

Protecting and Promoting the **Health of NFL Players:**

Legal and Ethical Analysis and Recommendations

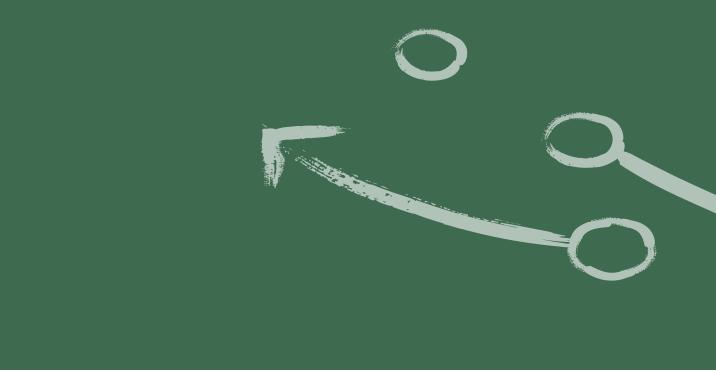
Part 6: Other Stakeholders



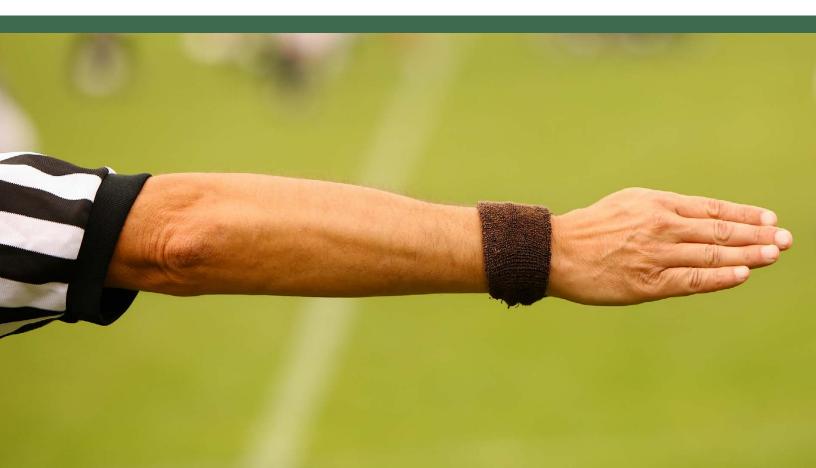
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Part 6 discusses several other stakeholders with a variety of roles in player health, including: Officials; Equipment Manufacturers; The Media; Fans; and, NFL Business Partners. Additionally, we remind the reader that while we have tried to make the chapters accessible for standalone reading, certain background or relevant information may be contained in other parts or chapters, specifically Part 1 discussing Players and Part 3 discussing the NFL and the NFLPA. Thus, we encourage the reader to review other parts of this Report as needed for important context.





Chapter 15



Officials

Officials, as the individuals responsible for enforcing the Playing Rules, have an important role in protecting player health on the field.

In order to ensure that this chapter was as accurate and valuable as possible, we invited the National Association of Sports Officials (NASO) and the National Football League Referees Association (NFLRA), both described below, to review a draft version of this chapter prior to publication. NASO provided brief comments but also stated that it did "not have any changes [it] feel[s] must be made."⁶² The NFLRA declined our invitation.⁶³

(A) Background

There are seven officials in an NFL game: Referee; Umpire; Head Linesman; Line Judge; Field Judge; Side Judge; and, Back Judge.¹ Each official is equally responsible for calling penalties during a game.² Each official is positioned differently on the field and the Referee is in charge of the officiating crew.

There were 122 officials during the 2015 season, with a mean of 11.5 years' experience in the NFL.³ Most NFL officials have 10 to 20 years of experience at the high school and college levels before becoming an NFL official.⁴ The NFL typically hires its officials from the best college football conferences.⁵

NFL officials are represented by the NFLRA. The NFLRA collectively bargains the terms and conditions of the officials' employment with the NFL. In fall 2012, the NFL locked out the officials after the parties were unable to agree on a new collective bargaining agreement (CBA).⁶ The lockout stretched from the preseason through the first quarter of the regular season, during which time replacement officials made numerous questionable calls, drawing the ire of players, coaches, and fans.7 In early September 2012, NFLPA General Counsel Tom DePaso wrote a letter to the NFL warning that the NFLPA would take "appropriate action" if it was determined that the replacement officials jeopardized the health and safety of the players.⁸ The NFLPA may have been concerned that the replacement officials would miss certain penalties, thereby effectively allowing riskier and more dangerous play.

In late September 2012, the parties reached a new CBA running through the 2019 season.⁹ The new CBA included a modified retirement structure through which the officials would partially contribute, an increase in pay to \$173,000 per year in 2013, rising to \$205,000 in 2019, and the option for the NFL to retain full-time officials (officials previously only worked during the preseason and season).¹⁰ The NFL-NFLRA CBA does not address player health issues.¹¹

Every NFL official is a member of NASO.¹² The NFLRA automatically enrolls all of its members as NASO members.¹³ NASO is a voluntary organization of approximately 22,000 member officials, ranging from the lowest levels of youth sports to the professionals.¹⁴ NASO provides an extensive list of services to its members, including educational programs, legal advocacy, and insurance policies.¹⁵ NASO, however, does not certify officials.¹⁶ Each sports organization, whether it is a state high school athletic association, the National Collegiate Athletic Association (NCAA), or the NFL, judges the qualifications of its officials during its hiring process.¹⁷

(B) Current Legal Obligations^a

Sports officials of all levels of play have generally been held to have the following legal duties: (1) inspect the field of play to ensure it is safe; (2) keep the playing field free of spectators and hazards; (3) ensure the game is played in safe weather conditions; and, (4) enforce equipment rules.¹⁸ These duties might appear limited but courts are historically reluctant to consider review of officials' on-field decisions during the course of play, such as whether an official failed to call a penalty or to apply a rule properly.¹⁹ Additionally, if players or other individuals seek to hold officials liable for a breach of one of the aforementioned duties, they must generally prove that the official acted with "gross negligence," as opposed to simple negligence.²⁰ The gross negligence requirement has historically applied to volunteer officials²¹ and thus it is unclear whether the same standard would apply to professional officials.

Official liability has also been shaped by robust lobbying efforts of the NASO.²² Sixteen states have passed laws requiring proof of gross negligence by an official before liability can be imposed.²³ The application of these laws is limited to youth sports, amateur sports, or volunteer officials in 13 states.²⁴ Three states (Tennessee, Mississippi, and Nevada) have laws restricting liability against officials that are not restricted to youth sports, amateur sports, or volunteer officials, and thus would protect NFL officials.²⁵ However, Tennessee is the only one of these states in which NFL clubs play.

NASO is aware of, and concerned about, the reach of statelevel concussion-related legislation, discussed at length in Part 7: Other Interested Parties, Section 3: Governments.²⁶ NASO is concerned that these laws improperly require lay officials to make medical determinations.²⁷ NASO is working to educate officials on the skills to recognize and report players with suspected medical conditions, and to always err on the side of caution by requiring players to be removed from play.²⁸

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

NASO also issues a Code of Conduct for Sports Officials, but none of NASO's stated principles concern player health and safety.²⁹ Moreover, NASO does not itself enforce its Code of Conduct.³⁰ Instead, it is NASO's intention that its Code of Conduct be adopted and enforced by the athletic associations and sports leagues that have authority over the officials.³¹

The NFLRA does not have a code of ethics.³²

D Current Practices

Many people have argued that the Playing Rules, and thus perhaps also the officials, have become overprotective of players' health and safety. That is, people often think that the Playing Rules, and thus also the officials, too frequently penalize players for certain types of tackles or hits, particularly on quarterbacks.³³ This opinion is held by many members of the media,³⁴ fans,³⁵ and players,^{36,b} among others.

Officials do play some role in the rulemaking process; they attend NFL Competition Committee meetings and participate in the discussion on proposed rule changes.³⁷ Moreover, certain rules do permit the official to take into consideration the likelihood of injury in determining whether to call a penalty, including roughing the passer³⁸ and roughing the holder on a place kick.³⁹ Nevertheless, the NFL makes the Playing Rules and it is the officials' principal job is to enforce them. On that front, there is generally no criticism that officials are failing to enforce the Playing Rules as enacted by the NFL.

In addition to calling penalties, NFL officials are empowered to call an "Injury Timeout" if he or she "determines a player to be injured."⁴⁰ In recent years, the NFL has actively encouraged officials to try and pay particular attention to see if players might be injured and to stop play accordingly.⁴¹ While it might be challenging for officials to determine whether a player is actually injured or faking an injury for competitive reasons, according to NASO, officials are taught to err on the side of caution.⁴² However, the Playing Rules also direct that the official "should not try to determine if [a] player is injured."⁴³ There are likely concerns about officials attempting to make medical determinations. Nevertheless, these two provisions seem to contradict and thus clarification may be warranted. Despite the officials' ability to prevent play from continuing when a player is injured, during the 2014 season there were several publicized examples of players who continued to play in games after suffering concussions.44 In the case of San Diego Chargers safety Jahleel Addae, "he looked disoriented and seemed to go into a convulsion while remaining on his feet, but he stayed in the game while fans on social media questioned why he was still playing while displaying such obvious distress."45 While the Addae incident caused the NFL to advise team medical staffs to be more vigilant about spotting concussions,46 it also raised concerns about the officials' failure to spot Addae's odd movements and to stop play as a result. Similar concerns were raised when New England Patriots wide receiver Julian Edelman looked "woozy" after suffering a hit in the 2015 Super Bowl.⁴⁷ Due partially to these incidents, in 2015 the NFL approved a rule that permits an athletic trainer stationed in the press box to stop play if it appears a player has suffered a head injury.⁴⁸

> In recent years, the NFL has actively encouraged officials to try and pay particular attention to see if players might be injured and to stop play accordingly.

Players that we interviewed seemed to believe that officials are doing an adequate job in enforcing the current rules but are not likely to take any other action concerning player health:^c

Current Player 5: "I think that they're doing as good of a job as they can. They're trying to do their best. I think with the targeting rules and the head to head contact, I think they've been overly cautious which, when it comes to protecting players, is probably on the right end. But besides that, I've never seen an official step outside the rule book to protect a player."

Former Player 2: "I don't think they play much role other than if they see a guy banged up, they're just going to make sure he seeks medical attention and that's what they're supposed to do. But I don't see them going above and beyond."

 $b \,$ Current Player 7: "It's . . . taking away from the game that we'll all learned how to play, by being too protective."

c We reiterate that our interviews were intended to be informational but not representative of all players' views.

(E) Enforcement of Legal and Ethical Obligations^d

Neither the CBA nor the Constitution and Bylaws address officials' conduct. Thus, it seems that a player would not be bound to arbitrate a claim against an official.⁴⁹

Moreover, litigation against officials seems to be an available remedy for players. It is unclear whether in any such litigations the gross negligence standard that has been applied to volunteer officials would also apply to professional officials officiating professional sports as research has revealed almost no cases where a professional official was sued.

There are only two known litigations concerning NFL officials, neither of which has clearly articulated a standard for judicial review of an official's actions.

In 1972, Baltimore Colts defensive end Charles "Bubba" Smith was injured during a preseason game when he collided with an aluminum yardage marker stuck in the ground on the sideline and which an official had not removed.⁵⁰ Smith was forced to sit out the 1972 season and sued the official.⁵¹ After a mistrial resulted in the case being retried, a jury found the official not liable for Smith's injury.⁵² In 1999, Cleveland Browns offensive lineman Orlando Brown was injured when an official threw a penalty flag (weighted with the standard BB pellets) into the air, which struck Brown in the eye.⁵³ The incident left Brown partially blind in the eye and seemingly unable to continue his football career.⁵⁴

Brown sued the NFL (but not the official) in a New York state court alleging that the NFL had failed to hire and employ competent officials and to properly train and supervise the officials.⁵⁵ In addition, Brown sought to hold the NFL vicariously liable for the official's alleged negligence.⁵⁶

The NFL sought to remove Brown's case to federal court and have it dismissed by asserting that his claims were preempted by the Labor Management Relations Act (LMRA) and the terms of the CBA.⁵⁷ The United States District Court for the Southern District of New York disagreed, holding that Brown's claims were state law claims which did not require interpretation of the CBA so as to trigger preemption.⁵⁸

The case was remanded to New York state court and reportedly settled for \$15 million to \$25 million in 2002.⁵⁹ Brown nevertheless actually returned to the NFL in 2003 and continued playing through 2005.⁶⁰

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

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F) Recommendations Concerning Officials

Indications are that officials are generally performing their jobs well concerning player health and safety and thus we have no formal recommendations for them. Officials should be praised for their efforts, particularly considering the high level of scrutiny around these issues. While officials should continue their solid work, they must always be diligent and open to change for additional ways to protect player health. In particular, it has been established that players who suffer brain injuries are at risk of serious aggravation of their conditions if they are injured again shortly after the first injury.⁶¹ While the athletic trainers designated for spotting injuries from the press box can help, officials should exercise their discretion to stop play liberally to ensure, as much as possible, that injured athletes do not remain on the field where they can be exposed to further injury.

