.Pa. 1980). Research did not reveal the outcome of the lawsuit after the court denied the NFLPA's motion to dismiss.

335 F.2d 1244 (9th Cir. 1985). *See also* Boogaard v. Nat'l Hockey League Players' Ass'n, 12-cv-9128, 2013 WL 1164301 (C.D.Cal. Mar. 20, 2013) (Dismissing duty of fair representation claim against NHLPA and finding NHLPA had no duty to advise estate of deceased player as to the statute of limitations on a duty of fair representation claim).

336 -cv-1559, 2014 WL 6776306 (E.D.Mo. Dec. 2, 2014).

337 *Id.*

338 Ballard v. Nat'l Football League Players Ass'n, 123 F. Supp.3d 1161 (E.D. Mo. 2015).

339 *See Quotes from NFLPA Press Conference,* NFLPA (Feb. 4, 2016), https://www.nflpa.com/news/all-news/quotes-from-nflpa-sb50-press-conference, *archived at* https://perma.cc/2GZH-FQ37 (NFLPA Executive Director DeMaurice Smith commenting on the Concussion Litigation: "we don't represent the people in the concussion settlement . . . we're not a part of it. [I am] not in a position to advise or give legal advice to people about whether they opted into the settlement or not.")

340 Mike Florio, *NFLPA Issues Brief Statement On Settlement of Concussion Lawsuits*, ProFootballTalk (Aug. 29, 2013, 3:41 PM), http://profootballtalk.nbcsports.com/2013/08/29/nflpa-issues-brief-statement-on-settlement-of-concussion-lawsuits/, *archived at* http://perma.cc/2NKD-MKKY; Mike Florio, *NFLPA Addresses Its Failure to be Mentioned in League of Denial*, ProFootballTalk (Oct. 13, 2013, 8:59 AM), http://profootballtalk.nbcsports.com/2013/10/13/nflpa-addresses-its-failure-to-be-mentioned-in-league-of-denial/, *archived at* http://perma.cc/3JWG-SZCF; *see also* Mike Freeman, Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive) xxii (2015) (quoting former player Sean Morey as stating "Every player that ever played the game, every player that plays the game today, is being betrayed by their union. Because they're dismissing this issue [football causing serious brain trauma] because they don't want to incur additional liability, and they're trying to protect themselves.").

341 Mike Florio, *NFLPA Addresses Its Failure to be Mentioned in League of Denial*, ProFootballTalk (Oct. 13, 2013, 8:59 AM), http://profootballtalk.nbcsports.com/2013/10/13/nflpa-addresses-its-failure-to-be-mentioned-in-league-of-denial/, *archived at* http://perma.cc/3JWG-SZCF.

342 F.3d 1170 (11th Cir. 2010).

343 U.S.C. § 158(d).

344 *See* Ford Motor Co. v. N.L.R.B., 441 U.S. 488 (1979) (discussing what issues are mandatory subjects of collective bargaining); Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157 (1971).

345 *NFL Gives $1 Million to Boston University for Study of Brain Injuries*, Nat'l Football League (Updated Jul. 26, 2012, 8:42 PM), http://www.nfl.com/news/story/09000d5d817a2623/article/nfl-gives-1-million-to-boston-university-for-study-of-brain-injuries, *archived at* http://perma.cc/D5LZ-NYMM.

346 NFL Comments and Corrections (June 24, 2016).

347 *Id.*

348 *See* Nat'l Football League, 2015 Player Health & Safety Report 30 (2015), http://static.nfl.com/static/content/public/photo/2015/08/05/0ap3000000506671.pdf/, *archived at* https://perma.cc/Y4BN-TUP7?type=pdf.

349 NFL Comments and Corrections (June 24, 2016).

350 Alan Schwarz, Walt Bogdanich, and Jacqueline Williams, *N.F.L.'s Flawed Concussion Research and Ties to Tobacco Industry*, N.Y. Times, Mar. 26, 2016, http://www.nytimes.com/2016/03/25/sports/football/nfl-concussion-research-tobacco.html, *archived at* https://perma.cc/NM4N-SW4Q. *See also NFL response to New York Times' concussion research story*, NFL.com (Mar. 24, 2016, 4:11 PM), http://www.nfl.com/news/story/0ap3000000647389/article/nfl-response-to-new-york-times-concussion-research-story, *archived at* https://perma.cc/Z3XE-8FQ6.

351 For examples of such studies in high school and college sports, *see* Barry P. Boden et al., *Catastrophic Injuries in Pole Vaulters, A Prospective 9-Year Follow-up Study*, 40 Am. J. Sports Med. 1488 (2012); Frederick O. Mueller and Robert C. Cantu, *Catastrophic injuries and fatalities in high school and college sports, fall 1982-spring 1988*, 22 Med. & Sci. in Sports & Exercise 737 (1990).

352 *See The Datalys Center for Sports Injury Research and Prevention,* NCAA, http://www.ncaa.org/health-and-safety/medical-conditions/datalys-center-sports-injury-research-and-prevention (last visited Aug. 3, 2016), *archived at* https://perma.cc/2M75-B24L.

353 *See, e.g., Data transparency,* GlaxoSmithKline, http://www.gsk.com/en-gb/behind-the-science/innovation/data-transparency (last visited June 20, 2016), *archived at* https://perma.cc/M5HN-NLHN; *Frequently Asked Questions*, the YODA Project, http://yoda.yale.edu/frequently-asked-questions-faqs#Data (last visited June 20, 2016), *archived at* https://perma.cc/2Z98-R7HC.

354 CBA, Art. 39, § 3(a).

355 Mike Florio, *Survey asks players how seriously they take concussions*, ProFootballTalk (Dec. 5, 2015, 6:40 AM), http://profootballtalk.nbcsports.com/2015/12/05/survey-asks-players-how-seriously-they-take-concussions/, *archived at* http://perma.cc/GE9A-RMRC.

356 NFL CBA, Art. 25, § 4.

357 *See* Paul McCrory et al., *Consensus statement on concussion in sport: the 4th Int'l Conference on Concussion in Sport held in Zurich, November 2012*, 47 Br. J. Sports Med. 250, 251 (2013).

358 *Id.* at 253.

359 Columnist Mike Freeman has made a similar recommendation. *See* Mike Freeman, Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive) 230–31 (2015) ("Make players sit for at least one game after a concussion, no matter if they pass concussion protocol tests or not. These tests are not infallible, and while sitting one game isn't a perfect solution, it helps prevent players from circumnavigating the system post-concussion.")

360 MLB CBA, Att. 36, ¶ 2.

361 *See* Paul McCrory et al., *Consensus statement on concussion in sport: the 4th Int'l Conference on Concussion in Sport held in Zurich, November 2012*, 47 Br. J. Sports Med. 250, 250–58 (2013) (discussing the challenges of and best practices for diagnosing concussions).

362 *See id.* at 254 (discussing the possibility of long-term problems for athletes that have suffered concussions).

363 *See id.* at 252–58 (discussing generally the challenges of determining when an athlete has recovered from a concussion).

364 Letter from Larry Ferazani, NFL, to authors (July 18, 2016).

365 *Id.*

366 *See* Sally Jenkins, *NFL's concussion priorities: Dodging blame, making players responsible*, Wash. Post, Dec. 3, 2015, https://www.washingtonpost.com/sports/redskins/nfls-concussion-priorities-dodging-blame-making-players-responsible/2015/12/03/1b8752f8-99d2-11e5-94f0-9eeaff906ef3_story.html, *archived at* https://perma.cc/JT6P-JX44 ("The heart of the NFL's concussion problem is not that players hide symptoms; it's a compensation structure that forces them to play hurt, or get cut.")

367 CBA, App. H: Notice of Termination; *see also* 2011 CBA, Art. 4, § 5(d); 2011 CBA, App. A: NFL Player Contract, ¶¶ 8, 11. "'Room' means the extent to which a Team's then-current Team Salary is less than the Salary Cap." 2011 CBA, Art. 1.

368 *See* Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA Ent. L. Rev. 179, 193–95 (2009) (describing the various forms of guaranteed compensation in the NFL).