Endnotes

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- 7 Id.; see Josh Katzowitz, NFL releases list of all officials for 2014 season, CBSSPORTS.COM (May 22, 2014, 11:38 AM), http://www.cbssports.com /nfl/eye-on-football/24569855/nfl-releases-list-of-all-officials-for-2014 -season, archived at https://perma.cc/A2ZW-F2GY (discussing that the 12 newest officials previously refereed in the Pac-12, SEC, Big 10, Big 12 and ACC).
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- 13 Interview with Jim Quirk, Executive Director, NFLRA (March 25, 2015).
- 14 Interview with Barry Mano, President, National Association of Sports Officials (Oct. 29, 2014).
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- 16 *ld*.
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- 19 Id. The Commissioner and the Supervisor of League Game Officials are responsible for selecting officials. See NFL Constitution and Bylaws (2012), § 8.7.
- 20 Glenn M. Wong, Essentials of Sports Law, § 4.7 (4th ed. 2010) (discussing duties of officials and gathering cases); Eric T. Gilson, *Sports Officiating and the Law: A Survey of Risks and Protections*, 7 Willamette Sports L.J. 32 (2009) (same).
- 21 See Alan S. Goldberger, Sports Officiating: A Legal Guide, 206–210 (2007) (stating "[t]he American legal system is traditionally reluctant to become involved in second guessing decisions of referees" and collecting cases); Order, Ind. School Dist. No. I-89 of Okla. County, Okla. v. Okla. Secondary School Activities Ass'n, 2014-cv-2235 (Okla. Cnty. Dec. 11, 2014) (dissolving temporary injunction after high school sued to replay state playoff game based on erroneous application of a rule: "it borders on the unreasonable, and in some respects extends far beyond the purview of the judiciary, to this Court more equipped or better qualified than Defendant to decide the outcome or any portion of a high school football game."); Georgia High School Ass'n v. Waddell, 285 S.E.2d 7 (Ga. 1981) (holding that Courts do not possess the authority to review the decisions of high school football referees).
- 22 See Marc T. Wolin, Robert D. Lang, Legal Liability for Sports Referees in Today's Litigious World – If You Can't Kill the Ump Then Sue Him, 15 U. Den. Sports & Ent. L.J. 83, 85 (2013); John Cadkin, Sports Official Liability: Can I Sue If the Ref Missed a Call? 2008 Den. U. Sports & Ent. L.J. 51, 52 (2008).
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- 24 *See* Gilson, *supra* note 20, at 41 (discussing NASO's lobbying efforts); Cadkin, *supra* note 22, at 56–57 (same).
- 25 Sports Officials Legislative Scorecard, Nat'l Ass'n Sports Officials, http://www.naso.org/Resources/Legislation/LegislationStatus/ SportsOfficialsLegislativeScorecard.aspx (last visited Aug. 7, 2015), archived at http://perma.cc/JV5L-98PD.
- 26 See M.G.L.A. 231 § 85V (Massachusetts statute restricting liability against volunteer officials and those working in youth sports); 745 ILCS 80/1 (Illinois statute restricting liability against volunteer officials and those working in youth sports); 42 Pa.C.S.A. § 8332.1 (Pennsylvania statute restricting liability against volunteer officials and those working in youth sports); 42 Pa.C.S.A. § 8332.1 (Pennsylvania statute restricting liability against volunteer officials and those working in youth sports); 6en.Laws 1956, § 9-1-48 (Rhode Island statute restricting liability against officials in youth sports); NDCC, 32-03-46 (North Dakota statute restricting liability against volunteer officials); LSA-R.S. 9:2798 (Louisiana statute restricting liability against volunteer officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against volunteer officials); Geality against volunteer officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports officials); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against youth sports); N.J.S.A. 2A:62A-6.1 (New Jersey statute restricting liability against yolunteer offic

§ 51-1-41 (Georgia statute restricting liability against officials for amateur sports); A.C.A. § 16-120-102 (Arkansas statute restricting liability against officials for amateur sports); V.T.C.A., Civil Practice & Remedies Code § 84.004 (Texas statute restricting liability against volunteers of youth sports organizations); MD Code, Courts and Judicial Proceedings, § 5-802 (Maryland statute restricting liability against officials of amateur sports).

- 27 See T. C. A. § 62-50-202 (Tennessee statute restricting liability against officials "at any level of competition"); Miss. Code Ann. § 95-9-3 (Mississippi statute restricting liability against officials "at any level of competition"); N.R.S. 41.630 (Nevada statute restricting liability against officials "at any level of competition").
- 28 Interview with Barry Mano, President, National Association of Sports Officials (Oct. 29, 2014).
- 29 *ld.*
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- 31 *See Code of Conduct for Sports Officials*, Nat'l Ass'n Sports Officials, http://www.naso.org/Portals/0/downloads/code_of_conduct.pdf (last visited Aug. 7, 2015), *archived at* https://perma.cc/35SA-8C6H?type =pdf.
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- 39 NFL Comments and Corrections (June 24, 2016).
- 40 NFL Playing Rules, § 2, Art. 9.
- 41 NFL Playing Rules, § 2, Art. 11.
- 42 NFL Playing Rules, § 5, Art. 2.
- 43 Interview with Jim Quirk, Executive Director, NFLRA (March 25, 2015).

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- 45 NFL Playing Rules, § 5, Art. 2.
- 46 Mike Florio, Giants LB Played Nearly Three Quarters with Concussion, ProFootballTalk (Nov. 13, 2014, 8:30 PM), http://profootballtalk .nbcsports.com/2014/11/13/giants-lb-played-nearly-three-quarters -with-concussion/, archived at http://perma.cc/LM4Z-YQJG; Lions' Michael David Smith, Laadrian Waddle Returned to Game After Concussion, ProFootballTalk (Oct. 23, 2014, 10:41 AM), http://profootballtalk .nbcsports.com/2014/10/23/lions-laadrian-waddle-returned-to-game -after-concussion/, archived at http://perma.cc/27UM-X5BJ.
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- 54 *ld.*
- 55 Brown v. Nat'l Football League, 219 F. Supp. 2d 372, 376 (S.D.N.Y. 2002).
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- 57 Id. at 376.
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Chapter 16



Equipment Manufacturers

One major strategy for protecting and promoting player health is to offer them the appropriate type and amount of injury-reducing equipment. For this reason, equipment manufacturers play an important role in player health.

In order to ensure that this chapter was as accurate and valuable as possible, we invited two leading equipment manufacturers, Riddell and Schutt, as well as the National Operating Committee on Standards for Athletic Equipment (NOCSAE), described below, to review a draft version of this chapter prior to publication. All three reviewed the chapter and provided comments.

(A) Background

The football equipment market is dominated by Riddell and Schutt, each of which hold at least a 45 percent share of the football equipment market,¹ across all levels of football. Riddell and Schutt offer all pads necessary for the game of football, including but not limited to helmets, faceguards, chin straps, mouth guards, shoulder pads, hip pads, thigh pads, knee pads, and rib pads.² Adams, another manufacturer of football equipment, was sold to Schutt's parent company, in 2014.³ Additionally, Rawlings, also once a manufacturer of football equipment, announced in 2015 that it was leaving the market.⁴ Xenith is seemingly one of the lone competitors left to Riddell and Schutt, though it only manufactures helmets and shoulder pads.⁵

The equipment manufacturers have not surprisingly had important interactions with the NFL. In 1988, the NFL and Riddell entered into an agreement without duration whereby Riddell provided free helmets, pads, and jerseys to all NFL clubs in exchange for Riddell receiving the exclusive right to display its logo on NFL helmets.⁶ Players were still nonetheless free to wear a helmet from any manufacturer, provided it met NFL standards.⁷ Schutt unsuccessfully challenged the NFL-Riddell agreement as a violation of antitrust laws.8 After litigation was initiated against both the NFL and Riddell concerning concussions (see Chapter 7: The NFL and NFLPA), the NFL renegotiated the agreement to conclude with the 2013 season.9 Following the expiration of NFL's deal with Riddell, the NFL said it would no longer have an official helmet sponsor.¹⁰ Similarly, the NFL does not have an official equipment sponsor. Players are permitted to wear whatever equipment they like, provided it meets NOCSAE standards, as will be discussed below.

For many years, the helmet manufacturers have attempted to develop helmets that reduced the risks of concussions and market them accordingly—even though it is questionable to what extent helmets can actually reduce the risk of concussions.¹¹ In comments provided after reviewing a draft of this chapter, Schutt CEO Robert Erb described the challenges of reducing the incidence of concussion as follows:

[W]hat is happening inside the skull, with the brain suspended in cerebrospinal fluid, is an extraordinarily complex event. There is an infinite array of possible trajectories and circumstances at the point of impact in a game of football, including field conditions, position played, girth and length of neck, medical history, whether one saw the hit coming, temperature, altitude, genetic make-up, area struck, type of turf, helmet implements and accessories, mass, speed, velocity of impact, fit of the helmet, etc., etc.

Indeed, the competition in the equipment manufacturer industry and the concerns about concussions have made the equipment manufacturing industry a challenging landscape. Riddell's development and marketing of the Revolution football helmet is a helpful example.

In 2002, Riddell provided a grant to be used to partially fund a study at the University of Pittsburgh Medical Center (UPMC) of Riddell's recently released Revolution helmet.¹² The study was designed to compare the concussion rates and recovery times for athletes wearing Riddell's Revolution helmet compared to athletes wearing older model helmets manufactured by both Riddell and its competitors.¹³ The study was conducted by Micky Collins and Mark R. Lovell, co-owners of ImPACT, the leading concussion diagnostic tool which was used to measure recovery time from concussion during the study.¹⁴

The study took three years and examined 2,141 high school football players: 1,173 using Revolution helmets and 968 using other helmets.¹⁵ The authors found 5.3 percent of players using Revolution helmets suffered concussions as compared to 7.6 percent of players using other helmets.¹⁶ The authors described the difference as "statistically significant" and said the results "demonstrated a trend toward a lowered incidence of concussion" but that the "limited sample size precludes a more conclusive statement of findings at this time."¹⁷ The study also highlighted that there was a 31 percent decreased relative risk for athletes wearing the Revolution helmet, comparing the 5.3 percent and 7.6 percent concussion rates.^{18,a}

Riddell seized on that last statistic and began to advertise that the Revolution helmet reduced the risk of concussion by 31 percent.¹⁹ Although this percentage improvement is technically accurate, the more relevant number in practice (or to players) is likely the absolute reduction in concussion rates, which was only 2.3 percent. Riddell also expanded the claim to all of its helmets even though they had not been a part of the study.²⁰

As part of a patent lawsuit brought by Riddell against Schutt, Schutt counterclaimed, alleging Riddell had violated state and federal false advertising laws by claiming that

a When providing comments for this Report, Riddell highlighted the fact that the UPMC study authors extrapolated that, if 1.5 million high school students participate in football each year, the risk reduction found with the Revolution helmet could theoretically mean 18,600–46,500 less concussions per year. Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).

Revolution helmets decreased the risk of concussion by 31 percent.²¹ The United States District Court for the Western District of Wisconsin ultimately granted Riddell summary judgment,^b finding that Riddell's claim that "technology" used in its helmets had been "shown to reduce the incidence of concussion" was not "literally false" as required to state a claim.²²

The 31 percent statistic has also been the subject of other litigation. In at least three cases brought by consumers (none of whom were NFL players), the plaintiffs alleged that Riddell's use of the 31 percent figure was misleading.²³ All three cases are ongoing as of the date of publication.²⁴ In two court decisions thus far, courts found that the 31 percent statistic could be considered misleading if it was used in advertising helmets that were not involved in the UPMC study.²⁵

However, Riddell's claims also caught the attention of the Federal Trade Commission (FTC). The FTC investigated Riddell and concluded that the UPMC study "did not prove that Revolution varsity football helmets reduce concussions or the risk of concussions by 31%."²⁶ The FTC nevertheless did not sanction Riddell since the company had already discontinued using the 31 percent statistic in marketing.²⁷ According to Riddell, it ceased using the statistic because it was no longer relevant—the helmets that the Revolution helmet had been compared to in the UPMC study "had largely been phased out of the market."²⁸

Notwithstanding the FTC's conclusion about Riddell's characterization of the UPMC study, the Revolution helmet has in other research been shown to reduce the risk of concussions as compared to older model helmets. A 2014 study determined that 2.82 percent of a population of college football players wearing a Revolution helmet suffered a concussion, as compared to 4.47 percent of players using an older Riddell model.²⁹ The study, like the UPMC study, found this difference to be statistically significant.³⁰

Perhaps counterintuitively, there has been an ongoing debate about whether the best way to improve player health is for players to wear *less* equipment. Coaches, commentators and others have long lamented that the helmet and shoulder pads are often used as a weapon by would-be-tacklers, offering the first and hardest blow to ball carriers.³¹ Although the NFL has recently increased the penalties for plays on which a player delivers a forcible blow with the top or crown of the helmet,³² the helmet arguably still

provides players with a level of protection that enables them to play the game with a degree of reckless abandon.³³

A recent rule changes provides a relevant example. In 2013 the NFL reinstated a rule requiring players to wear thigh and knee pads.³⁴ One might then have expected a reduction in contusions to the hips, thighs and knees that season. However, no such reduction occurred. During the 2013 season, there were 61 reported contusions to these areas.³⁵ In the four prior seasons, there was a mean of 55.75 contusions to these areas.³⁶ To be fair, this change was taking place simultaneously with other changes, confounding any strong causal inference, but it does give a reason to resist the assumption that more equipment necessarily equals fewer injuries.

Also of note, the NFL does not mandate the use of mouth guards,³⁷ despite some but still disputed evidence that mouth guards can help prevent concussions.³⁸

Attached as Appendix J is a timeline of equipment-related events and policies in the NFL.

B) Current Legal Obligations^c

The principal source of equipment manufacturers' legal obligations is products liability law.³⁹ Products liability is an area of tort law, which can vary from state to state. The American Law Institute publishes "Restatements of the Law," which are useful summaries of general principles about various areas of law. According to the Restatement of the Law Third, Torts: Products Liability, a manufacturer of consumer products, such as sports equipment, has a duty not to cause personal injury as a result of:

- selling or distributing products which contain manufacturing defects;⁴⁰
- selling or distributing products which are defective in design;⁴¹
- selling or distributing products without adequate instructions or warnings;⁴²
- 4. misrepresenting a material fact concerning the product;⁴³
- 5. failing "to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning";⁴⁴ and
- 6. failing to recall harmful products.45

b 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).

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

While the above list addresses an equipment manufacturers' principal legal obligations concerning player health, it is not an exhaustive list. For example, equipment manufacturers could potentially be subject to liability for common law fraud claims, for violating consumer protection statutes, or for misrepresenting their products.

Although every state legislature has passed a law concerning the treatment of concussions in youth athletes (*see* Part 7: Interested Parties, Section 3: Governments), there are no federal or state laws directly governing athletic equipment standards.⁴⁶

The safety standards for athletic equipment that currently exist are almost exclusively determined by the National Operating Committee on Standards for Athletic Equipment (NOCSAE). NOCSAE is a non-profit organization with the stated purpose of improving athletic equipment and reducing injuries through equipment standards.⁴⁷ NOCSAE was formed in 1969 in response to more than 100 high school and college football players killed by skull fractures and acute brain bleeding during the 1960s.48 NOCSAE's Board of Directors consists of representatives from the American Academy of Pediatrics, American College Health Association, American College of Sports Medicine, American Football Coaches Association, American Medical Society for Sports Medicine, American Orthopaedic Society for Sports Medicine, Athletic Equipment Managers Association, National Athletic Equipment Reconditioners Association, National Athletic Trainers Association, and the Sports & Fitness Industry Association.49

The safety standards for athletic equipment that currently exist are almost exclusively determined by the National Operating Committee on Standards for Athletic Equipment (NOCSAE).