369 *See* Mike Florio, *The Full Kaepernick Contract Details*, ProFootballTalk (Jun. 5, 2014, 12:46 AM), http://profootballtalk.nbcsports.com/2014/06/05/the-full-kaepernick-contract-details/, *archived at* http://perma.cc/BM65-VHRR (discussing details of Colin Kaepernick's 2014 contract with the San Francisco 49ers. Despite reports that Kaepernick had received $61 million guaranteed, only about $13 million was guaranteed against skill, injury and Salary Cap).

370 *See* Chris Deubert, Glenn M. Wong & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Ent. L. Rev. 1 (2012) (discussing the movement towards more guaranteed compensation). In 2012, Peyton Manning signed a five-year deal with the Denver Broncos for $96 million, $58 million of which was guaranteed. Mike Klis and Jeff Legwold, *Peyton Manning's $96 Million Deal With Broncos Includes Neck Injury Clause*, Denver Post, (Mar. 20, 2012), http://www.denverpost.com/ci_20213659/peyton-mannings-deal-broncos-5-years-96-million, *archived at* http://perma.cc/3NPD-MJDW. In 2014, J.J. Watt signed a six-year deal with the Houston Texans for $100 million, $51.8 million of which was guaranteed. *Texans Give J.J. Watt $100M Deal*, ESPN.com (Sept. 2, 2014), http://espn.go.com/nfl/story/_/id/11451373/jj-watt-houston-texans-reach-agreement-6-year-100-million-deal, *archived at* http://perma.cc/HRE6-TNKX. And, in 2015, Ndamukong Suh signed a six-year deal with the Miami Dolphins for $114 million, $60 million of which was guaranteed. Josh Alper, *Dolphins Make It*

Official With Ndamukong Suh, ProFootballTalk (Mar. 11, 2015, 4:14 PM), http://profootballtalk.nbcsports.com/2015/03/11/dolphins-make-it-official-with-ndamukong-suh/, *archived at* http://perma.cc/8BPH-R5T5.

371 *See* Deubert *supra* note 370 at 52–61 (discussing changes to rookie compensation scheme).

372 *Id.*

373 Gene Upshaw, *NFLPA's Upshaw Responds*, Wash. Post, Dec. 22, 2002, *available at* 2002 WLNR 15865309.

374 NFLPA, *A New Look at Guaranteed Contracts in the NFL* (circa 2002) (on file with authors) ("Over half of all salary earned by NFL players now is guaranteed"); NFLPA, *Guaranteed Contracts in Professional Team Sports: How Does the NFL Compare?* (circa 2007) (on file with authors) ("at least 52% of all compensation in the NFL is, in fact, 'guaranteed' to players.'")

375 Mike Florio, *Fully-guaranteed contracts could cause problems for teams, players,* ProFootballTalk (May 29, 2015, 9:55 AM), http://profootballtalk.nbcsports.com/2015/05/29/fully-guaranteed-contracts-could-cause-problems-for-teams-players/, *archived at* http://perma.cc/GE9E-YSME (discussing potential problems with guaranteed contracts in the NFL).

376 *See* 2011 CBA Art. 43, § 8 (empowering Non-Injury Grievance arbitrator to issue an "a money award, order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of [the CBA] or any other applicable document, or an advisory opinion pursuant to Article 50, Section 1(c)."); 2011 CBA Art. 50, § 1(d) (Joint Committee obligated to "address and correct" issues identified by investigating neutral physicians).

377 *See, e.g.,* 2011 CBA, Art. 14, § 6 (permitting fines of $500,000 on players, Contract Advisors and Club officials and $6,500,000 on Clubs found to have violated the Rookie Compensation Pool); 2011 CBA, Art. 18, § 3 (permitting fines of $375,000 on any person or Club that falsely certifies certain information); 2011 CBA, Art. 21, § 8(d)(i) (requiring fines of $100,000 for head coaches that have violated offseason workout rules the first time); 2011 CBA, Art. 42, § 1(a) (permitting Clubs to fine players for a variety of items, including being overweight, missing practice and violating curfew); 2011 CBA, Art. 48, § 3 (imposing fine of $30,000 on any Club that negotiates a player contract with a Contract Advisor not certified by the NFLPA).

378 The various fines discussed above are generally the result of findings by either the Commissioner or an arbitrator. Similarly, fines for Article 39 violations could be subject to a finding of violation by the Non-Injury Grievance arbitrator pursuant to Article 43.

379 Mike Florio, *NFL, NFLPA unveil new concussion protocol enforcement policy*, ProFootballTalk (July 25, 2016, 5:01 PM), http://profootballtalk.nbcsports.com/2016/07/25/nfl-nflpa-unveil-new-concussion-protocol-enforcement-policy/, *archived at* https://perma.cc/2U94-JU92.

380 *Id.*

381 *Id.*

382 *Id.*

383 *See Medical Malpractice Statute of Limitations by State,* Rocket Lawyer, https://www.rocketlawyer.com/article/medical-malpractice-statute-of-limitations-by-state.rl (last visited Aug. 7, 2015), *archived at* https://perma.cc/9VFH-METW (providing medical malpractice statute of limitations in each state); *Chart: Statutes of Limitations in All 50 States*, NOLO.com, http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html (last visited Aug. 7, 2015), *archived at* http://perma.cc/MZ62-H475 (providing negligence statute of limitations in each state).

384 Throughout the litigation, news articles routinely and erroneously — either explicitly or implicitly — claimed that if the players' concussion-related claims were dismissed in court, they'd have the ability to pursue their claims in arbitration. *See, e.g.*, Michael Sokolove, *How One Lawyer's Crusade Could Change Football Forever*, N.Y. Times (Mag.), Nov. 6, 2014, http://www.nytimes.com/2014/11/09/magazine/how-one-lawyers-crusade-could-change-football-forever.html?_r=0, *archived at* https://perma.cc/4DJ6-XMQV?type=pdf ("a ruling for the league would have forced the players into mediation or arbitration and most likely only modest payouts"); Peter Keating, *An Unsettling Deal On Concussions,* ESPN Magazine, Nov. 18, 2014, *available at* http://espn.go.com/nfl/story/_/id/11899196/pnfl-concussion-settlement-bob-stern-objection-p, *archived at* http://perma.cc/VL28-MQW6 ("in August 2012, the NFL moved to dismiss their cases entirely, arguing that the league's labor deal, not the courts, should resolve injury disputes").

385 NFL Comments and Corrections (June 24, 2016).

386 The NFL provided us with a copy of the Player Engagement Resource Guide.

387 *See* Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 Yale L.J. 1826, 1834 (2013).

388 *See* Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 3 (2013).

389 Marlene Satter, *Employers Auto Enrolling at Company Match*, BenefitsPro.com (Jan. 21, 2015), http://www.benefitspro.com/2015/01/21/employers-auto-enrolling-at-company-match, *archived at* http://perma.cc/33VA-X6F6.

390 Josh Alper, *Brandon Browner on Earl Thomas, Richard Sherman: Hit That Shoulder, Hit That Elbow*, ProFootballTalk (Jan. 26, 2015, 3:15 PM), http://profootballtalk.nbcsports.com/2015/01/26/brandon-browner-on-earl-thomas-richard-sherman-hit-that-shoulder-hit-that-elbow/, *archived at* http://perma.cc/DBL9-65CD.

391 Mike Florio, *Concussions Take on a Strategic Component*, ProFootballTalk (Jan. 23, 2012, 10:09 PM), http://profootballtalk.nbcsports.com/2012/01/23/concussions-take-on-a-strategic-component/, *archived at* http://perma.cc/9FD8-Q98C.

Chapter 8

NFL Clubs

The NFL is an unincorporated association of 32 member clubs.[97] It serves as a centralized body for obligations and undertakings shared by the member clubs. Nevertheless, each member club is a separate and distinct legal entity,[98] with its own legal obligations separate and distinct from club owners and employees. This chapter focuses on NFL clubs as individual entities, rather than the clubs' employees, many of whom are discussed in other chapters. Additionally, the role of NFL club owners is discussed in Chapter 7: The NFL and NFLPA.

NFL clubs are the players' employers and hire many of the stakeholders discussed in this report. In this respect, NFL clubs play a powerful role in dictating the culture concerning player health.