Today, NOCSAE sets general safety standards for equipment in all sports while also providing specific guidance for baseball, softball, football, hockey, lacrosse, polo, and soccer.⁵⁰ Equipment manufacturers themselves and not NOSCAE are responsible for testing their equipment and evaluating compliance with the NOSCAE standards.⁵¹ Compliance with NOCSAE standards must then be confirmed by the Safety Equipment Institute, an independent organization that specializes in testing and certifying personal protective equipment.⁵² If the equipment complies, the equipment manufacturer may place a NOCSAE trademarked logo on the equipment indicating that it meets NOCSAE standards.⁵³

NOCSAE's funding is derived from manufacturers' use of the NOCSAE logo as a symbol of certification.⁵⁴ NOCSAE enters into licensing agreements with sports equipment manufacturers whereby the manufacturers are permitted to place the NOCSAE logo on its equipment provided the equipment meets NOCSAE's standards.⁵⁵ The licensing agreements also impose ongoing quality control and assurance requirements on the manufacturers.⁵⁶ If the equipment does not meet NOCSAE standards, then the manufacturer cannot use the NOCSAE logo, and presumably, NOCSAE does not receive any licensing money from the manufacturer.^d

Certainly a significant portion of NOCSAE's work has been related to football helmets and concerns about concussions. In reviewing a draft of this chapter, NOCSAE made three points it identified as framing its approach to these matters:

- 1. There is no concussion specific helmet standard in the world, in ANY activity, sport or otherwise.
- There is no scientific consensus as to what a concussion performance standard should incorporate as a pass/fail injury threshold.
- 3. Ethical standards for personal protective equipment must be based on consensus science, must be feasible and effective, and must not create a new risk of injury or increase the risk of injury in other areas.⁵⁷

NOCSAE has two standards relevant to football helmets. First, NOCSAE has a standard that governs helmets in sports generally, known as the ND001 standard.⁵⁸ Second, NOCSAE has a standard governing football helmets specifically, known as the ND002 standard.⁵⁹ The ND002 standard is subject to any changes made to the broader ND001 standard.⁶⁰ While some have suggested that NOCSAE's standards have not meaningfully changed over time,⁶¹ in reviewing this chapter, NOCSAE strongly disagreed.⁶²

d According to NOCSAE, since 1996 it has funded more than \$8 million of independent research at universities concerning equipment safety. Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors).

Indeed, a review of the relevant standards demonstrates that the ND001 standard has been substantively revised 16 times since it was first published in 1973, and the ND002 standard has been revised 3 times since it split from the ND001 standard in 1998.⁶³ Nevertheless, we are not engineers or scientists and thus we cannot opine on the significance of these revisions. Finally, it is important to understand that NOCSAE's standards are performance standards—they measure the helmet's ability to withstand certain physical forces—they do not specify materials or design.⁶⁴

Under NOCSAE's standard, the football helmet is placed on a synthetic head model that is filled with glycerin and fitted with various measuring instruments. The head model fitted with the helmet is then dropped sixteen times onto a polymer anvil with two of the drops from a height of sixty inches onto six different locations of the helmet at varying temperatures determined by NOCSAE to simulate different potential game temperatures. After each drop a "Severity Index," which measures the severity of the impact absorbed by the head model at the moment of impact, is determined. Helmets are graded on a pass-fail basis, and the helmets that pass are those meeting an acceptable Severity Index.⁶⁵

In June 2014, NOCSAE proposed a new standard that would include rotational forces into the analysis for football helmets.⁶⁶ The proposed standard was open for comment through June 2015 with NOCSAE scheduled to vote on its adoption in 2016.⁶⁷ Again, we lack the scientific expertise to opine on the appropriateness of NOCSAE's standards.^e Nevertheless, a report by the National Academy of Sciences on youth concussions, citing NOCSAE's research into rotational forces, suggested that NOCSAE's standards are at the forefront of the science in evaluating the efficacy of helmets.⁶⁸

The Consumer Product Safety Commission (CPSC), the federal agency responsible for regulating the safety of thousands of consumer products,⁶⁹ does not have any standards for football helmets.⁷⁰ Indeed, in 1980 the CPSC denied a petition requesting it set standards for football helmets "to reduce the risks of head, neck, and spinal injuries," citing voluntary standards and purported decreasing injury

e In reviewing a draft of this chapter, NOCSAE stated that its standards for football helmets, including third-party certification, exceed those set by the Consumer Product Safety Commission for bicycle helmets and by the Department of Transportation for motorcycle helmets. Letter from Mike Oliver, Executive Director/General Counsel, NOCSAE, to authors (Apr. 28, 2016) (on file with authors). We lack the scientific expertise to evaluate NOCSAE's statement.

rates.⁷¹ In 2011, New Mexico Senator Tom Udall proposed the Children's Sports Athletic Equipment Safety Action that would have required the CPSC to develop standards for football helmets, mandate third-party testing of youth football helmets, and instruct the Federal Trade Commission to regulate the manner in which helmet manufacturers advertise the safety specifications of their products.⁷² However, the bill was never enacted.^{73,f}

C) Current Ethical Codes

There are no known codes of ethics for sports equipment manufacturers.

D) Current Practices

f

Equipment manufacturers have seemingly altered their behavior due to the increased litigation and scrutiny, as discussed above in the background to this chapter. For example, in touting its new SpeedFlex helmet in 2014, Riddell's senior vice president for research and product development was careful not to claim that the helmet could help reduce concussions:

We'll let the medical researchers weigh in on the medical data around concussions, because that's kind of a moving target right now because of all the things that are being learned[.] But what we can do is try to reduce the forces of impact to the player's head. I think reducing those forces is unequivocally a good thing.^{74,g}

There is also the possibility (albeit unlikely) that football equipment, helmets in particular, could be regulated by the Food and Drug Administration (FDA). The FDA regulates "medical devices," which includes, among many other things, "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory which is ... intended for use . . . in the cure, mitigation, treatment, or prevention of disease, in man[.]" What is a Medical Device?, U.S. Food and Drug Admin., http://www.fda.gov/ aboutfda/transparency/basics/ucm211822.htm (last visited Aug. 7, 2015), archived at http://perma.cc/VJ9Q-GCUH, quoting Federal Food Drug & Cosmetic Act (FDCA) § 201(h), 21 USC 321(h). To the extent that football equipment and helmets are intended to prevent injuries and diseases, they appear to fit within the definition of a medical device. If the FDA chose to regulate football equipment, the manufacturers would be subject to a variety of regulatory requirements, likely including registering the product with the FDA, providing information to the FDA before the product can be sold publicly, and providing accurate and descriptive labeling and literature concerning the product. Overview of Device Regulation, U.S. Food and Drug Admin., http:// www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/#labeling (last visited Aug. 7, 2015), archived at http://perma.cc/6A6M-SU55. Nevertheless, there is no indication that the FDA is considering regulating football equipment and, as will be discussed below, it appears that football equipment manufacturers are providing the types of warnings that the FDA would likely require.

g Former Player 2 complained that equipment manufacturers were often misleading about their products: "This helmet is supposed to be safer for your head, but then you go hit somebody and you have a concussion. You're saying 'What the hell is going on?'"

Riddell's website also now contains a wealth of information, articles, and links concerning concussions,^{75,h} all of which would militate against claims that Riddell failed to warn consumers about the risks of concussions. Similarly, Schutt's homepage contains a lengthy warning about the risks of concussions that a visitor to the website must check off as having "read and underst[ood]" before visiting any other Schutt webpage.¹

At the current time, NOCSAE appears to be taking a proactive approach in assessing whether equipment actually meets its standards. In December 2014, NOCSAE announced that the two most popular lacrosse helmets on the market did not meet NOCSAE standards.⁷⁶ The helmet manufacturer quickly offered to increase the padding in the helmets at no cost to the consumer, a modification NOCSAE accepted.⁷⁷ Had it not made changes to the helmets, the manufacturer would not have been able to continue using the NOCSAE logo as evidence of its compliance with NOCSAE standards.⁷⁸

In addition to NOCSAE, Virginia Tech has also provided valuable information concerning football helmets. Since 2011, The Virginia Tech Department of Biomedical Engineering and Mechanics has been evaluating helmets using a series of biomechanical tests and assigning them a rating from zero stars up to five stars based on the helmet's perceived ability to minimize the risk of concussions.⁷⁹ The Virginia Tech ratings have become incredibly important in the industry, as consumers are reluctant to

h In reviewing this chapter, Riddell indicated that since 1981 its helmets have included a warning that "NO HELMET CAN PREVENT ALL HEAD OR NECK INJURIES A PLAYER MIGHT RECEIVE WHILE PARTICIPATING IN FOOTBALL" and that improper use of the helmet "can result in severe head or neck injuries, paralysis or death." In addition, Riddell indicated that beginning in 2002, its helmets have included warnings that contact in football can result in "CONCUSSION-BRAIN INJURY" and advised players not to "return to a game until all symptoms are gone and you have received MEDICAL CLEARANCE." Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).

i The entire message reads:

WARNING

Scientists have not reached agreement on how the results of impact absorption tests relate to concussions. No conclusions about a reduction of risk or severity of concussive injury should be drawn from impact absorption tests. NO HELMET SYSTEM CAN PREVENT CONCUSSIONS OR ELIMINATE THE RISK OF SERIOUS HEAD OR NECK INJURIES WHILE PLAYING FOOTBALL.

Keep your head up. Do not butt, ram, spear or strike an opponent with any part of the helmet or faceguard. This is a violation of football rules and may cause you to suffer severe brain or neck injury, including paralysis or death and possible injury to your opponent. Contact in football may result in Concussion/Brain Injury which no helmet can prevent. Symptons (sic) include loss of consciousness or memory, dizziness, headache, nausea or confusion. If you have symptoms, immediately stop and report them to your coach, trainer and parents. Do not return to a game or contact until all symptoms are gone and you receive medial (sic) clearance. Ignoring this warning may lead to another and more serious or fatal brain injury.

NO HELMET SYSTEM CAN PROTECT YOU FROM SERIOUS BRAIN AND/OR NECK Injuries including paralysis or death. To avoid these risks, do not engage in the sport of football.

See http://www.schuttsports.com/, archived at http://perma.cc/6K6F-PEU9.

buy anything that has not received five stars from Virginia Tech.⁸⁰ According to Virginia Tech, the research "is done as part of Virginia Tech's service mission and is 100% independent of any funding or influence from helmet manufacturers."⁸¹

E) Enforcement of Legal and Ethical Obligations^j

Players' only recourse against equipment manufacturers is a civil lawsuit.

Riddell, along with the NFL, is a defendant in the Concussion Litigation, discussed at length in Chapter 7: The NFL and NFLPA. The plaintiffs' claims against Riddell are summarized by the header to the section of the plaintiffs' Complaint concerning Riddell: "The Riddell Defendants Duty to Protect Against the Long-Term Risk of Concussions."⁸² The plaintiffs alleged a variety of intentional and negligent acts on the part of Riddell concerning the design, manufacture, inspection, testing and warnings related to Riddell helmets which allegedly caused plaintiffs to suffer injuries. The plaintiffs further alleged that Riddell has never "acknowledge[d] a link between repeat concussions and later life cognitive problems" and that Riddell has "never warned any Plaintiff or retired player of the long-term health effects of concussions."⁸³

In August 2012, Riddell sought to dismiss the plaintiffs' claims arguing, like the NFL, that the claims were preempted by the Labor Management Relations Act (LMRA).⁸⁴ Common law claims such as negligence are generally preempted by the LMRA.⁸⁵ The LMRA bars or "preempts" state common law claims^k 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."⁸⁶

Riddell argued that claims against it are subject to preemption "even though the Riddell Defendants were not parties to the CBAs, because, as the Supreme Court has explained, the doctrine of complete preemption barring state-law claims 'is more aptly expressed not in terms of parties but in terms of the purpose of the lawsuit."⁸⁷

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

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.*

The NFL settled the Concussion Litigation in August 2013, approved by the United States District Court for the Eastern District of Pennsylvania in April 2015,⁸⁸ and by the United States Court of Appeals for the Third Circuit in April 2016.⁸⁹ Riddell was not a party to the settlement and has not reached any settlement of its own. Thus, the Concussion Litigation continues as against Riddell.

Riddell's argument that the LMRA preempts the claims against it seems unlikely to succeed, if for no other reason than it would leave players with no ability to enforce equipment manufacturers' obligations. Players cannot pursue grievances against equipment manufacturers under the CBA because the manufacturers are not parties to the CBA and thus did not agree to arbitrate any such claims.

In addition, as mentioned above, Riddell is currently the subject of several ongoing lawsuits brought by non-NFL player consumers who, like the plaintiffs in the Concussion Litigation, allege a variety of intentional and negligent acts on the part of Riddell concerning the design, manufacture, inspection, testing, warnings, and marketing related to Riddell helmets that allegedly caused plaintiffs to suffer injuries.⁹⁰ Schutt is also a defendant in at least one of the lawsuits.⁹¹

There is, however, one case against Schutt brought by an NFL player that bears mentioning. In 2016, Ryan Mundy, who played in the NFL from 2009 to 2014, sued Schutt alleging that a defect in the helmet caused a laceration on his forehead when he impacted another player.⁹² Mundy alleged that the laceration required 17 stitches and left him with permanent scarring.⁹³ The lawsuit is ongoing as of the date of publication.

Lastly, NOCSAE has minimal enforcement authority against equipment manufacturers. As mentioned above, NOCSAE can only prevent non-conforming equipment from using the NOCSAE logo, substantially precluding the product from being sold. Since all NFL equipment meets NOCSAE standards, there is nothing more that NOCSAE can do in offering players recourse.



(F) Recommendations Concerning Equipment Manufacturers

It appears that equipment manufacturers are generally working to create the safest equipment possible. Equipment manufacturers for a variety of reasons (including both liability and brand image) have generally sought to make equipment safer and the recent increased emphasis on player health and safety can only have accelerated that interest. We thus expect and recommend that equipment manufacturers continue to invest in the research and development of safer equipment. Similarly, at present time it appears equipment manufacturers have been more careful in ensuring they accurately convey the benefits and limitations of their equipment. In this regard, equipment manufacturers should continue to do what they have been doing and there is no need for formal recommendations.