(A) Background

NFL clubs are important stakeholders in player health. They are powerful organizations that employ many people with direct day-to-day interaction concerning player health issues. Club owners typically hire a general manager who then hires the coaching and football operations staff. The general manager and other executives are also likely involved with the hiring of the medical staff. Like all organizations, there is thus likely to develop a specific culture surrounding important issues, which will vary from club to club. In football, the club's attitude towards player health can have a significant impact.

NFL clubs are the players' employers and hire many of the stakeholders discussed in this report. In this respect, NFL clubs play a powerful role in dictating the culture concerning player health.

(B) Current Legal Obligations[a]

The 2011 CBA contains multiple provisions governing clubs' health obligations to its players:[b]

1. **Medical Care Generally:** "Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry."[1]

2. **Physically Unable to Perform (PUP) List:** Any player who is placed on the PUP List as a result of a football-related injury "will be paid his full Paragraph 5 Salary while on such list."[2] In practice, this provision differentiates the PUP List from the Non-Football Injury ("NFI") List. A player is placed on the NFI List when he suffers an injury outside of football and clubs are not required to pay players their Paragraph 5 Salary while they are on the NFI List.

3. **Club Physicians:** Clubs must retain a board-certified orthopedic surgeon and at least one physician board-certified in internal medicine, family medicine, or emergency medicine. All physicians also must have a Certificate of Added Qualification in Sports Medicine.[3] In addition, clubs are required to retain consultants in the neurological, cardiovascular, nutritional, and, neuropsychological fields.[4]

4. **Physicians at Games:** "All home teams shall retain at least one [Rapid Sequence Intubation] RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies."[5]

5. **Club Athletic Trainers:** "All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer."[6]

6. **Second Medical Opinion:** Clubs are obligated to pay for a player's consultation with a physician for a second medical opinion provided the player first consults with the club physician and the club physician is provided a report of the second physician's examination and diagnosis.[7]

7. **Player's Right to a Surgeon of His Choice:** Players have the right to choose the surgeon who will perform a surgery and the club must pay for the surgery provided the player first consulted with the club physician.[8]

8. **Workers' Compensation:** Clubs are required to provide workers' compensation coverage or comparable benefits to its players.[9]

9. **Injury Protection:** If a player is physically unable to play in the season following a season in which he was injured but remains under contract with the club, clubs are required to pay an amount equal to 50 percent of the player's Paragraph 5 salary in the subsequent season, up to a range of $1–1.2 million.[10]

    a) Players can also earn "Extended Injury Protection" benefits up to a range of $500–575,000 for the second season after the season in which the player was injured.[11]

In addition to their obligations under the CBA, NFL clubs also have statutory obligations to provide health insurance to NFL players. Starting in 2015, the 2010 Patient Protection and Affordable Care Act (ACA) obligates employers who employ an average of at least 50 full-time employees

a The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

b The club obligations discussed herein are separate and apart from those of the NFL as a centralized entity.

on business days to provide some basic level of health insurance to its employees or pay a financial penalty.[12] NFL clubs certainly employ more than 50 people (NFL clubs have 53 players, not including players placed on Injured Reserve, and a host of other employees)[13] and thus are obligated by the ACA to provide basic health insurance to their players.

Additionally, it is possible that NFL clubs are obligated to take certain measures concerning employee health and safety as a result of the Occupational Safety and Health Act[14] or a similar state or federal regulatory scheme. However, research has not revealed the application of any such scheme to the NFL in practice, and we thus avoid a theoretical analysis here. The application of the Occupational Safety and Health Act is the subject of future work by the Law & Ethics Initiative of The Football Players Health Study.

However, one statutory employee-benefit mechanism with which NFL clubs do have regular interactions is workers' compensation laws. Before we discuss the current ethical codes and current practices of the clubs, we discuss in detail the application of workers' compensation laws to NFL clubs.

1) WORKERS' COMPENSATION

Workers' compensation benefits and statutes have been contentious issues in the NFL.

"Workers' compensation laws provide protections and benefits for employees who are injured in the course of their employment. In the typical case, the workers' compensation regime grants tort immunity to employers in exchange for the regime's protections and benefits to the employee."[15] Since the first CBA in 1968, NFL clubs have been obligated to make the necessary arrangements to provide workers' compensation benefits to their players. If the state in which the club operates does not have workers' compensation or specifically excludes professional athletes from workers' compensation coverage, the CBAs have required those clubs to "guarantee equivalent benefits to its players."[16]

As a preliminary matter, it is important to point out that workers' compensation laws, systems and benefits vary widely among the states. Below, we try to provide a general description of workers' compensation rights and their relevance to NFL players.

Workers' compensation provides two important benefits to workers: monetary compensation; and, coverage for medical care. We discuss each of these benefits in turn.

Workers' compensation payments typically depend on the employee's level of injury or disability and the extent to which the injury or disability affects the employee's ability to continue working. Generally, workers receive "around one-half to two-thirds of the employee's average weekly wage."[17] In addition, the amount of benefits is subject to maximums which are usually tied to the state's average weekly wage,[18] and are generally between $500 and $1,000.[19] The benefits continue so long as the employee is disabled or unable to work. Additionally, the amount a player receives in workers' compensation reduces the amount the club is obligated to pay the player for certain other CBA-provided benefits.[20]

Medical care coverage is an important benefit available to players through workers' compensation. If a player is injured during the season, he is entitled to medical care from the club "during the season of injury only[.]"[21] Consequently, if a player suffers an injury that causes him to have ongoing or recurring healthcare needs (such as surgeries) well beyond the season of injury (and for perhaps the rest of his life), the club will have no obligation to pay for such care. Workers' compensation fills that gap. Workers' compensation statutes generally require the employer (really the employer's insurance carrier) to pay for reasonable and necessary medical expenses that are the result of an injury suffered at the workplace in perpetuity. More importantly, the worker does not have to pay for any part of the care.

Players must be diligent in protecting their rights. Even if a player suffers an injury and believes it has healed well, the player cannot know if the injury will resurface or cause problems later in life. Thus, the player must protect his rights by filing for workers' compensation benefits within the applicable statute of limitations, generally between one and three years. The workers' compensation claim is then adjudicated by a panel or board commissioned by the state. If the player is successful in his claim, he will be entitled to future medical care concerning the injury, even if no further care is needed at the time.

The trade-off for workers' compensation benefits from an employee's perspective is that the laws generally bar any civil lawsuit against the employer or other employees. Workers' compensation statutes provide compensation for workers injured at work (without having to prove the employer was at fault) and thus generally preclude lawsuits based on the co-workers' negligence.[22] This preemption applies with regard to the negligence of any co-worker, regardless of hierarchy or reporting structure. So, for example, as is discussed in detail in Chapter 9: Coaches, players generally cannot sue coaches for negligence due to workers' compensation statutes.

The clubs contract with insurance companies to pay for workers' compensation benefits. It is believed that clubs pay approximately $1.2 to $1.5 million in workers' compensation insurance premiums each year. Once a player files for workers' compensation benefits, the insurance carrier will be responsible for handling the litigation as well as paying any benefits.

In recent years, California received a flood of NFL player workers' compensation claims because of some unique (but now amended) statutory provisions.

First, California's workers' compensation law extended broadly to cover employees of non-California employers who were injured while in California temporarily on behalf of their employers.[23] Section 3600.5 of California's Labor Code previously dictated that if an employee "who has been hired or is regularly employed in the state receives personal injury by accident arising out of and in the course of such employment outside of this state, he . . . shall be entitled to [workers'] compensation" benefits under California law.[24] "The California Workers' Compensation Board has taken a wide view of the phrase 'regularly employed' that has allowed NFL players to be covered under the broad umbrella of workers' compensation rights in the state."[25]

Second, California permitted employees to recover for "cumulative" injuries. A cumulative injury is an injury that is "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment."[26] Recent controversy concerning NFL player injuries has centered on head, neck, and neurological conditions. These types of injuries generally have been diagnosed and recognized as injuries that did not occur as the result of any specific play or incident but instead are the cumulative result of decades of playing football.[27] Thus, California's cumulative injury designation appeared to perfectly suit the recent claims by current and former NFL players.