NOCSAE has minimal enforcement authority against equipment manufacturers. As mentioned above, NOCSAE can only prevent non-conforming equipment from using the NOCSAE logo, substantially precluding the product from being sold. Since all NFL equipment meets NOCSAE standards, there is nothing further NOCSAE can offer in terms of player health, other than continued research.

Considering the public interest at hand, football equipment might be an area where additional regulation would be appropriate. Nevertheless, it is unclear who might fill this role of regulating equipment manufacturers. One possibility is for the Government, including the CPSC, to play a greater role in establishing and enforcing equipment standards. For this and other reasons we have included the Government as an Interested Party in Part 7.

Endnotes

- See Lisa Brown, Rawlings Chases Growth in Football Equipment, St. Louis Post-Dispatch, Oct. 27, 2013, http://www.stltoday.com/business/ local/rawlings-chases-growth-in-football-equipment/article_06babb3c -9483-5115-b42b-8e818693901c.html (last visited Aug. 7, 2015), archived at http://perma.cc/MDR4-YFFN (describing each company's market share as exceeding 40%); Lisa Brown, Rawlings Gaining Ground in the Football Equipment Market, St. Louis Post-Dispatch, Sept. 18, 2011, http://www.stltoday.com/business/local/rawlings-gaining-ground -in-the-football-equipment-market/article_69329d3b-dd8d-5079-a9a9 -9cf8b473b832.html (last visited Aug. 7, 2015), archived at http://perma .cc/924L-C74G (describing Riddell and Schutt's combined market share as over 90%).
- 2 See Shop, RIDDELL, http://www.riddell.com/ (last visited Aug. 7, 2015); Football, Schutt Sports, http://www.schuttsports.com/aspx/sport/ ProductLanding.aspx?sp=3 (last visited Aug. 7, 2015), archived at http://perma.cc/HL4K-2EJE.
- 3 E-mail from Robert Erb, Chief Executive Officer, Kranos Corporation to authors (Mar. 16, 2016) (on file with authors).
- 4 Lisa Brown, End of the line for Rawlings' football helmets, St. Louis Post-Dispatch, June 21, 2015, http://www.stltoday.com/business/local/end -of-the-line-for-rawlings-football-helmets/article_c2a1a349-104c-504e -80d7-ea37c7ddd951.html, archived at https://perma.cc/F98N-XUV5.
- 5 *See Xenith Products*, Xenith, www.xenith.com/products/ (last visited Aug. 7, 2015).
- 6 See Jenny Vrentas, The First Line of Defense, MMQB (Oct. 22, 2013), http://mmqb.si.com/2013/10/22/nfl-helmets-head-injury-concussion/, archived at http://perma.cc/WL9Q-7PXT (describing Riddell agreement as "indefinite"); see also Schutt Athletic Sales Co. v. Riddell, Inc., 727 F.Supp. 1220 (N.D.III. 1989) (dismissing Schutt's claim that the NFL-Riddell agreement violated antitrust law).
- 7 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).
- See Schutt Athletic Sales Co. v. Riddell, Inc., 727 F.Supp. 1220 (N.D.III. 1989)

- 9 Darren Rovell, NFL, Riddell Ending Helmet Deal, ESPN, (Oct. 25, 2013, 2:44 PM), http://espn.go.com/nfl/story/_/id/9875758/nfl-end-official -helmet-deal-riddell-2013–14-season, archived at http://perma.cc /8LRU-CJHT.
- 10 Vrentas, *supra* note 6.
- 11 Steven Rowson et al., Can Helmet Design Reduce the Risk of Concussion in Football? 120 J Neurosurgery 919 (2014) ("Although helmet design may never prevent all concussions from occurring in football, evidence illustrates that it can reduce the incidence of this injury."); Don Comrie et al., Letters to the editor: football helmet design and concussion, 121 J. Neurosurgery 491 (2014) (criticizing the findings of the Rowson paper); Timothy A. McGuine, et. al., Protective equipment and player characteristics associated with the incidence of sport-related concussion in high school football players: a multifactorial prospective study, 42 Am. J. Sports Med. 2470 (2014) ("Incidence of SRC [sport-related concussion] was similar regardless of the helmet brand (manufacturer) worn by high school football players. Players who had sustained an SRC within the previous 12 months were more likely to sustain an SRC than were players without a history of SRC.").
- 12 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors); Micky Collins et al., *Examining Concussion Rates and Return to Play in High School Football Players Wearing Newer Helmet Technology: A Three-Year Prospective Cohort Study*, 58 Neurosurgery 275 (2006).
- 13 Id.; Riddell, Inc. v. Schutt Sports, Inc., 724 F. Supp. 2d 963, 967 (W.D.Wis. 2010).
- 14 Collins et al., *supra* n. 12.
- 15 Riddell, Inc. v. Schutt Sports, Inc., 724 F. Supp. 2d 963, 968 (W.D.Wis. 2010).
- 16 *ld.*
- 17 *ld.*
- 18 *Id.* 7.6% less 31% of 7.6% = approximately 5.3%.
- 19 *ld.*
- 20 Id. at 969.
- 21 See id. at 966.

- 22 Id. at 965.
- 23 See In re Riddell Concussion Reduction Litigation, 121 F. Supp.3d 402 (D.N.J. 2015); DuRocher v. Riddell, Inc., 97 F. Supp.3d 1006 (S.D. Ind. 2015); Midwestern Midget Football Club Inc. v. Riddell Inc., 15-cv-244, 2015 WL 4727438 (S.D. W. Va. Aug. 10, 2015).
- 24 See Thiel v. Riddell, Inc., 13-cv-7585 (D.N.J.); DuRocher v. Nat'l Collegiate Athletic Ass'n, 13-cv-1570 (S.D. Ind.); Midwestern Midget Football Club Inc. v. Riddell, Inc., 15-cv-244 (S.D. W. Va.).
- 25 See Memorandum Opinion and Order, Midwestern Midget Football Club Inc. v. Riddell, Inc., 15-cv-244 (S.D. W. Va. June 17, 2016), ECF No. 78; In re Riddell Concussion Reduction Litigation, 121 F. Supp.3d 402, 416–17 (D.N.J. 2015).
- 26 Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions, and the Battle for Truth 316–317 (2013). The FTC's investigation followed an October 19, 2011 hearing before the Senate Commerce entitled "Concussions and the Marketing of Sports Equipment." *Id.*
- 27 Id.
- 28 Letter from Brian P. Roche, General Counsel, Riddell, Inc., to authors (Apr. 28, 2016) (on file with authors).
- 29 Steven Rowson et al., *Can Helmet Design Reduce the Risk of Concussion in Football*? 120 J. Neurosurgery 919 (2014).
- 30 Id.
- 31 See Stephen Chapman, Football Doesn't Have to Resemble Battlefield Footage, Chi. Trib., Oct. 20, 1988, available at 1988 WLNR 1727333; Red Smith, Headgear as a Weapon, N.Y. Times, Feb 23, 1981, http://www .nytimes.com/1981/02/23/sports/red-smith-headgear-as-weapon.html, archived at http://perma.cc/2LJV-K2RQ.
- 32 David Barron, *Football: Prevent Defense: From NFL Down, Sport is Legislated to Create a Safer Playing Environment,* Hous. Chron., Aug. 18, 2013, *available at* 2013 WLNR 20617460.
- 33 To help teach players not to use their heads while making tackles, the University of New Hampshire football team occasionally practices without helmets. See Jenny Ventras, Helmetless Football? It's the New Practice at New Hampshire, MMQB, (Dec. 4, 2014), http://mmqb .si.com/2014/12/04/helmetless-football-practice-university-of-new -hampshire/, archived at http://perma.cc/6CBB-8Y5J.
- 34 Tom Pelissero, *More Padding Mandatory in NFL, Protection of Knees, Thighs Now Required,* USA Today, July 12, 2013, *available at* 2013 WLNR 16937591.
- 35 Quintiles, NFL Injury Data Analysis (Feb. 19, 2014) (on file with authors).
- 36 Id.
- 37 Jeffri Chadiha, *10 Steps to Make the Game Safer*, ESPN, (Aug. 30, 2012), http://espn.go.com/nfl/story/_/id/8061129/nfl-10-steps-make-game -safer (last visited Aug. 7, 2015), *archived at* http://perma.cc/E49Q -A6SC.
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- 40 A product "contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." Restatement (Third) of Torts: Products Liability § 2 (1998).
- 41 A product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the

omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2 (1998). This definition has proven controversial and some states have adopted alternative definitions. *See* Larry S. Stewart, Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime, 74 Brook. L. Rev. 1039 (2009); Patrick Lavelle, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 Duq. L. Rev. 1059 (2000).

- 42 A product "is defective because of inadequate instructions or warnings... when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. Restatement (Third) of Torts: Products Liability § 2 (1998).
- 43 "One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation." Restatement (Third) of Torts: Products Liability § 9 (1998).
- 44 "A reasonable person in the seller's position would provide a warning after the time of sale if: (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning." Restatement (Third) of Torts: Products Liability § 10 (1998).
- 45 "One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if: (a)(1) a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or (2) the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and (b) the seller or distributor fails to act as a reasonable person in recalling the product." Restatement (Third) of Torts: Products Liability § 11 (1998).
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- 60 See id. at ¶ 1.2.
- 61 See Alan Schwarz, As Concussions Rise, Scant Oversight for Football Helmet Safety, N.Y. Times, Oct. 21, 2010, http://www.nytimes.com/2010 /10/21/sports/football/21helmets.html?pagewanted=all, available at http://perma.cc/2LJV-K2RQ ("The standard has not changed meaningfully since it was written in 1973"); Jason Navia, Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention, 64 Admin. L. Rev. 265, 269 (2012) ("NOCSAE's testing standards for football helmets have not changed since 1973").
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Chapter 17



The Media^a

Today, the media takes on many forms, including traditional print journalists in newspapers and magazines, television and radio network broadcasters and reporters, and journalists who work for Internet-based news sources, *e.g.*, "blogs." In discussing the media in this chapter, we intend for the term to include all of the aforementioned individuals who report news as a profession, *i.e.*, get paid, as well as their employers.^{1,b} The NFL and the media have an important and significant relationship that, as a result, makes the media a stakeholder in player health.

a The portions of this work related to media are the result of collaboration with John Afflect, Knight Chair in Sports Journalism and Society, Penn State University.

b We recognize that the line between "media" and "social media" is increasingly blurred these days. Nevertheless, we think issues related to social media are properly addressed in Chapter 18: Fans.

In order to ensure that this chapter was as accurate and valuable as possible, we invited the Professional Football Writers Association (PFWA) and the National Sports Media Association (NSMA) to review a draft version of this chapter prior to publication. Both groups declined our invitation.

(A) Background

The NFL currently has television broadcasting agreements with ESPN, NBC, CBS, FOX, NFL Network, and DirecTV. The NFL also has a radio broadcasting agreement with Westwood One and, for at least the 2016 season, a streaming agreement with Twitter.² In total, the broadcasting agreements bring in approximately \$7 billion in annual revenue to the NFL³—58 percent of the NFL's approximate \$12 billion in total annual revenue.⁴

The television networks pay the broadcast fees in response to consumer demand. According to The Nielsen Company, during the 2015 season, 46 out of the top 50 rated television programs, including the top 25, were NFL games.⁵ In addition, more than 202 million Americans watched an NFL game in 2014—68 percent of the country.⁶

The networks also employ dozens of journalists, broadcasters, and other on-air talent to support their NFL coverage. All of the NFL's television broadcasting partners (except DirecTV) have pre-game shows consisting of various broadcasters, journalists, former players, coaches, and executives. Moreover, ESPN dedicates more than 23 hours of shows each week (not including SportsCenter) exclusively to the NFL during the season, and even created a 90,000 square foot studio exclusively for its NFL coverage.⁷

In addition to the television media, the PFWA consists of hundreds of writers who cover the NFL on a regular basis.⁸ These writers consist of traditional journalists as well as those who work for online news organizations.

To assist the media's coverage, the NFL has a robust Media Relations Policy requiring players and coaches to make themselves available to the media and for practices to generally be open to the media.⁹ Players diagnosed with concussions are excused from speaking with the media until they have cleared the Concussion Protocol (*see* Appendix A).¹⁰ Players nonetheless do not always cooperate with the Media Relations Policy. In 2014, Seattle Seahawks running back Marshawn Lynch was fined \$100,000 for refusing to speak to the media.¹¹ When he did speak, Lynch repeated the same non-responsive phrases over and over, such as "thanks for asking"¹² or "I'm just here so I won't get fined."¹³ Below, we discuss the media and its historical treatment of player health matters before moving to a discussion of the NFL's Injury Reporting Policy.

1) THE MEDIA AND ITS HISTORICAL TREATMENT OF PLAYER HEALTH

Media have been reporting on injuries since the NFL's inception. At the same time, reporters have also been praising players who played through injuries for just as long. The Chicago Daily Tribune's coverage of the NFL champion 1940 Chicago Bears provides some descriptive examples. In the account of a key victory that season, the Bears' 14-7 win over the Green Bay Packers, writer George Strickler declared "the story of the game is written in the second half, when [the Bears' George] Swisher leaped from the bench incased (sic) in tape that protected his recently fractured ribs and brought the breath out of a recordbreaking crowd of 45,434[.]"14 The article went on to praise Packers fullback Clark Hinkle, "who played a good share of the contest with a back injury that would have kept him out of any game except one with the Bears."15 About a month later, Strickler's preview of the championship matchup between the Bears and the Washington football club devoted a paragraph to Swisher, who had an injured heel but was declared set to play, and to two injured Washington players.¹⁶

The converse of this praise is that members of the media have also been willing to criticize those players they believe lack toughness,¹⁷ not an uncommon occurrence.