Third, the statute of limitations on an employee's workers' compensation claim in California did not begin to run until the employer formally notified the employee of his or her rights under California's workers' compensation laws.[28] "NFL teams, either believing that they had adequately taken care of their players' medical conditions at the time, or hoping to avoid workers' compensation claims, or simply being unaware of the possibility of such claims, historically had not informed their players of their rights under California's regime."[29]

Likely as a result of California's liberal workers' compensation laws, between 2006 and 2013, 3,400 former NFL players filed for workers' compensation in California alleging head or brain injuries.[30] The NFL estimated that the average California workers' compensation claim cost the club $215,000 to resolve, though it is unclear whether this figure refers to payments to players, or also includes legal fees.[31] Additionally, more than two-thirds of all California workers' compensation claims made by professional athletes and which cited cumulative trauma were made by players who never played for a California club.[32]

The NFL, not surprisingly, pushed for changes to California's workers' compensation scheme. In 1997, the NFL unsuccessfully sponsored legislation that would have limited California's workers' compensation benefits to athletes who lived in the state and would have prevented athletes from collecting benefits for cumulative injuries.[33] The NFL seemingly pursued this legislation despite the fact that the 1993 CBA imposed a moratorium on lobbying related to workers' compensation that was not lifted until June 1, 1999.[34]

Having failed to change the law, NFL clubs then began to contract around the law by inserting a provision into player contracts that require players to file their workers' compensation claims in the club's home state and under the law of the club's home state.[35] The NFL has prevailed in its efforts to enforce these provisions.[36]

These successes did not stop the NFL from pursuing amendments to California's workers' compensation laws.

In early 2012, only months after the execution of the most recent CBA, the NFL renewed its efforts to have California's workers' compensation statutes amended.[37] After extensive lobbying from the NFL and to a lesser extent the NFLPA on the opposite side of the issue,[38] on October 8, 2013, California Governor Jerry Brown signed into law amendments to California's workers' compensation statutes that affected all claims filed on or after January 1, 2014.

This legislation amended California's workers' compensation statute in two significant ways.

First, athletes who did not play for California teams can no longer file claims under California's workers' compensation laws if the athlete's employer "has furnished workers' compensation insurance coverage or its equivalent under the laws of a state other than California."[39] Since the CBA requires clubs to obtain workers' compensation insurance coverage or its equivalent, the amended legislation effectively precludes out-of-state players from filing for benefits in California.

Second, even players who played for California-based teams must meet certain criteria to file for workers' compensation in California. The player must have: (a) played for a California-based team for at least two seasons or 20% of his or her career; and (b) "worked for fewer than seven seasons for any team or teams other than a California-based team."[40] This second provision, had it been in place when they played, would have effectively precluded some of California's most high-profile athletes from filing for workers' compensation.[c]

The legislation easily passed despite questions as to whether the bill provided any clear benefit to the state. By curtailing potentially thousands of annual workers' compensation claims, the state saves the administrative costs related to adjudicating workers' compensation claims. Nevertheless, some critics argued that the NFL was able to get the bill passed by erroneously suggesting the state in some way was responsible for paying the players' workers' compensation benefits.[41] As the bill's author Assemblyman Henry Perea admitted, clubs – and not the state – pay for the benefits.[42,d]

Moreover, the NFLPA has argued that in fact the players pay for the benefits.[43] The NFL-NFLPA CBA sets a "Player Cost Amount," effectively an upper limit on the total salary and benefits NFL clubs can expend on players. The CBA also permits a Salary Cap, limiting the total amount clubs can spend on players and effectively curtailing player salaries. The Salary Cap is determined by deducting player benefits from the Player Cost Amount.[44] Thus, the more clubs pay in benefits, the less they pay in salary. Workers' compensation payments (including to former players) and premiums are among the benefits deducted from the Player Cost Amount to set the Salary Cap.[45] Players, through the CBA, have thus accepted less salary in exchange for increased benefits, including workers' compensation benefits.

> Workers' compensation statutes generally require the employer (really the employer's insurance carrier) to pay for reasonable and necessary medical expenses that are the result of an injury suffered at the workplace in perpetuity.

The NFL's workers' compensation issues did not end with California. In May 2014, Louisiana legislators introduced a bill, with the support of the New Orleans Saints, to address the method for calculating a player's workers' compensation benefits.[46] Workers' compensation benefits are determined based on the workers' salary. Louisiana Administrative Law Judges adjudicating workers' compensation claims had generally determined that an athlete's benefits should be determined by the athlete's salary at the time the athlete was injured.[47] The athletes argued that their benefits should instead be determined by considering their entire compensation for the year in which they are injured.[48]

The difference in calculation methods used by the state of Louisiana is quite large. NFL player salaries are paid out during the 17-week regular season; they earn considerably less during minicamps and training camps. In 2015, all veterans—regardless of skill and regular season salary—received only $1,800 per week during training camp,[49] whereas the minimum weekly salary for a four-year veteran during the regular season was $43,823.53.[50] Thus, it is clear a player injured during training camp rather than the regular season will receive significantly less workers' compensation benefits.[e]

The NFLPA and its players mobilized against the 2014 bill, led by Saints' star quarterback Drew Brees.[51] After a few weeks of debate, the Louisiana proposed bill was tabled for further discussion among the parties on the best way to calculate the benefits.[52]

c For instance, Wayne Gretzky, widely considered the greatest hockey player of all-time, could not file for worker's compensation under this rule even though he spent 7.5 of years of his 21 year career with the Los Angeles Kings. Terrell Owens, one of the most-accomplished 49ers wide receiver of all-time would also be precluded, having followed his first six years in San Francisco with seven years with other NFL clubs. Lastly, Barry Bonds, arguably one of the greatest baseball players ever (and certainly one of the most controversial), is ineligible for workers' compensation benefits despite having hit 586 home runs for the San Francisco Giants because he also played seven years with the Pittsburgh Pirates.

d Ironically, some have also argued that the changes to California's workers' compensation statutes will increase costs to the state. Modesto Diaz, a California workers' compensation attorney specializing in representing athletes, contended that injured former athletes who are no longer eligible to receive workers' compensation payments from their teams will now have to resort to Social Security disability benefits, Medicaid, and other forms of government aid, Ken Bensinger & Marc Lifsher, *California Limits Workers' Comp Sports Injury Claims,* L.A. Times, Oct. 3, 2013, http://articles.latimes.com/2013/oct/08/business/la-fi-workers-comp-nfl-20131009, *archived at* http://perma.cc/2JTS-83KK, effectively shifting player health costs from the clubs to the state.

e In reviewing this Report, the NFL explained that "[a]t least some states pay workers' comp benefits based on the contract salary, regardless of when the player gets hurt." NFL Comments and Corrections (June 24, 2016).

Other states' workers' compensation laws have athlete-specific language. For example, Pennsylvania's workers' compensation statute reduces the athlete's workers' compensation benefits by any amounts received by the athlete from the club during the time the athlete was injured, including salary, club-funded insurance, and any other benefit paid as a result of the CBA.[53] These types of statutes coupled with benefit maximums effectively prevent many athletes from receiving any workers' compensation benefits. Moreover, according to the NFLPA, every year NFL clubs sponsor state level legislation that seeks to curtail players' workers' compensation benefits in some way.

To assist NFL players with workers' compensation claims, the NFLPA makes available to players and their contract advisors a document describing the benefits claim process, benefits amount and statutes of limitations. Additionally, the NFLPA has recommended workers' compensation attorneys in each city in which an NFL club plays (collectively, the "Panel"). The Panel consists of approximately 60 attorneys. Because players play in many states, they are often eligible for workers' compensation benefits in many states. The advantage of the Panel is coordination and communication (with the NFLPA' assistance) that permits a player to determine which state will provide the player with the best benefits. Finally, contract advisors are prohibited from referring a player to a workers' compensation attorney who is not a member of the Panel.[54]

(C) Current Ethical Codes

Research has not revealed any ethical code that governs NFL clubs as such.

(D) Current Practices

The best way to understand NFL clubs' current practices concerning player health is to examine the current practices of the relevant NFL club employees or contractors: see Chapter 2: Club Doctors; Chapter 3: Athletic Trainers; Chapter 9: Coaches; Chapter 10: Club Employees; and Chapter 11: Equipment Managers. These employees carry out the day to day tasks of the club, interact with the players, and dictate the club's culture accordingly.

(E) Enforcement of Legal and Ethical Obligations[f]

The 2011 CBA provides a few options for players dissatisfied with the medical care provided by an NFL club. Nevertheless, these options, discussed below, provide questionable remedies to the players for a club's health-related obligations.

First, a player could submit a complaint to the Accountability and Care Committee (ACC), which consists of the NFL Commissioner (or his designee), the NFLPA Executive Director (or his designee), and six additional members "experienced in fields relevant to health care for professional athletes," three appointed by the Commissioner and three by the NFLPA Executive Director.[55] "[T]he complaint shall be referred to the League and the player's Club, which together shall determine an appropriate response or corrective action if found to be reasonable. The Committee shall be informed of any response or corrective action."[56] There is thus no neutral third-party adjudicatory process for addressing the player's claim or compensating the player for any wrong suffered. The remedial process is left entirely in the hands of the NFL and the club, both of which may face a significant conflict of interest and have reasons not to find that a club's medical staff acted inappropriately and to compensate the injured player accordingly.

Second, a player could commence a Non-Injury Grievance.[g] The 2011 CBA directs certain disputes to designated arbitration mechanisms[57] and directs the remainder of any disputes involving the CBA, a player contract, NFL rules or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.[58] Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a "money award."[59] Many of the clubs' above-described legal obligations could be the subject of a Non-Injury Grievance. However, Non-Injury Grievances must be filed within 50 days "from the date of the occurrence or non-occurrence upon which the grievance is based."[60] Additionally, it is possible

f Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

g The term "Non-Injury Grievance" is something of a misnomer. The CBA differentiates between an "Injury Grievance" and a "Non-Injury Grievance." An Injury Grievance is exclusively "a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player's terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player's injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

that under the 2011 CBA, the NFL could argue that complaints concerning medical care are designated elsewhere in the CBA and thus should not be heard by the Non-Injury Grievance arbitrator.[61]

In the 2011 CBA, the parties added Article 39: Players' Rights to Medical Care and Treatment (Appendix F), supplementing and amending some provisions from prior CBAs. Article 39 reaffirms some of the clubs' obligations concerning player health and the rights of players concerning their health that were expressed in past CBAs. Article 39 also added and clarified several substantive provisions.[h] Nevertheless, since the execution of the 2011 CBA, there have been no Non-Injury Grievances concerning Article 39 decided on the merits,[62] suggesting either clubs are in compliance with Article 39 or the Article has not been sufficiently enforced.

Although no Article 39 Non-Injury Grievances have been adjudicated on the merits, there was a significant grievance concerning Article 39 between the New England Patriots and former Patriots' defensive lineman Jonathan Fanene. In that matter, the NFLPA alleged that Patriots club doctor Tom Gill violated Article 39, § 1(c)'s requirement that Gill's primary duty in providing player medical care shall be to the player and that he comply with all medical ethics rules concerning his treatment of Fanene.[63] Prior to the 2012 season, the Patriots and Fanene agreed to a three-year contract worth close to $12 million, including a $3.85 million signing bonus.[64] As part of a pre-employment questionnaire, Fanene, according to the Patriots, stated that he took no medications regularly even though he had been taking significant amounts of painkillers to mask chronic pain in his knee.[65] The Patriots terminated Fanene's contract during training camp, citing Fanene's alleged failure to disclose his medical condition,[66] and initiated a System Arbitration[i] to recoup $2.5 million in signing bonus money already paid to Fanene (discussed further in Chapter 1: Players).[67] Specifically, the Patriots alleged Fanene violated his obligations to negotiate the contract in good faith.[68]

The NFLPA alleged that during the 2012 training camp, Gill told Patriots owner Robert Kraft and club President Jonathan Kraft that he was "trying to put together a case" against Fanene so that the club could seek the return of the signing bonus paid. The NFLPA further alleged that, at the direction of Patriots head coach Bill Belichick, Gill intentionally delayed and ultimately refused performing surgery on Fanene so the Patriots could convince him to retire. Moreover, the NFLPA alleged that Gill fabricated and/or back-dated notes to help the Patriots' grievance against Fanene. All of these actions, according to the NFLPA, violated Article 39, § 1(c).

h For a description of these health-related changes, see Appendix B.

i A System Arbitration is a legal process for the resolution of disputes between the NFL and the NFLPA and/or a player concerning a subset of CBA provisions that are central to the NFL's operations and which invoke antitrust and labor law concerns, including but not limited to the NFL player contract, NFL Draft, rookie compensation, free agency, and the Salary Cap. 2011 CBA, Art. 15, § 1.

There have been no Non-Injury Grievances concerning Article 39 decided on the merits, suggesting either clubs are in compliance with Article 39 or the Article has not been sufficiently enforced.

Gill generally denied the allegations and insisted that his comments were taken out of context.[69] The dueling grievances were settled in September 2013 when the Patriots let Fanene keep $2.5 million in signing bonus money already paid but did not have to pay the $1.35 million still owed.[70] The settlement thus prevented any precedential legal authority.[j]

Prior to the 2011 CBA, there were some arbitrations against clubs concerning medical care but all of the cases revealed by our research were denied as untimely.[71] In addition, each of these cases discuss that the CBA's statutes of limitations have been and are to be construed strictly by the arbitrators.

The third option for a player seeking to enforce a club's health-related obligations is to request the NFLPA to commence an investigation before the Joint Committee on Player Safety and Welfare ("Joint Committee"). The Joint Committee consists of three representatives chosen by the NFL and three chosen by the NFLPA.[72] "The NFLPA shall have the right to commence an investigation before the Joint Committee if the NFLPA believes that the medical care of a team is not adequately taking care of player safety. Within 60 days of the initiation of an investigation, two or more neutral physicians will be selected to investigate and report to the Joint Committee on the situation. The neutral physicians shall issue a written report within 60 days of their selection, and their recommendations as to what steps shall be taken to address and correct any issues shall be acted upon by the Joint Committee."[73] While a complaint to the Joint Committee results in a neutral review process, the scope of that review process' authority is vague. The Joint Committee is obligated to act upon the recommendations of the neutral physicians, but it is unclear what it means for the Joint Committee to act and there is nothing obligating the NFL or any club to abide by the neutral physicians' or Joint Committee's recommendations. Moreover, there is no indication that the neutral physicians or Joint Committee could award damages to an injured player.[74]

In 2012, the NFLPA commenced the first and only Joint Committee investigation.[75] The nature and results of that investigation are confidential per an agreement between the NFL and NFLPA.[76]

Lawsuits against clubs are another possible avenue of relief, but prove difficult to pursue. The CBA presents the biggest obstacle against any such claim. This is because the Labor Management Relations Act (LMRA)[77] bars or "preempts" state common law[k] claims, such as negligence, where the claim is "substantially dependent upon analysis of the terms" of a CBA, *i.e.,* where the claim is "inextricably intertwined with consideration of the terms of the" CBA."[78] In order to assess a club's duty to an NFL player—an essential element of a negligence claim—the court would likely have to refer to and analyze the terms of the CBA, resulting in the claim's preemption.[79] In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.,* a Non-Injury Grievance against the club), rather than through litigation.