The introduction of television created a powerful new way for fans, through the media, to experience NFL football. For example, in 1960, CBS created a documentary called *The Violent World of Sam Huff*, a New York Giants linebacker. Huff wore a microphone during a game for the documentary, which was narrated by Walter Cronkite.¹⁸

Perhaps one of the most important events in the media's coverage of the NFL occurred with the creation by Ed Sabol of a small film company that would later become NFL Films, an NFL-controlled corporation. NFL Films created widely acclaimed highlight films using dramatic music, slow motion, and live microphone recordings of players and coaches. In addition, NFL Films excelled at glorifying the violence of the game and toughness of the players.¹⁹ Former NFL Films President Steve Sabol once described NFL Films' work as "movie making perfectly matched to the grace and the beauty and the violence of pro football."²⁰

Beginning in 2003,²¹ ESPN introduced a segment called "Jacked Up" which also glorified the violence of the game. The segment aired prior to Monday Night Football each week with former player and broadcaster Tom Jackson replaying the weekend's biggest and most ferocious hits while all of the announcers yelled in unison that the player receiving the hit had "got JACKED UP!"²² The segment was discontinued after the 2008 season²³ after criticism from both the media²⁴ and fans.²⁵

2) THE NFL'S INJURY REPORTING POLICY

A key component of the media's relationship to player health is the NFL's "Personnel (Injury) Report Policy" ("Injury Reporting Policy"). The Injury Reporting Policy requires each club to report information on injured players to both the NFL and the media each game week ("Injury Report").²⁶ The stated purpose of this reporting is "to provide a full and complete rendering of player availability" to all parties involved, including the opposing team, the media, and the general public. According to the NFL, the policy is of "paramount importance in maintaining the integrity of the NFL,"²⁷ *i.e.*, preventing gambling on inside information concerning player injuries.^c

The Injury Report is a list of injured players, each injured player's type or location of injury, and the injured player's type or location of injury, and the injured player's status for the upcoming game. Each injury must be described "with a reasonable degree of specificity,"²⁸ *e.g.*, ankle, ribs, hand or concussion. For a quarterback's arm injury or a kicker's or punter's leg injury, the description must designate left or right. Historically, the player's status for the upcoming game was classified into four categories: Out (definitely will not play); Doubtful (at least 75 percent chance will not play); Questionable (50-50 chance will not play); and, Probable (virtual certainty player will be available for normal duty).²⁹

In 2016, the NFL changed the classifications for player injuries by: (1) eliminating the probable designation; (2) changing the definition of "questionable" to "uncertain as to whether the player will play in the game"; (3) changing the definition of "doubtful" to "unlikely the player will participate"; and, (4) only using the "out" designation two days before a game.³⁰ The Injury Report also indicates whether a player had full, limited, or no participation in practice, whether due to injury or any other cause (*e.g.*, team discipline, family matter, etc.).³¹

Clubs must issue an Injury Report after practice each Wednesday, Thursday, and Friday of game week. If there are any additional injuries after the Friday deadline, the club must report these injuries to the NFL, the club's opponent, the televising network, and the local media on Saturday and Sunday.³²

The Injury Reporting Policy dictates that all injury reports be "credible, accurate, and specific within the guidelines of this policy." In "unusual situations," clubs are requested to contact the League's Public Relations Office, and when in doubt, clubs should include a player in the Injury Report. Clubs and coaches that violate the policy are subject to disciplinary action. If a player with a game status of "Doubtful" plays, the club must provide a written explanation to the NFL within 48 hours.³³

Despite the enforcement system and disciplinary action for abuse (typically fines of \$5,000 to \$25,000³⁴), many in the media along with coaches and players have questioned the Injury Report's accuracy and value. A 2007 USA Today analysis of two-and-a-half seasons of Injury Reports found a high variance in the number of injuries reported by teams, with 527 reported by the Indianapolis Colts versus just 103 by the Dallas Cowboys; interviews with coaches suggested that the different philosophies of coaches to report even minor injuries versus only major injuries accounted for this variance.³⁵ In the same article, former Pittsburgh Steelers coach Bill Cowher was quoted as saying that he deliberately changed the location of injuries (e.g., reporting hip instead of knee) to protect his players from having their injuries targeted by opponents.³⁶ Baltimore Ravens head coach Jim Harbaugh, after being fined for not listing an injured player in 2012, told the media that "[t]here's no credence on the injury report now. . . . It doesn't mean anything. It has no value."37 In March 2014, two former players on the New England Patriots stated that head coach Bill Belichick filed inaccurate and false injury reports.³⁸ Many in the media have referred to the Injury Report as a "game" or "joke."39 Finally, some believed that the 2016 changes to the injury reporting policy allowed for even more gamesmanship.⁴⁰ Possibly due to the potential for fines for misreporting injuries on the Injury Report, many clubs have policies prohibiting players from speaking to the media about injuries.41

c For more information on gambling and the NFL see Chapter 18: Fans.

(B) Current Legal Obligations^d

Traditionally, the media's main legal obligations toward the individuals it covers are explained in terms of defamation law. Defamation is "[t]he act of harming the reputation of another by making a false statement to a third person."42 Slander is the spoken form of defamation while libel is the written form.⁴³ A public figure, which would likely include any NFL player,⁴⁴ must prove that the reporter alleged to have committed defamation acted with "actual malice."45 Actual malice is generally established where the reporter knew the statement was false or acted with reckless disregard of whether the statement was false or not.46 Thus, media members generally have a legal obligation to work diligently to ensure the accuracy of their reports concerning public figures, including NFL players. Beyond these generalized obligations, there do not appear to be any specific relevant legal obligations that the media has as to NFL players.

C) Current Ethical Codes

The principal source of media ethical obligations comes from the Society of Professional Journalists (SPJ), a voluntary organization of nearly 10,000 members.⁴⁷ The SPJ Code of Ethics includes 35 specific obligations, separated into the following categories: Seek Truth and Report It; Minimize Harm; Act Independently; and, Be Accountable and Transparent.⁴⁸ The principles most relevant to NFL players include:

> Ethical journalism treats sources, subjects, colleagues and members of the public as human beings deserving of respect.

> > * * *

Balance the public's need for information against potential harm or discomfort.

* * *

Weigh the consequences of publishing or broadcasting personal information.

The PFWA does not have a Code of Ethics but does include as one of its stated purposes "[t]o practice and advance the concepts of professional journalism while using verifiable facts, proper attribution and an objective, appropriate perspective in order to inform and enlighten the public in a credible manner."⁴⁹

D) Current Practices

Media attention and interest concerning player health and safety has certainly increased in recent years. On the one hand, numerous news articles discussed and cited in this Report brought important attention to player health issues and increased scrutiny of current practices. At the same time, the media's interest in player injury information for reasons unrelated to player health has increased dramatically.

Perhaps the biggest contributing factor to increased media attention to player injuries is fantasy football. As is discussed in more detail in Chapter 18: Fans, tens of millions of NFL fans play fantasy football with billions of dollars at stake. An essential component of fantasy football success is the health of the players on the fan's fantasy football roster. Media companies have responded with a variety of items to assist fans. For example, ESPN has a website called "Injury Central" which tracks injuries to key fantasy players,⁵⁰ and CBS Sports partnered with a web application called "Sports Injury Predictor" which is supposed to help fans determine whether a player is likely to get injured.⁵¹ Additionally, every Sunday morning during the season, ESPN broadcasts a two-hour fantasy football show called "Fantasy Football Now." The program includes live updates from reporters on players' health statuses while also debating which players will "benefit" from the injury to another player.52 Another frequent topic of debate among fantasy football media is whether fans can "trust" a player and his health.⁵³ Finally, ESPN employs Stephania Bell, "a physical therapist who is a board-certified orthopedic clinical specialist" to provide analysis of player injuries, specifically as they relate to fantasy football.54

As is discussed in more detail in Chapter 18: Fans, Section D: Current Practices, some have argued that fantasy football commoditizes and depersonalizes the players.⁵⁵ The reason is that media and fan focus is not on the health of players as human beings, but the health of the player as a replaceable unit in a gambling game. For example, when Carolina Panthers quarterback Cam Newton was in a major car crash during the 2014 season, fans quickly took to social media asking what the car crash meant for their fantasy football team.⁵⁶

Another important factor in the media's coverage of players and their health is the increasingly intense 24/7 news cycle. With the rapid demand for and consumption of news, journalists may not have sufficient time to verify the details of a

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

story. If they do, they risk being scooped by competing news outlets. Moreover, news is no longer delivered by a predictable group of traditional news outlets. A large number of websites and Twitter users pass along rumors and other stories about players, many of which make it into the mainstream media as "news." Additionally, several top sports media organizations have websites specifically devoted to "rumors," including ESPN,57 FOX Sports' Yardbarker,58 and NBC Sports' ProFootballTalk.59 National Football Post, another well-read NFL-specific website, includes a column called "The Training Room," written by former San Diego Chargers Club doctor Dr. David Chao.⁶⁰ On a weekly basis, Chao speculates on the diagnosis, prognosis, and treatment of player injuries. Of note, Chao resigned as the Chargers Club doctor in 2013 after a series of negative incidents, including a complaint by the NFLPA (see Chapter 2: Club Doctors).

An example of the intense interest in player health information occurred during the 2015 offseason when Giants defensive end Jason Pierre-Paul suffered a hand injury that resulted in the amputation of one of his fingers. While Pierre-Paul was in the hospital and the status of his hand still uncertain, ESPN reporter Adam Schefter Tweeted a photo of a hospital surgical record showing that Pierre-Paul's finger was to be amputated.⁶¹ Despite criticism for posting the picture of Pierre-Paul's medical records, ESPN and Schefter defended the Tweet as part of the normal reporting of player injuries.⁶² In February 2016, Pierre-Paul sued ESPN and Schefter, alleging they had violated Florida medical confidentiality and privacy laws. In August 2016, the United States District Court for the Southern District of Florida denied ESPN and Schefter's motion to dismiss. finding that Pierre-Paul had properly pled a claim for invasion of privacy.⁶³ The case is ongoing as of the date of this publication.

Prior to the 2014 season, Green Bay Packers star quarterback Aaron Rodgers lamented the intense interest in player injuries and its effect on players:

TMI. There's too much information out there[.] There's too much exposure and, at times, undue pressure on players and coaching staffs to play now, win now. Just too much access.^{64,e} Players we interviewed echoed these concerns:^f

- **Current Player 4:** "I think at times [the media's coverage of player health issues] could be pretty hurtful Their job is to get as much information as possible and you, as a player, don't necessarily want all your business being published in an article."
- Current Player 5: "I think for the most part the media usually doesn't know what they're talking about. In sports reporting, I think there's a very low bar for accuracy. So I think in general that they don't do a very good job of drawing attention to player safety or reporting the facts."
- Former Player 2: "I don't know how accurate [the club is] giving proper information to the media . . . , so I wouldn't say [the media is] that accurate I would say 60 percent confidence that anything the media reports on injuries is true."

Clubs and the NFL have also placed considerable pressure on the way the media covers the NFL. The NFL and the clubs have websites that employ writers to cover the clubs. Not surprisingly, these writers receive greater access to the clubs, the League, coaches and players than unaffiliated writers, and often write stories favorable to the clubs or League. Additionally, NFL clubs often have public relations staff that monitors or shadows the media during interviews and news conferences. If a journalist writes articles unfavorable to the club, the club might reduce that journalist's access to the club, its coaches, and players.⁶⁵ Similarly, when reporter Albert Breer left NFL Network in 2016, he explained that, while with NFL Network, he was prevented or discouraged from reporting on stories problematic for the NFL.⁶⁶

> With the rapid demand for and consumption of news, journalists may not have sufficient time to verify the details of a story. If they do, they risk being scooped by competing news outlets.

e Perhaps as further support for Rodgers' complaint, in July 2014, the satirical news organization *The Onion* ran a story with the following headline: "Report: Majority of Football Fans Better Informed On Health of NFL Players Than Parents." *Report: Majority of Football Fans Better Informed on Health of NFL Players Than Parents*, The Onion (July 29, 2014), http://www.theonion.com/article/report-majority-of-football-fans-better-informed-o-36565, *archived at* http://perma.cc/GJY6-AX2F.

f 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.

g Former Player 2 also believed that "the media definitely does" put pressure on players concerning their health.

Despite the increased attention to player health issues, it is still common for journalists to question a player's toughness. For example, when Chicago Bears quarterback Jay Cutler was removed from a 2011 playoff game due to a knee injury, numerous news articles questioned the severity of Cutler's injury and his inability to return to the game.⁶⁷ Sometimes the criticism is more implicit. For example, during a 2015 playoff game against the Green Bay Packers, Dallas Cowboys linebacker Rolando McClain left the game after suffering a head injury.68 McClain had been diagnosed with a concussion earlier in the week after suffering a head injury in the prior week's game against the Detroit Lions.⁶⁹ Nevertheless, when McClain was taken out of the Packers game, a Dallas-based ESPN reporter Tweeted: "Rolando McClain to Cowboys locker room. Nobody frustrates training staff more[.]"70

Conversely, if the media glorifies players for playing with injuries,⁷¹ it creates pressure on other players to do the same.

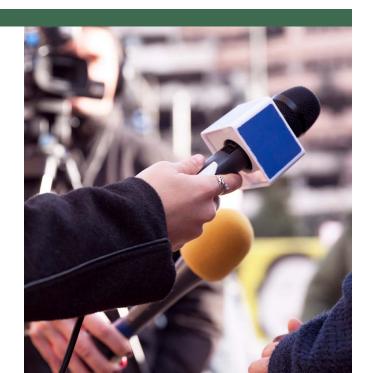
The media's portrayal of players can have a powerful influence on the public. In a 2014 article in *Communication* & *Sport*,⁷² researchers reviewed 177 newspaper articles concerning two injury situations: Cutler's, as discussed above, and Washington quarterback Robert Griffin III's efforts to play with a knee injury during a 2013 playoff game against the Seattle Seahawks.⁷³ Of note, the researchers found that the leading theme from the articles discussing Griffin's injury shifted the blame to the Washington football club (40.67 percent of articles). Meanwhile, 49.24 percent of articles supported Cutler's decision to stop playing while 44.22 percent of articles blamed Cutler in some way, downplayed the severity of his injury or called him a "sissy" in some way. The authors, citing other studies, reasoned that "[t]he notion that a player who needs to sit out or miss playing time due to an injury is a 'sissy' or less of a 'man' can have extremely unfortunate consequences."⁷⁴ Finally, the authors suggested that "[a]s sports journalists take more of an advocacy role and support athletes who make their health a priority, attitudes towards injuries and the players who sustain them may gradually begin to change."⁷⁵

The media's coverage of player health issues has been mixed. Beginning in January 2007, Alan Schwarz of The New York Times was one of the leading journalists to report on health problems among former NFL players and problems with the NFL's approach to player health issues, including its Mild Traumatic Brain Injury (MTBI) Committee.76 Schwarz appropriately received numerous accolades for this work. Mark Fainaru-Wada and Steve Fainaru of ESPN and authors of League of Denial similarly exposed problems in the way player health is or has been addressed, and the resulting problems suffered by current and former players. Reporters from all over the country and world have taken the lead from this work and contributed their own stories of problems concerning player health. Without this work, many of the improvements concerning player health that have been made in the last 5 to 10 years may never have happened.^h

Despite the important work the media has done reporting on player health, there are also concerns. First, the media regularly reports on the perils and drawbacks of football,

h Indeed, Current Player 9 believes the media has done a good job of covering player health "because they've done a good job of bringing awareness."

The media may not always have adequate space or time to convey the implications, and more importantly the limitations, of studies concerning player health.



whether children should be allowed to play,⁷⁷ and whether fans should continue to engage with the sport.⁷⁸ While these may be legitimate and important aspects to cover, some of this coverage shows a tendency to ignore important benefits to players (including those offered by the NFL and NFLPA) and others, and other positive aspects of the game.ⁱ In other words, balance in coverage in some instances appears to be lacking.

Another problem relates to accuracy. There have been many important scientific studies concerning the injuries, particularly concussions, suffered by football players. However, the media may not always have adequate space or time to convey the implications, and more importantly the limitations, of these studies.^{j,79} The media may not always have adequate space or time to convey the implications, and more importantly the limitations, of studies concerning player health. Similarly, the media has not always accurately reported on player health litigation. For example, on September 12, 2014, the NFL filed an expert report in support of its position that the Concussion Litigation settlement would adequately compensate the plaintiffs.⁸⁰ The NFL's experts, using "conservative assumptions," assumed 28 percent of former players would be eligible for benefits under the settlement to demonstrate that the settlement was adequate.81 The same day, the New York Times published a story entitled "Brain Trauma to Affect One in Three Players, N.F.L. Agrees."82 The Times' headline ignored that the number was used by an actuarial firm as a conservative estimate meant to demonstrate the adequacy of the settlement-as opposed to medical data-and misstated 28 percent as "one in three," when it is actually closer to

one in four.^k The scientific and legal nuances are difficult to understand, which makes accurate reporting on them critically important.

E) Enforcement of Legal and Ethical Obligations

A player's most likely available legal recourse against a member of the media is a civil lawsuit alleging defamation. As discussed above, lawsuits against journalists must overcome the high burden of proving that the journalist acted with actual malice, which should only arise in the rare event a journalist fails to abide by any of the sourcing or fact-checking requirements of the industry. Importantly, statements of opinion cannot be defamatory⁸³ and truth is an absolute defense to defamation claims.⁸⁴ While there are a few instances of sports figures suing journalists or publications for defamation,⁸⁵ there are no known cases of an NFL player suing a journalist.

In addition, as demonstrated by the Pierre-Paul case, it is possible more players will look to assert health privacyrelated claims against media members.

The PFWA has a "Grievance Committee" that is charged with hearing any complaints about its members but its sanctioning authority as to the media is unclear. Similarly, while the SPJ has an Ethics Committee, it has no mechanism for investigating or enforcing violations of its Code of Ethics.⁸⁶ Instead, the SPJ believes the best enforcement of journalism ethics comes from the scrutiny of the public and other journalists.⁸⁷

i Former Player 3: "There's thousands, tens of thousands, of former players . . . doing great, physically, mentally, financially, spiritually doing great. So those stories are not told."

i For example, in January 2015, The New York Times reported on a study done at the Boston University School of Medicine which, based on tests given to 42 former NFL players, purported to find "that those who began playing tackle football when they were younger than 12 years old had a higher risk of developing memory and thinking problems later in life." Ken Belson, Study of Retirees Links Youth Football to Brain Problems, N.Y. Times, Jan. 28, 2015, http://www.nytimes.com/2015/01/29/ sports/football/study-points-to-cognitive-dangers-of-tackle-football-before-age-12. html, archived at https://perma.cc/G7MC-KGE8?type=pdf. However, the New York Times article did not include any responses to the study, including criticism from highly respected neurologist Julian Bailes, which was included in ESPN's coverage of the study. See Tom Farrey, Study Cites Youth Football for Issues, ESPN (Jan. 29, 2015, 4:04 PM), http://espn.go.com/espn/otl/story/ /id/12243012/ex-nfl-playersplayed-tackle-football-youth-more-likely-thinking-memory-problems, archived at http://perma.cc/V3Y5-EQJH (Bailes told ESPN "that the sample is too small to draw any conclusions from, and that the results of NFL players cannot be compared to that of athletes who never made it to that level.").

Similarly, in a lengthy article praising the attorney who filed the first concussionk related lawsuit against the NFL, the New York Times wrongly asserted that if the NFL had won its motion to dismiss prior to the settlement, the case would have proceeded in "mediation or arbitration." Michael Sokolove. How One Lawver's Crusade Could Change Football Forever, N.Y. Times (Magazine), Nov. 6, 2014, http://www.nytimes.com/2014/11/09/magazine/how-one-lawyers-crusade-couldchange-football-forever.html, archived at https://perma.cc/4DJ6-XMQV?type=pdf. In reality, dismissal likely would have been the end of the players' claims. See Michael McCann, Retired Players Who Opt Out of NFL Concussion Settlement Taking Big Risk, Sports Illustrated (Jan. 26, 2015), http://www.si.com/nfl/2015/01/26/nflconcussion-lawsuit-settlement-retired-players-opt-out, archived at http://perma.cc/ ZD66-EJ67. See also In re Nat'l Hockey League Players' Concussion Injury Litigation, 14-md-2551, 2016 WL 2901736, *22 (D. Minn. May 18, 2016) ("Plaintiffs, as retire[d] [hockey players], would likely be unable to access the arbitration forum and would not have another forum in which to seek relief").

F) Recommendations Concerning the Media

The media has a powerful and unique voice to shape the way player health issues are perceived and addressed. Below we make recommendations to improve the relationship between the media and the players they cover.

Goal 1: To recognize the media's responsibility in encouraging a culture of health for NFL players.

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

Recommendation 17:1-A: The media's reporting on players should take care not to dehumanize them.

The media can both help and hurt players. While many reporters are increasingly taking into consideration players' health, there are still many reporters who are willing to criticize and question the toughness of players who suffer injuries or who do not play with injuries. Such reports impossibly and improperly assume to understand the pain the player may be in or the medical consequences of the player's playing with the injury. Moreover, such reports fail to take into consideration the player's best interests, *e.g.*, the player's short- and long-term health.

Similarly, the fantasy football-related discussions, websites, and applications take on a disturbing tone in some instances. At their worst, they do not acknowledge the players as human beings with medical conditions that could, and in many cases will, affect the quality and length of their lives. Instead, in some instances there is a dehumanization of the player and only a concern for how the player's injury that will affect fantasy football rosters which, relative to player health, is meaningless.⁸⁸ While many in the media work hard to avoid dehumanizing players, those media members who participate in and perpetuate such discussions should reconsider the tone and context of their reports and debates. We recognize that this is an aspirational goal and not one that can be readily monitored or enforced, but it is important to acknowledge this behavior as a problem and the role it plays in player health.

Through taking care in its reporting of player injuries and treating players with dignity, the media has the power to draw greater public emphasis to player health and also reduce pressure on players to play while injured.

Recommendation 17:1-B: The media should engage appropriate experts, including doctors, scientists and lawyers, to ensure that its reporting on player health matters is accurate, balanced, and comprehensive.

The media's coverage of player health issues, while excellent at times, also has been occasionally misleading or not entirely accurate. Inaccurate news reports will only undermine the credibility of the serious issues facing NFL players. 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. While we understand the pressures faced by members of the media trying to complete work on tight deadlines, we also emphasize the importance of engaging appropriate experts who can help the media understand these complex issues.

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Chapter 18





Fans are undoubtedly a central component to the NFL's success. Fans engage with NFL football and players in a variety of ways, including by watching on television, attending practices or games in-person, by gambling and playing fantasy sports, and through public events where fans might see or speak with players. These different fan experiences also shape the fan's interests and role in player health.

While in other chapters we provided the stakeholder an opportunity to review a draft of the relevant chapter(s) prior to publication, because there is no well-defined representative for fans, no one reviewed this chapter on behalf of fans prior to publication.

a The portions of this work related to fans are the result of collaboration with Daniel Wann, Professor, Murray State University.

A) Background

Below we discuss two components of fandom that have connections to player health: (1) the level at which fans engage with the NFL; and, (2) gambling, an activity that presents particular legal and ethical concerns.

1) FAN ENGAGEMENT

NFL football is the most popular sport in America by a variety of measures.1 Thirty-five percent of Americans consider professional football (i.e., the NFL) their favorite sport, a number that is increasing yearly.² Fifty-five percent of Americans identify themselves as fans of the NFL.³ According to ESPN, there are more than 85 million "avid" NFL fans—"more than a quarter of the nation."⁴ A mean of more than 68,000 people attend every NFL game.⁵ NFL games are the most watched television programming: more than 20 million people watch the primetime broadcasts, triple the ratings of the major television networks.⁶ The Super Bowl is the most viewed broadcast in television history, with approximately 45-percent of all households (about 53 million) tuning in annually.7 And, not surprisingly, millions of fans also follow and engage with their favorite NFL clubs via social media.8

Indeed, NFL fans have strong psychological connections to their favorite clubs. Being a fan is a central component of their social identity,⁹ and fans often have a stronger connection to their favorite club than their religion or alma mater,¹⁰ or their favorite consumer brands such as clothing and food or beverage products.¹¹

2) FANS AND GAMBLING^b

A comprehensive analysis of issues in the NFL, including player health, is not complete without a discussion of gambling,^c including fantasy sports.^d The sports gambling

- c For purposes of this report, gambling is defined broadly to include traditional sports gambling (point spreads, money lines, totals, prop bets, in-game wagering, etc.), and fantasy sports (season-long and daily). We acknowledge the ongoing debate about whether fantasy sports constitute gambling but believe it is appropriate to include them in the definition for our purposes. *See, e.g.,* Decision and Order, State of New York v. DraftKings, Inc., Index No. 543054/2015 (N.Y. Sup. Ct. Dec. 11, 2015) (enjoining daily fantasy sports operator from conducting business in New York).
- d Although specific forms of fantasy sports have been exempted under the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), see 31 U.S.C. §§ 5361–5367, many suggest that in reality there is no distinction between gambling and fantasy sports, see, e.g., Robert Lipsyte, Serving Sports Fans Through Journalism, ESPN (Dec. 3, 2014), http://espn.go.com/blog/ombudsman/tag/_name/robert-lipsyte, archived at http://perma.cc/5G2C-EPTB ("The rise of gambling and fantasy leagues — some would argue often the same thing — will have social consequences that need to be monitored"); Joshua Brustein, Web Sites Blur Line between Fantasy Sports and Gambling, N.Y. Times, Mar. 11, 2013, http://www.nytimes. com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling. html, archived at https://perma.cc/C6E5-5J3P?type=pdf.

industry in the United States is vast and appears to have grown at an exponential rate since the 1970s.¹² The size of the legal college and professional football gambling market is limited to Nevada, Montana, and Delaware by virtue of the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal statute that exempted a small number of states from a federal prohibition on sports gambling.¹³

The legal sports gambling market in Nevada saw, in total, \$3.9 billion wagered on sports in 2014, \$1.74 billion of which was on football (about 45 percent of the total).¹⁴ In 2014, Nevada sportsbooks won \$113.73 million on college and professional football.¹⁵ Delaware recently reported revenue associated with state licensed football pools of \$25.4 million.¹⁶ The "Montana Sports Action," a line of games related to fantasy football and racing, sold \$179,790 worth of tickets in 2013.¹⁷ Although no monetary amounts are available, the *Houston Chronicle* reported that "the Super Bowl is by far the most wagered on event—legally and illegally—in the country."¹⁸

Despite the above-referenced figures, illegal gambling still dwarfs legal gambling. In the United States, illegal gambling on professional sports has been estimated at \$80-\$380 billion annually.¹⁹ If we assume the rate of illegal gambling on football matches Nevada's 45-percent rate of legal gambling on football, one would estimate that there is as much as \$170 billion illegally gambled on football each year.²⁰ While likely off in its specifics, that estimate gives a rough sense of the magnitude of illegal NFL gambling that goes on.

The relationship between gambling and the NFL's popularity is undeniable. As one current club owner recently said in reference to gambling, "our game is made for that."²¹ In testimony surrounding the 1999 National Gambling Impact Study (created at Congress' behest), broadcaster Bob Costas stated "there is also no denying that the presence and prevalence of sports gambling benefits those leagues and benefits their television ratings."²² More recently, NFL commentator Mike Florio opined on the role of fantasy sports and NFL popularity:

The unprecedented growth of pro football over the last 20 years has resulted in large part from the ascension of fantasy football. With free agency potentially undermining fan rooting interest in specific teams, the ability to cobble together a team of their own has expanded fan interest far beyond the teams they love and the teams they hate.²³

b The portions of this work related to gambling are the result of collaboration with Ryan Rodenberg, JD, PhD, Professor, Florida State University.

Gambling and player health have a long history. Following a 1960 incident in which a point spread²⁴ changed dramatically after publication of a photograph of Pittsburgh Steeler quarterback Bobby Layne's injured arm, the NFL instituted a policy requiring clubs to report player injury status during the week.^{25,e} Former NFL security director Jack Danahy explained the purpose of the injury reports during a 1976 deposition:

We have initiated a program in the [NFL] wherein we require each team to report injuries on Tuesdays, again on Thursdays, and then following Thursday, right up to the time of the game. We publicize these injuries. The purpose of making this information public—and it has been in existence probably as long as I have been in the league . . . is to foreclose the possibility of gamblers attempting to obtain or obtaining confidential information or obtaining information surreptitiously as to the condition of ballplayers. We want it out in the open so that no one can claim an unfair advantage.²⁶

For at least the last 50 years, the NFL has been concerned about the possibility of inside information about player injuries making its way into the hands of gamblers, who typically were involved in organized crime. In 1967, NFL assistant to the Commissioner in charge of gambling, William G. Hundley, wrote a letter to a federal probation officer on behalf of organized crime figure Gil Beckley as a result of Beckley's provision of NFL gambling-related information to Hundley.^f Former NFL commissioner Pete Rozelle admitted in a 1976 deposition that inside information concerning injuries "could be construed as for gambling purposes."27 Also during a 1976 deposition, NFL security director Jack Danahy stated: "There can be times when maybe there is a key injury and we will have four and five representatives calling in at the same time with point spread changes."28 In 1977, the NFL admitted that

it "investigates at least one allegedly crooked game a week during a typical season."²⁹ Additionally, there have been reports of gamblers seeking to obtain information from NFL club doctors.^g

> In the United States, illegal gambling on professional sports has been estimated at \$80-\$380 billion annually.