In cases where the club doctor is an employee of the club—as opposed to an independent contractor—a player's lawsuit against the club is likely to be barred by the relevant state's workers' compensation statute. As discussed earlier, workers' compensation statutes provide compensation for workers injured at work and thus generally preclude lawsuits based on the co-workers' negligence.[80] This has been the result in multiple cases brought by NFL players against clubs and club doctors.[81]

Several players have sued their clubs concerning medical issues, with mixed results. In recent years, courts generally have determined that players' claims for negligent or otherwise improper medical care are preempted.[82] However, some cases concerning medical issues survive preemption. For example, between 2005 and 2008, six Cleveland Browns players became infected with staphylococcus ("staph"), raising concerns about the cleanliness of the Browns' facilities.[83] Among the infected, wide receiver Joe Jurevicius and center LeCharles Bentley filed lawsuits against the Browns.

j Gill was removed as the Patriots' Club doctor in April 2014. Liz Kowalczyk, *Troubles In Their Field*, Bos. Globe, Apr. 12, 2014, *available at* 2014 WLNR 9885884. The Patriots stated the change was because Gill was no longer chief of sports medicine at Massachusetts General Hospital and that the Club's doctor had "always" been the chief of sports medicine at the Hospital. *Id.* The Patriots made the change even though some reports indicated he was well-liked and trusted by the players. Bob Hohler, *Gill Denies He Sided With Team Over Player*, Bos. Globe, Dec. 13, 2014, *available at* 2014 WLNR 35249641.

k Common law refers to "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." Black's Law Dictionary (9th ed. 2009). The concept of "preemption" is "[t]he principle (derived from the Supremacy Clause [of the Constitution] that a federal law can supersede or supplant any inconsistent state law or regulation." *Id.*

In 2009, Jurevicius sued the Browns and Browns' doctors in Ohio state court, alleging causes of action for negligence, negligent misrepresentation, fraud, constructive fraud, breach of fiduciary duty, common law intentional tort, and statutory intentional tort against the Browns.[84] Jurevicius generally alleged that the Browns failed to take proper precautions to prevent staph infections and lied to players about what steps the Club had taken to prevent infections.[85] The Browns attempted to remove the case to federal court (and then argued that it was preempted), arguing that Jurevicius' claims were barred by the CBA.[86] In a March 31, 2010 decision, the United States District Court for the Northern District of Ohio determined that Jurevicius' negligence, negligent misrepresentation, fraud, common law intentional tort and statutory intentional tort claims were not preempted, while the constructive fraud and breach of fiduciary duty claims were. The Court generally found that the CBA did not address a club's obligations concerning facilities and thus did not need to be interpreted to resolve Jurevicius' claims.[87] The lawsuit was settled a few months after the Court's decision.[88]

In 2010, Bentley sued the Browns, alleging facts and claims similar to Jurevicius'.[89] Likely because the Browns had already lost the argument that claims arising out of these facts were preempted, the Browns did not attempt to remove the case to federal court and have it dismissed on the preemption ground. Instead, the Browns filed a motion to compel Bentley's claims to the arbitration procedures outlined in the CBA.[90] In July 2011, relying on the *Jurevicius* decision, the Court of Appeals of Ohio affirmed the denial of the Browns' motion.[91] Bentley and the Browns settled the case a month later.[92]

In a very similar case, in 2015 kicker Lawrence Tynes sued the Tampa Bay Buccaneers after he contracted methicillin-resistant Staphylococcus aureus (MRSA) from the club's training facility. Relying in part on *Jurevicius*, the United States District Court for the Middle District of Florida ruled that Tynes' claims were not preempted.[93] The court found that Tynes' claims had "nothing to do with medical treatment" and that "there is nothing in the CBA regarding the condition of facilities."[94] The case was remanded to Florida state court and is ongoing as of the date of publication.

One additional case bears mentioning. In *Chuy v. Philadelphia Eagles Football Club*,[95] former Eagles lineman Don Chuy successfully recovered against the Eagles for intentional infliction of emotional distress after the Eagles' Club doctor told a reporter that Chuy suffered from a fatal disease after the 1969 season. In a 1979 opinion, the United States Court of Appeals for the Ninth Circuit affirmed the jury verdict in Chuy's favor, finding that the allegations, if true as the jury found, "constituted intolerable professional conduct."[96] Considering the age of the case, its relevance today is unclear, particularly because it is questionable whether such a claim would survive preemption.

While players do have options for seeking redress against clubs concerning player health (probably arbitration more so than litigation), practical considerations often prevent players from pursuing these options. Players are constantly concerned about losing their job or status with the club. Filing a Non-Injury Grievance against a club is a surefire way to anger the club and jeopardize the player's career.[l] Thus, players often forego pursuing viable claims.

l Current Player 8: "You don't have the gall to stand against your franchise and say 'They mistreated me.' . . . I, still today, going into my eighth year, am afraid to file a grievance, or do anything like that[.]"

(F) Recommendations Concerning NFL Clubs

NFL clubs collectively comprise the NFL. Thus, any recommendations concerning NFL clubs would ultimately be within the scope of recommendations made concerning the NFL. Moreover, NFL clubs act only through their employees or independent contractors, including coaches, other employees, and the medical staff. Thus, any recommendation we make for the improvement of clubs would be carried out through recommendations we make concerning club employees. For these reasons, we make no separate recommendations here and instead refer to the recommendations in the chapters concerning those stakeholders for recommendations concerning NFL clubs. Nevertheless, we do stress that it is important that club owners, as the leaders of each NFL club and its employees, take seriously and personally participate in player health issues, including overseeing the response to recommendations made in this Report.

Additionally, there is one recommendation contained in another chapter that is also directly relevant to NFL clubs:

- Chapter 1: Players — Recommendation 1:1-G: Players should not sign any document presented to them by the NFL, an NFL club, or employee of an NFL club without discussing the document with their contract advisor, the NFLPA, their financial advisor, and/or other counsel, as appropriate.

Endnotes

1 American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 187 (2010).

2 See Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011) (listing each of the 32 different entities as defendants in lawsuit).

3 CBA, Art. 39, § 3(e).

4 CBA, Art. 20, § 2. It is most likely the General Manager or person with control over personnel decisions who makes the decision whether to place a player on the PUP List.

5 The American Board of Family Medicine issues Certificates of Added Qualifications in several areas, including Sports Medicine. *See Certificates of Added Qualifications (CAQs)*, Am. Bd. Family Med., https://www.theabfm.org/caq/index.aspx (last visited Aug. 7, 2015), *archived at* https://perma.cc/R6JS-D2Z5.

6 CBA, Art. 39, § 1. It is the American Board of Family Medicine which issues Certificates of Added Qualification in Sports Medicine. *See Sports Medicine,* Am. Bd. Family Med., https://www.theabfm.org/caq/sports.aspx (last visited Aug. 7, 2015), *archived at* https://perma.cc/R6JS-D2Z5.

7 CBA, Art. 39, § 1(e).

8 CBA, Art. 39, § 2.

9 CBA, Art. 39, § 4.

10 CBA, Art. 39, § 5.

11 CBA, Art. 41, § 1.

12 CBA, Art. 45.

13 CBA, Art. 45, § 4.

14 *See* 26 U.S.C. § 4980H.

15 CBA, Art. 25, § 4.

16 *See* 29 U.S.C. § 651, et seq.

17 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 109 (2012).

18 *See, e.g.,* 2011 CBA, Art. 41, § 1.

19 Lex Larson, Workers' Compensation Law, § 1.01 (Matthew Bender 2014).

20 Lex Larson, Workers' Compensation Law, § 1.03 (Matthew Bender 2014).

21 Howard Berkes, *Injured Workers Suffer As 'Reforms' Limit Workers' Compensation Benefits*, Nat'l Pub. Radio (Mar. 4, 2015), http://www.npr.org/2015/03/04/390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits, *archived at* http://perma.cc/X5WN-5TRG (discussing states' reductions in maximum workers' compensation benefits).

22 *See* 2011 CBA, Art. 41, § 4.

23 CBA, App. A, ¶ 9.

24 *See* Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. 211 (2005) (discussing generally medical malpractice in the sports context and the preclusion of claims by workers' compensation statutes); John Redlingshafer, *Tonight's Matchup – Workers' Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Received When a Team Doctor Allegedly Aids in Ending Their Careers?,* 2 DePaul J. Sports L. & Contemp. Probs. 100 (2004) (same).

25 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 111 (2012).

26 *Id.*

27 *Id., citing* Injured Workers' Ins. Fund of Md. v. Workers' Comp. Appeals Bd., 29 Cal. Workers' Comp. Rep. 182 (2001); Carroll v. New Orleans Saints, No. ADJ2295331 (ANA0397551) (Workers' Comp. Appeals Bd. Jan. 24, 2011).

28 Cal. Labor Code § 3208.1.

29 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 110 (2012).

30 *Id.* at *110, n. 18, *citing* Cal. Labor Code § 3550 (2012) (requiring employers to post in a conspicuous place the name of their insurance carrier and the entity responsible for workers compensation claims); *see, e.g.*, Kaiser Found. Hosp. v. Workers' Comp. Appeals Bd., 702 P.2d 197, 201 (1985) ("[W]hen an employer fails to perform its statutory duty to notify an injured employee of his workers' compensation rights, the injured employee is unaware of those rights from the date of injury through the date of the employer's breach, then the statute of limitations will be tolled until the employee receives actual knowledge that he may be entitled to benefits under the workers' compensation system.").

31 Gabriel Feldman, *Closing the Floodgates: The Battle Over Workers' Compensation Rights in California*, 8 Fla. Int'l Univ. L. Rev. 107, 110–111 (2012).

32 Ken Bensinger & Marc Lifsher, *California Limits Workers' Comp Sports Injury Claims,* L.A. Times, Oct. 3, 2013, http://articles.latimes.com/2013/oct/08/business/la-fi-workers-comp-nfl-20131009, *archived at* http://perma.cc/2JTS-83KK.

33 Armand Emamdjomeh & Ken Bensinger, *NFL Workers' Comp Victory Comes at a Price*, L.A. Times, Feb. 1, 2014, http://www.latimes.com/business/la-fi-nfl-claims-20140201-dto-htmlstory.html, *archived at* http://perma.cc/JNF5-42RR.

34 Bensinger, *supra* note 32.

35 *Id., citing NFL Tackles Benefits*, L.A. Times, Apr. 11, 1997, http://articles.latimes.com/1997-04-11/business/fi-47559_1_compensation-benefits, *archived at* http://perma.cc/EB2S-B54W.

36 CBA, Art. LIV.

37 Bensinger, *supra* note 32.

38 *See* Matthews v. Nat'l Football League Mgmt. Council, 688 F.3d 1107 (9th Cir. 2012); Chicago Bears Football Club, Inc. v. Haynes, 816 F. Supp. 2d 534 (N.D. Ill. 2011); New Orleans Saints, LLC v. Cleveland, No. 2:11-cv-02093 (E.D. La. Aug. 24, 2011) (Beck, Arb.); Kansas City Chiefs Football Club, Inc. v. Allen, No. 4:12-cv-00238 (W.D. Mo. Feb. 24, 2012) (Beck, Arb.), and Atlanta Falcons Football Club LLC v. Nat'l Football League Players Ass'n, No. 1:12-cv-00753 (N.D. Ga. Feb. 23, 2012) (Beck, Arb.).

39 See Michael Hiltzik, *California Gives a Huge Payoff to the NFL*, L.A. Times, Oct. 8, 2013, http://articles.latimes.com/2013/oct/08/business/la-fi-mh-nfl-20131008, *archived at* http://perma.cc/6V33-FCPB (discussing, among other things, timeline of amendments to California's workers' compensation laws).

40 The NFLPA issued a memorandum to agents and players about the issue. See Mike Florio, *California Overreacts to NFL Workers' Compensation Loophole,* ProFootballTalk (May 3, 2013, 10:11 AM), http://profootballtalk.nbcsports.com/2013/05/03/california-overreacts-to-nfl-workers-compensation-loophole, *archived at* http://perma.cc/TJZ3-X2LC. Also, star quarterbacks Tom Brady of the New England Patriots and Drew Brees of the New Orleans Saints wrote an editorial in the San Francisco Chronicle decrying the proposed legislation. Tom Brady & Drew Brees, *Injured Pro Athletes Deserve Workers' Comp,* S.F. Chronicle, June 23, 2013, http://www.sfchronicle.com/opinion/openforum/article/Injured-pro-athletes-deserve-workers-comp-4617644.php?t=7ce9302705cefdcb88, *archived at* http://perma.cc/R97F-J2TC.

41 Cal. Labor Code § 3600.5(c).

42 Cal. Labor Code § 3600.5(d).

43 See Hiltzik *supra* note 39; Florio *supra* note 40.

44 Brady *supra* note 40.

45 Florio *supra* note 40.

46 CBA, Art. 12, § 6(c)(v).

47 *See* 2011 CBA, Art. 12, § 2(a)(iv) (listing workers' compensation benefits among "Benefits" to be deducted).

48 Michael David Smith, *Brees, NFLPA Speak Against Saints-supported Workers' Comp Bill,* ProFootballTalk (May 16, 2014, 7:17 PM), http://profootballtalk.nbcsports.com/2014/05/16/drew-brees-nflpa-speak-against-saints-supported-workers-comp-bill/, *archived at* http://perma.cc/G57L-Z784; Mike Florio, *Louisiana Workers' Compensation Fight Could Be Easily Solved*, ProFootballTalk (May 17, 2014, 12:44 PM), http://profootballtalk.nbcsports.com/2014/05/17/louisiana-workers-compensation-fight-could-be-easily-solved/, *archived at* http://perma.cc/2BGU-Z9PP.

49 Florio *supra* note 48.

50 *Id.*

51 CBA, Art. 23, § 4.

52 See 2011 CBA, Art. 26, § 1 (listing a four-year veteran's minimum salary for the 2015 season as $745,000). $745,000 divided by 17 weeks equals $43,823.53.

53 *House Bill 1069 is Wrong for Louisiana*, NFL Players Ass'n (May 13, 2014), https://www.nflpa.com/news/all-news/house-bill-1069-is-wrong-for-louisiana, *archived at* https://perma.cc/5JM3-EB8Q.

54 Mike Florio, *Sponsor Pulls Controversial Louisiana Workers' Compensation Bill*, ProFootballTalk (May 27, 2014, 4:36 PM), http://profootballtalk.nbcsports.com/2014/05/27/sponsor-pulls-controversial-louisiana-workers-compensation-bill/, *archived at* http://perma.cc/E7DT-BGE9.

55 P.S. § 565.

56 NFLPA Regulations, § 3(B)(28).

57 CBA, Art. 39, § 3(a).

58 CBA, Art. 39, § 3(d).

59 For example, Injury Grievances, which occur when, at the time a player's contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the Salary Cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

60 *See* 2011 CBA, Art. 43, § 1.

61 *See* 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator's authority, including to grant a "money award").

62 CBA, Art. 43, § 2.

63 The Non-Injury Grievance arbitrator has the authority to determine whether a complaint against a doctor fit within his or her jurisdiction under Article 43. *See* 2011 CBA, Art. 43, § 1 (discussing scope of Non-Injury Grievance arbitrator's jurisdiction).

64 This information was provided by the NFLPA.

65 Letter from Thomas J. DePaso, NFLPA General Counsel, to W. Buckley Briggs, Vice President of Labor Arbitration and Litigation, NFL Management Council re: NFLPA v. New England Patriots (June 19, 2013).

66 Mike Reiss and Mike Rodak, *Source: Fanene agrees to terms*, ESPNBoston.com (Mar. 14, 2012, 3:45 PM), http://espn.go.com/blog/boston/new-england-patriots/post/_/id/4719093/reports-fanene-agrees-to-terms, *archived at* http://perma.cc/J777-DFFB.

67 Opinion, Nat'l Football League v. Nat'l Football League Players' Ass'n In re: Jonathan Fanene, 2–3 (CBA Appeals Panel, Feb. 25, 2013).

68 Josh Alper, Report: Pats Cut Fanene with Failure to Disclose Physical Condition Designation, ProFootballTalk (Aug. 22, 2012, 8:47 AM), http://profootballtalk.nbcsports.com/2012/08/22/report-pats-cut-fanene-with-failure-to-disclose-physical-condition-designation/, archived at http://perma.cc/G727-E7AV.

69 Opinion, Nat'l Football League v. Nat'l Football League Players' Ass'n In re: Jonathan Fanene, *supra* note 67.

70 *See* 2011 CBA, Art. 4, § 8 ("any Club, any player and any player agent or contract advisor engaged in negotiations for a Player Contract . . . is under an obligation to negotiate in good faith.")