(B) Current Legal Obligations^h

Generally speaking, fans have no legal obligations specific to their status as NFL fans. In other words, fans are generally obligated to treat (and avoid harming) players in the manner as they would any other individual.

Unfortunately, there have been several violent incidents between fans and athletes in a variety of sports over the years. Brawls occurred between Boston Bruins players and New York Rangers fans in 1980 (National Hockey League), and between Indiana Pacers players and Detroit Pistons fans in 2004 (National Basketball Association).³⁰ Fortunately (relatively speaking), in the NFL, fan and player violence has generally been limited to incidents of players and opposing fans trading snowballs.³¹ However, during a 2014 joint practice between the Oakland Raiders and Dallas Cowboys, after players began to fight near fans, a Raiders fan swung a helmet at a Cowboys player, narrowly missing.³²

While some of these incidents have resulted in criminal charges (typically assault or battery) for the fans and players,³³ there have been no criminal or civil proceedings that would demonstrate that fans have a legal obligation to players unique to the fan-player relationship.

e For more information on the NFL's Injury Reporting Policy, see Chapter 17: The Media.

f Letter from William G. Hundley to C.L. Williams, Probation Department, Miami, FL, April 20, 1967 ("[Beckley] offered, on a confidential basis, to furnish any information that came into his possession concerning the possibility of endeavors to corrupt professional football players, seek unauthorized information about players [sic] conditions, and supply any other information that might reflect adversely on the integrity of professional football."). A March 2, 1970 *Time Magazine* feature described Beckley as follows: "Handling as much as \$250,000 worth of bets daily, Beckley, 58, mastered all the tricks of his arcane trade: (i) wangling information from locker rooms; (ii) computing odds in his head; and (iii) occasionally bribing athletes." *See also* Adam Bernstein, *Lawyer William G. Hundley, 80*, Wash. Post, June 14, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/13/ AR2006061301681.html, *archived at* http://perma.cc/7WZ6-5QHZ (describing Hundley's role at the NFL).

g See Rob Huizenga, M.D., You're Okay, It's Just a Bruise 67–68 (1994) (former Los Angeles Raiders Club doctor explaining ""For the first time in my life I had information that people would pay money for. Big money.")

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

C) Current Ethical Codes

The only existing ethical codes for fans are stadium codes of conduct. In 2008, the NFL and its clubs began to implement codes of conducts for fans attending games.³⁴ The NFL's code requires fans to refrain from:

- Behavior that is unruly, disruptive, or illegal in nature.
- Intoxication or other signs of alcohol impairment that results in irresponsible behavior.
- · Foul or abusive language or obscene gestures.
- Interference with the progress of the game (including throwing objects onto the field).
- Failing to follow instructions of stadium personnel.
- · Verbal or physical harassment of opposing team fans.

Moreover, in 2012, the NFL began to require that any fan ejected from a stadium be required to take an online course on stadium conduct before being permitted back into an NFL stadium.³⁵ While these codes of conduct are not specific to the fan-player relationship, if followed, they would seemingly help to minimize the frequency of incidents between fans and players.

(D) Current Practices

1) FAN ENGAGEMENT

Increased attention on football-related injuries has had an effect on fans. A 2014 Bloomberg Politics poll reported that 50 percent of Americans say they will not let their son play football.36 Major news publications such as the New York Times and Boston Globe have questioned whether it is ethical to continue to watch football³⁷ or to let your kids play football.³⁸ Not surprisingly, between 2010 and 2012, Pop Warner, the country's largest youth football program, saw a 9.5-percent decrease in participation.³⁹ Although officials at Pop Warner have suggested a number of potential causes for the declining rates (e.g., a poor economy), they admitted that parent concerns about injuries was likely a key contributor to the drop in participation.⁴⁰ While other organizations have reported similar declines in participation,⁴¹ the Sports & Fitness Industry Association (SFIA) actually found that participation in tackle football across all leagues and among individuals aged 6 and above increased from 2014 to 2015.42,i

Despite all of the scrutiny, fans have generally not been dissuaded from consuming NFL football. Many fans enjoy NFL football (and other physical sports) specifically because of its violent nature.⁴³ Moreover, in a 2014 *Sports Illustrated* poll, while 26 percent of fans reported being less interested in NFL football as a result of news stories regarding the long-term health risks of playing football, only 8 percent said they actually viewed fewer NFL games than they did two years ago.⁴⁴ In contrast, 36 percent of fans said they were watching more NFL games than they previously did.⁴⁵ Additionally, after the NFL's mishandling of domestic violence incidents during the 2014 season, only 11 percent of fans said they were less likely to watch as a result.⁴⁶

Nevertheless, in the long term, decreased participation in youth football is likely to result in fewer future NFL fans. Research has frequently found that previous involvement in youth sport is one of the best predictors of interest in sport as a fan.⁴⁷ If fewer children participate in football because parents are hesitant to expose them to potential injury, a likely longitudinal consequence will be fewer adults interested in football as a fan years later (or at least less interested than they would have been had they played football).

The same dynamic is evident from older studies. A 1981 study found that fans rated football plays as more entertaining and enjoyable when the plays were violent in nature.⁴⁸ In a similar study, published in 1982, fans reported greater enjoyment of watching sport contests when the announcers focused on the hatred and violence between the two teams.⁴⁹ It has even been argued by some scholars that some fans are attracted to combative sports such as the NFL specifically for the opportunity to see players be injured.⁵⁰ Indeed, it is not uncommon for news articles to compare watching an NFL game to being in attendance at the Roman Colosseum.⁵¹

A fan's concern for an athlete's injury not surprisingly depends on his or her feelings toward that athlete. Following the 2001 fatal car crash by NASCAR drive Dale Earnhardt, Sr., researchers examined the reactions of NASCAR fans.⁵² Those who were not fans of Earnhardt were more likely to trivialize Earnhardt's death and be unsympathetic in their reactions to the crash. Conversely, fans with a strong attachment to Earnhardt were clearly disturbed and psychologically affected by the incident.

For more discussion on youth football, see Part 7: Other Interested Parties: Youth Leagues.

There are many incidents of fans cheering players' injuries. In one of the more famous examples, in 1999, Philadelphia Eagles fans cheered as Dallas Cowboys star wide receiver Michael Irvin was being placed on a stretcher as a result of head and neck injuries.⁵³ In a more recent trend, fans have been cheering when their own players (typically poorly performing quarterbacks) are injured, such as Cleveland Browns fans and Derek Anderson in 2008,⁵⁴ Kansas City Chiefs fans and Matt Cassel in 2012,⁵⁵ and Houston Texans fans and Matt Schaub in 2013.⁵⁶

Fans' occasional disregard for the health of players is not surprising considering past research that has shown that college football fans are more attached to the game of football than they are to the individual players.⁵⁷ Some have suggested that as a result of the players' helmets, players become depersonalized,⁵⁸ and thus fans do not develop the same sentiment towards players and might not be uncomfortable cheering an injury.

There are, of course, positive relationships between fans and players as well. Research has shown that athletes are viewed positively by fans where the athletes are perceived as "good people off the field,"⁵⁹ and exhibit prosocial behavior.⁶⁰ Nevertheless, there is no doubt that players often feel pressure from fans to perform.⁶¹

2) FANS AND GAMBLING

As discussed in the background section of this chapter, the NFL has long been concerned about the commoditization of player health information. These concerns persist today. In a 2011 book discussing the gambling scandal involving former NBA referee Tim Donaghy,^j professional gambler Jimmy Batista described winning a large amount after receiving a tip from the Philadelphia Eagles' locker room concerning the injury status of star running back Brian Westbrook (who played from 2002 to 2010) right before a game.⁶²

Today, the "Personnel (Injury) Report Policy" ("Injury Reporting Policy") makes clear that "it is NFL policy that information on all injured players be supplied by the clubs to the league office."⁶³ The NFL describes the Injury Reporting Policy as one "of paramount importance in maintaining the integrity of the NFL."⁶⁴ The potential abuses of the Injury Reporting Policy, including the possibility that players and coaches target injured players, are discussed in more detail in Chapter 17: The Media.

Perhaps the most visible way in which gambling affects players today is through fantasy sports. An estimated 33.5 million Americans play fantasy sports every year, spending more than \$3 billion on fantasy games and related services and products.⁶⁵ Moreover, there are many websites where fantasy players, for a fee, can win cash prizes, some exceeding \$1 million.⁶⁶ These games have been partially exempted under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA),⁶⁷ a legal status supported by the NFL, MLB, NBA, NHL, and NCAA.⁶⁸

Fans now routinely harass players via social media or in person concerning players' fantasy performance.



j "Tim Donaghy, a former National Basketball Association (NBA) referee, was caught making picks on games he officiated during the 2006–07 season following an investigation conducted by the Federal Bureau of Investigation. Donaghy bet on dozens of games that he officiated in each of the three prior seasons and had disclosed information regarding player injuries and which referees were assigned to specific games to people betting on NBA games. He was eventually sentenced to a prison term of fifteen months for conspiracy to commit wire fraud and ordered to pay \$217,266 USD in restitution by denying his employer the intangible right to his honest services and conspiracy to transmit wagering information." Richard H. McLaren, *Is Sport Losing Its Integrity?* 21 Marq. Sports L. Rev. 551, 566 (2011).

The high stakes of fantasy sports has nevertheless come with a dark side. Fans now routinely harass players via social media or in person concerning players' fantasy performance.⁶⁹ Star running backs Jamaal Charles of the Kansas City Chiefs and Arian Foster of the Houston Texans both recalled being pressured by fans to come back from injuries to help the fans' fantasy football performance.⁷⁰ Additionally, many of the interactions have come in the form of threats. For example, during the 2013 season, a fan sent the following Tweet to New York Giants running back Brandon Jacobs: "ON LIFE BRANDON IF YOU DON'T RUSH FOR 50 YARDS AND TWO TOUCHDOWNS TONIGHT ITS OVER FOR YOU AND YO FAMILY N---ER."^k Jacobs reported the incident to NFL security.⁷¹

Current Player 4 relayed a story in which an injured teammate had a fan tell the player "to get back in the game" because the fan had the player on his fantasy roster. "[The player] was pretty disgusted that somebody would even suggest something like that."¹ Current Player 6 confirmed "[y]ou feel the pressure and you hear the chatter" and Current Player 7 said players "definitely" feel pressure from fans to play through injuries.^m

The NFL reportedly has growing concerns about high stakes fantasy sports,⁷² but to date has not reversed its position that fantasy sports is not gambling; this is unsurprising since the NFL administers free fantasy leagues (without cash prizes) through its own website,⁷³ and even recognizes a Fantasy Player of the Year at its annual awards ceremony.⁷⁴ Indeed, inside information concerning player injuries is now just as important for fantasy sports as it

- k In the Tweet to Jacobs, the fan spelled out the entire slur. See Fantasy Pressure, ESPN (Dec. 8, 2014, 10:09 AM), http://espn.go.com/video/clip?id=11994138.
- I Other players also expressed concern about the pressures created by fantasy football: Current Player 9: "Yes, definitely [players feel pressure from fans], especially with fantasy football." Former Player 2: "This fantasy football stuff right now has kind of gone crazy."
- m Other players did not believe players felt meaningful pressure from fans. Current Player 2: "I don't think that [fans] play a huge role in putting pressure on guys as they're out on the field. I don't think there's any that have any impact on the guy whether a guy is going to go out there and play hurt or not." Current Player 10: "I don't think the fans or even the media plays that much into it." 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.

always has been for more traditional gambling: ESPN offers a subscription service called "Insider Trading," which purportedly includes "a collection of fantasy advice pulled straight from the locker rooms and practice fields of every team."⁷⁵

The relationship between gambling and professional sports has caused some to reconsider its prohibition. In November 2014, NBA Commissioner Adam Silver, accepting that gambling has become widespread, called for the legalization of sports gambling, proposing that it instead be heavily regulated.⁷⁶ Indeed, both the NBA and MLB own equity interests in fantasy websites where fans pay entry fees and can win large financial prizes.⁷⁷ While the NFL does not have an equity interest in such websites, two NFL club owners do.⁷⁸ The NFL, nevertheless, as a collective entity, has been unmoved, stating that Silver's comment "doesn't change our stance that has been articulated for decades: no gambling on N.F.L. games."⁷⁹

E) Enforcement of Legal and Ethical Obligations

As discussed above, there are no legal obligations unique to the fan-player relationship. To the extent fans assault, batter, threaten or otherwise harm NFL players, NFL players could pursue either criminal charges or a civil lawsuit against the fan.

If fans are acting unruly or in a threatening manner at a game, players can bring that to the attention of security and have the fan ejected.

F) Recommendations Concerning Fans

Fans, ultimately, are what drive the success of the NFL. Fans consume the sport in incredible numbers, driving recordbreaking television audiences and contracts. Fans, thus, also have incredible power. Without fan interest, the money, power, and prestige disappear. Below we make recommendations that seek to recognize and harness the power of the fans for the betterment of NFL players.

Goal 1: To wield the power of NFL fans to improve the health of NFL players.

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

Recommendation 18:1-A: Fans should recognize their ability to bring about change concerning player health.

As discussed above, fans are tremendously important when it comes to the NFL's success. Fans thus have the leverage to pressure the NFL and other stakeholders into making positive changes for player health. There is precedent for the exercise of such leverage. In 2009, the Sports Fan Coalition was formed by a former White House attorney for the purposes of protecting fans' interests.⁸⁰ In its brief history, two items on the Sports Fan Coalition agenda have changed for the better: (1) NCAA college football created a playoff system; and, (2) the Federal Communications Commission eliminated a rule that permitted NFL clubs to "blackout" television broadcasts where the game did not reach a certain attendance level. While the Sports Fan Coalition's importance in these changes is unclear, it seems likely that the Sports Fan Coalition's expression of a collective fan voice had an impact.