71 Bob Hohler, *Gill Denies He Sided With Team Over Player*, Bos. Globe, Dec. 13, 2014, *available at* 2014 WLNR 35249641.

72 Mike Reiss, *Quick-hit Thoughts Around NFL, Patriots,* ESPNBoston.com (Sept. 21, 2013, 11:15 PM), http://espn.go.com/blog/boston/new-england-patriots/post/_/id/4749358/quick-hit-thoughts-around-nfl-new-england-patriots, *archived at* http://perma.cc/FR5E-SY2B.

73 In *Bunch v. New York Giants,* former New York Giants fullback Jarrod Bunch commenced a Non-Injury Grievance against his former Club alleging that the Giants violated the CBA by failing to advise Bunch that he had sustained a torn MCL during a 1993 training camp scrimmage. The arbitrator dismissed Bunch's claim as outside the 45-day statute of limitations. (Creo, Arb. Dec. 10, 1997), available as Exhibit 19 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.

In *Jeffers v. Carolina Panthers*, former Carolina Panthers wide receiver Patrick Jeffers brought suit against the Panthers and Panthers' doctor Donald D'Alessandro in North Carolina state court for medical malpractice alleging that D'Alessandro performed "high-risk surgical procedures upon Jeffers' knees without Jeffers' knowledge or consent." The North Carolina Superior Court denied the Panthers' motion to dismiss but granted the Club's motion to compel the action to arbitration. Jeffers thereafter filed a Non-Injury Grievance pursuant to the CBA. Before a hearing on the merits, the parties submitted two issues to the arbitrator: (1) whether Jeffers' claims against the Panthers were subject to arbitration; and, (2) whether Jeffers' claims were barred by the CBA's statute of limitations. The arbitrator found that Jeffers' claims against the Club were required to be brought under the CBA because the claims would require "consideration of the express and implied terms of the CBA." The arbitrator then dismissed Jeffers' claims as time-barred by the CBA's 45-day statute of limitations. (Das, Arb. Mar. 25, 2008), available as Exhibit 15 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.

In *Wilson v. Denver Broncos*, former Denver Broncos linebacker Al Wilson commenced a Non-Injury Grievance against his former Club alleging that the Broncos violated Art. XLIV, § 1 of the 2006 CBA (discussed above in *Bunch*) by failing to advise Wilson of the adverse effects of a neck injury sustained during the 2006 season. Wilson sought his 2007 salary after having been terminated prior to the 2007 season. The arbitrator dismissed Wilson's claim as outside the 45-day statute of limitations. (Townley, Arb. Oct. 29, 2008), available as Exhibit 16 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.

See also Stevenson v. Houston Texans (Das, Arb. Feb. 4, 2013) (player's Non-Injury Grievance that Club violated CBA by conducting contact drills in minicamp resulting in player's injury barred by CBA's 45-day statute of limitations), available as Exhibit 18 to the Declaration of Dennis L. Curran in Support of Defendant National Football League's Motion to Dismiss Second Amended Complaint (Section 301 Preemption), Dent v. Nat'l Football League, 14-cv-2324 (N.D. Cal. Sep. 24, 2014), ECF No. 73.

74 CBA, Art. 50, § 1(a).

75 CBA, Art. 50, § 1(d).

76 In Stringer v. Nat'l Football League, the Court also expressed concerns about the effectiveness of the Joint Committee: "While the NFL is required to give "serious and thorough consideration" to recommendations of the Joint Committee, the CBA imposes no independent duty on the NFL to consider health risks arising from adverse playing conditions, or to make recommendations for rules, regulations or guidelines for the clubs to follow." 474 F. Supp. 2d 894, 896 (S.D.Ohio 2007).

77 This information was provided by the NFLPA.

78 *Id.*

79 U.S.C. § 185.

80 Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 213, 200 (1985).

81 *See, e.g.,* Givens v. Tennessee Football, Inc., 684 F. Supp. 2d 985 (M.D.Tenn. 2010) (player's tort claims against Club arising out of medical treatment preempted); Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009) (players' tort claims arising out of drug test preempted).

82 *See* Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. 211 (2005) (discussing generally medical malpractice in the sports context and the preclusion of claims by workers' compensation statutes); John Redlingshafer, *Tonight's Matchup – Workers' Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Received When a Team Doctor Allegedly Aids in Ending Their Careers?,* 2 DePaul J. Sports L. & Contemp. Probs. 100 (2004) (same).

83 *See* Lotysz v. Montgomery, 309 A.D.2d 628 (N.Y. App. Div. 2003) (NFL player's medical malpractice claim against club doctor barred by state workers' compensation statute); Daniels v. Seattle Seahawks, 968 P.2d 883 (Wash. Ct. App. 1998) (same); Hendy v. Losse, 819 P.2d 1 (Cal. 1991) (same); Rivers v. New York Jets, 460 F.Supp. 1233 (E.D.Mo. 1978) (player's claim that club wrongfully concealed the true nature of player's condition barred by workers' compensation statute); Brinkman v. Buffalo Bills Football Club Division of Highwood Service, Inc., 433 F.Supp. 699 (W.D.N.Y. 1977) (player's claim that Club failed to provide adequate medical care barred by workers' compensation law). *See also* Bryant v. Fox, 515 N.E.2d 775 (Ill. App. Ct. 1987) (NFL player's medical malpractice claim against Club doctor not barred by workers' compensation statute where evidence established that doctor was an independent contractor); Martin v. Casagrande, 559 N.Y.S.2d 68 (N.Y. App. Div. 1990) (NHL player's claim that Club doctor and general manager conspired to withhold information about player's medical condition barred by workers' compensation statute); Bayless v. Philadelphia National League Club, 472 F.Supp. 625 (E.D.Pa. 1979) (former MLB player's claim that Club negligently administered pain-killing drugs barred by workers' compensation statute).

84 *See, e.g.,* Givens v. Tennessee Football, Inc., 684 F. Supp. 2d 985 (M.D.Tenn. 2010); Jeffers v. D'Alessandro, 681 S.E.2d 405 (N.C. Ct. App. 2009); Sherwin v. Indianapolis Colts, Inc., 752 F.Supp. 1172 (N.D.N.Y. 1990); *see also* Brocail v. Detroit Tigers, Inc., 268 S.W.3d 90 (Tex. App. 2008) (MLB player's claim that Club failed to provide a proper second opinion preempted). Older cases do not even incorporate a preemption analysis, as the CBA then-controlling was likely less substantive in player health and welfare provisions. *See, e.g.,* Krueger v. S.F. Forty Niners, 234 Cal.Rptr. 579 (Cal.App. 1987) (ordering judgment in favor of player who played from 1958–73 and who alleged 49ers fraudulently concealed medical information).

85 *Jurevicius Becomes Sixth Browns Player in 4 Years to Contract Staph Infection*, ESPN (Apr. 11, 2008, 6:06 PM), http://sports.espn.go.com/nfl/news/story?id=3341171, *archived at* http://perma.cc/5Q7K-6ZWK.

86 *See* Jurevicius v. Cleveland Browns Football Co. LLC, 09-cv-1803, 2010 WL 8461220 (N.D.Ohio Mar. 31, 2010).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Jurevicius Settles Lawsuit with the Browns*, ESPN (June 15, 2010, 6:37 PM), http://sports.espn.go.com/nfl/news/story?id=5289486, *archived at* http://perma.cc/5FYK-KB94.

91 *See* Bentley v. Cleveland Browns Football Co., 958 N.E.2d 585 (Ohio Ct. App. 2011).

92 *Id.*

93 *Id.*

94 *Browns, LeCharles Bentley Settle*, ESPN (Aug 15, 2012, 8:50 PM), http://espn.go.com/nfl/story/_/id/8272933/cleveland-browns-settle-former-lineman-lecharles-bentley-2010-staff-infection-lawsuit, *archived at* http://perma.cc/D87L-LZGY.

95 Tynes v. Buccaneers Limited Partnership, 15-cv-1594, 2015 WL 5680135 (M.D. Fl. Sep. 24, 2015).

96 *Id.* at *5–6.

97 F.2d 1265 (3d Cir. 1979).

98 *Id.* at 1274.