Fans could have a similar positive impact on NFL player health, including by putting pressure on the NFL, NFLPA, clubs, and other stakeholders to adopt recommendations like those we have made in this Report.ⁿ

Recommendation 18:1-B: Fans should recognize that the lives of NFL players are more than entertainment, and that NFL players are human beings who suffer injuries that may adversely affect their health.

While NFL players' profession entails playing a sport largely for the entertainment of fans, an NFL career has real and important short and long-term impacts on players and their families. The fan experience sometimes strips some fans of understanding or sympathy for players—viewing them as mere means rather than human beings. Such a view is incompatible with the principle of Respect we have outlined in this Report. Fortunately, fans have increasingly taken note of the ways in which the game can harm players and through their behavior can help foster a norm of respect. This is a positive trend and hopefully one that will continue.

Recommendation 18:1-C: Fans should not pressure players to play while injured.

n The long-time NFL columnist Mike Freeman stated, "[i]f there ever comes a time when fans see the players as people and not commodities or gladiators or faceless entities on our fantasy rosters, everything could change." Mike Freeman, Two Minute Warning: How Concussions, Crime, and Controversy Could Kill the NFL (and What the League Can Do to Survive) xx (2015).

Recommendations Concerning Fans – continued

For the reasons discussed above, fans should respect players and their physical and mental conditions. It is obvious that all NFL players often play with varying degrees of injury and pain. No fan—except perhaps former NFL players—can realistically understand the physical limitations of a player's particular injury and whether it can withstand the physical demands of playing in an NFL game. Moreover, fans should respect that the player has legitimate long-term interests in his health at stake. As part of the continuing theme, fans must treat players with dignity and respect, and not as combatants for the fans' amusement.

On a related topic, fans should exercise discretion when communicating with players via social media. While the interaction between players and fans via social media is a great way to build a connection, fans should obviously refrain from crossing the line with racist attacks or other threats. To the extent players are recipients of such communications, they should take them seriously and report them to club and NFL security.

Recommendation 18:1-D: Fans should not advocate, cheer, encourage, or incite player injuries.

It seems obvious that one should not encourage or be happy about the bodily or mental injury of another human being. Nevertheless, fans sometimes express joy when a player, even their own team's player, has been injured. That behavior is incompatible with showing respect for players and treating them as human beings.

Endnotes

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Chapter 19



NFL Business Partners

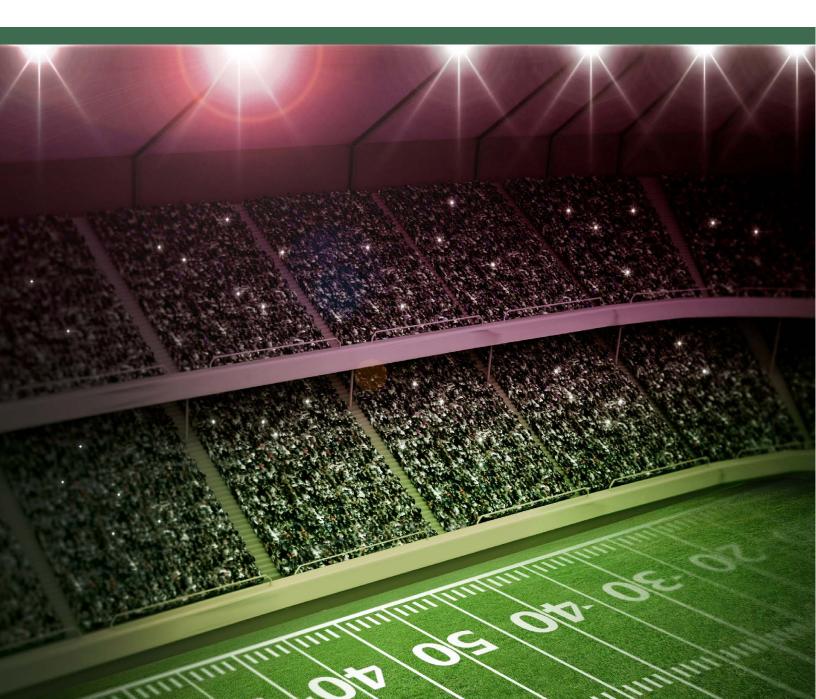
In the 2015 season, the NFL had approximately 29 official corporate partners,^a which collectively paid the NFL more than one billion dollars annually.¹ While there are many other companies that might advertise on television during NFL games or around other NFL events, the business partners we are principally focused on here are the ones that have reached an agreement with the NFL to be considered an official partner or sponsor of the NFL. These business partners are an important component in professional football. Such a role includes the potential, and at times the obligation, to also play a role in player health.

a These corporate partners are sponsors of the NFL as opposed to sponsors of particular clubs or players. In addition, none of them are Medical Service Providers, as discussed in Chapter 2: Club Doctors.

In order to ensure that this chapter was as accurate and valuable as possible, we invited nine NFL business partners to review a draft version before publication: Verizon, Anheuser-Busch, Pepsi, and McDonald's did not respond to multiple invitations to review the Report; Gatorade, FedEx, and Nationwide Insurance declined to review the draft; Microsoft reviewed the chapter but did not provide any comments; and, Nike provided a single comment affirming the importance of player health and safety to Nike.^b

(A) Background

The largest NFL business partners at the time of publication include Verizon (\$250 million in sponsorship annually);² Anheuser-Busch (\$233 million);³ Nike (\$220 million);⁴ Pepsi (\$100 million);⁵ and, Microsoft (\$80 million).⁶ The relationship with the NFL generally provides the business partners, among other things, advertising during NFL games and through other NFL media, the right to include the NFL logo on their products and in their advertisements, the right to advertise themselves as the "official" brand of the NFL, exclusivity in their brand category, and/or the right to engage in promotional activities at NFL events, such as the Super Bowl. The business partners have clearly determined that the value of their association with the NFL and the related exposure exceeds the millions in sponsorship fees.



b Nike's full comment: "As a sponsor of the NFL and the sponsor and footwear provider of many individual players, the safety and well-being of players is important to us. Through the years NIKE has worked closely with the both the NFLPA and the NFL in the NFL Foot and Ankle Committee (a subsection of the Player Safety Committee). Additionally, we have always worked directly with athletes, teams and equipment managers on testing, feedback and changes to our products to help athletes perform to their highest ability." E-mail from Nike counsel to author (May 18, 2016, 12:05 PM).

Table 19-A: NFL Sponsors (2015)⁷

Sponsor	Category	Since
Gatorade	Isotonic beverage	1983
Visa USA	Payment systems service	1995
Campbell's Soup	Soup	1998
FedEx	Worldwide package delivery service	2000
Frito-Lay	Salted snack/popcorn/peanuts/dip	2000
Mars Snackfood	Chocolate and non- chocolate confectionery	2002
Pepsi	Soft drinks	2002
Bridgestone	Tire	2009
Procter & Gamble (Gillette, Head & Shoulders, Vicks, Old Spice)	Grooming products, fabric care/ air care, household needs	2009
Verizon	Wireless telecommunication service	2010
Barclays	Affinity card/rewards program	2010
Papa John's	Pizza	2010
Castrol	Motor oil	2010
Anheuser-Busch	Beer	2011
USAA	Insurance/military appreciation	2011
Bose	Home theater system	2011
Marriott	Hotel	2011
Xbox (Microsoft)	Video game console, interactive video entertainment console	2011
Nike	Athletic apparel	2012
Quaker	Hot cereal	2012
Procter & Gamble (Tide, Duracell)	Household cleaning, battery power	2012
Lenovo	Computers (desktop, laptop, and computer workstations)	2012
McDonald's	Restaurant	2012
SAP	Cloud software solutions, business and business analytics	2012
Microsoft (Surface, Windows)	Sideline technology (tablet, PC operating system)	2013
Cover Girl	Beauty	2013
Nationwide	Insurance	2014
Extreme Networks	Wi-Fi Analytics Provider	2014
Hyundai	Automobile	2015

(B) Current Legal Obligations^c

Although NFL players and NFL business partners benefit from one another, there is generally no direct legal relationship between them. While some players might also enter into endorsement agreements with the business partners, these contracts concern marketing matters and would not create any legal obligations for the business partners concerning NFL player health.⁸ Similarly, the CBA does not create any obligations on NFL business partners, nor could it, since the CBA is a contract between the clubs and players. Thus, NFL business partners have no legal obligations to NFL players specific to their status as business partners.

C) Current Ethical Codes

The NFL is supported by a range of business partners whose main focus often has nothing to do with football, but instead centers on reaching the NFL's massive audience for marketing purposes. Reaching consumers is a legitimate and important business goal, but not all advertising venues are fair game. One can imagine a wide variety of unsavory outlets a company would prefer (and ought) to avoid, even if they would be an effective way to reach potential customers. This is because companies are often concerned—either genuinely, or out of fear that negative responses from consumers will affect their bottom linethat they may contribute to some ethically problematic endeavor, thereby becoming complicit in or even exacerbating it. Notably, complicity comes in many forms, ranging from failure to intervene when one has the capacity to provide assistance to offering active support to an ethically problematic activity.

As increasing questions arise about the health of professional football players, NFL business partners (and their customers) may ask themselves, "what is our responsibility?" That is, what level and type of support should they be providing to the NFL, or from a different angle, to the players? At root, these questions are about unclean hands, and whether NFL business partners are profiting on the backs of players who may suffer dire consequences in the long term. While the precise risks and benefits of an NFL career remain subject to debate, the concerns suggest that these are precisely the questions that ethically responsible companies should ask. To avoid complicity, these companies should be concerned with what endeavors they allow their money to support, and in what ways they can and/or should wield their power to affect change. The concept of corporate social responsibility seeks to address these questions. We find it a useful framework for understanding the ethical obligations NFL business partners might have towards players. The most influential articulation of corporate social responsibility principles is the United Nations Guiding Principles on Business and Human Rights, published in 2011 ("Guiding Principles").⁹ Indeed, many NFL business partners have stated their intention to comply with the Guiding Principles.¹⁰

To be clear, we are not claiming that any of the problems we discuss in this Report or that NFL players face by playing football rise to the level of human rights violations; given the simple fact of consent to play and payment for services, the difficulties players face do not compare to the numerous and ongoing tragedies around the world that human rights law is thought to govern. Nonetheless, the Guiding Principles provide a framework for understanding business enterprises' ethical obligations concerning others. This framework is useful to understanding the relationship between NFL business partners and players, even if we are not discussing human rights violations.

To put the point another way, in asking the question "what ethical obligations should business partners have as to the health of NFL players," it is useful to begin by understanding what recognized ethical obligations they have in the human rights realm, simply as a starting point. The Guiding Principles include several principles that may be relevant to that inquiry:

- Business enterprises should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."¹¹
- "[B]usiness enterprises should carry out human rights due diligence" including "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."¹²
- Business enterprises should engage in "meaningful consultation with potentially affected groups and other relevant stakeholders."¹³
- Business enterprises should "exercise" leverage "to prevent or mitigate the adverse impact" when possible.¹⁴
- Business enterprises which lack the leverage to prevent or mitigate the adverse impact should consider "collaborating with other actors."¹⁵

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

In the corporate context, these responsibilities are considered as defining the ethical business conduct, but the Guiding Principles do not purport to be legally enforceable obligations. Nonetheless, using the Guiding Principles as persuasive authority, we highlight two of the above principles for further discussion.

Importantly, the Guiding Principles do not require that the business enterprises' conduct cause an adverse impact, only that they be "directly linked." NFL business partners' practices almost certainly do not cause player health problems, but for reasons discussed in this chapter, there is a direct link between business partners' practices and player health issues.

Second, the second-to-last bullet point recognizes business enterprises' obligations to exercise leverage where appropriate. Again, for reasons discussed in this chapter, business partners have the ability to wield influence with the NFL. With that influence comes the responsibility to act conscientiously and force others to do the same, including on matters concerning player health.

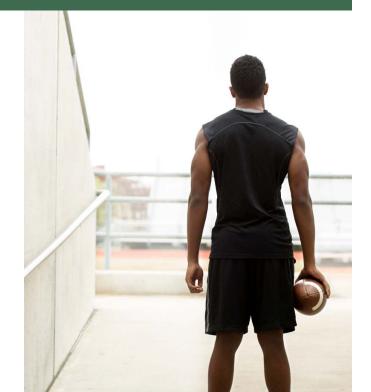
(D) Current Practices

NFL business partners' approach to NFL player health issues is best highlighted by examining their response to recent NFL controversies. When the NFL faced scrutiny for mishandled domestic violence incidents in the fall of 2014, many of its major sponsors issued generalized statements expressing disappointment in the situation and calling on the NFL to make changes.¹⁶ However, research has not revealed any statements by any NFL corporate sponsor concerning the lawsuits over concussions or painkillers, or any other player health or safety issue.

> Business partners should be concerned with what endeavors they allow their money to support, and in what ways they can and/or should wield their power to affect change.

Much of the relationship between business partners and the NFL occurs behind closed doors. All we can see are the public positions, statements, and actions undertaken by business partners. Taking inspiration from the Guiding Principles (and again emphasizing that there is no claim that we are talking about human rights violations), and evaluating only based on the public record (a limitation, to be sure), it does not appear that NFL business partners have undertaken any of these kinds of efforts to prevent harm to the health of NFL players, or even to influence a culture that recognizes the value and importance of player health. That is, there is no evidence that NFL business partners have: (1) sought to prevent or mitigate player health problems; (2) conducted due diligence concerning player health issues; (3) engaged in meaningful consultation

Research has not revealed any statements by any NFL corporate sponsor concerning the lawsuits over concussions or painkillers, or any other player health or safety issue.



with players concerning player health issues; (4) exercised leverage in an individual capacity to prevent or mitigate player health problems; or, (5) exercised leverage in a collaborative capacity to prevent or mitigate player health problems.^d

Commentators have opined that one way to push the NFL to make meaningful changes to its policies or course of conduct regarding player health is to threaten financial consequences, *i.e.*, if business partners threatened to stop doing business with the NFL.¹⁷ Thus, there seemingly exists the possibility that NFL business partners have the power to effect change—or to at least begin meaningful conversation about change—concerning player health issues.

Nevertheless, so long as the NFL remains a valuable property with which to be associated, it seems unlikely that individual business partners would risk damaging their relationships with the NFL by either taking adverse positions or putting pressure on the League. At the same time, this may be an era where the economic realities are changing.

Business enterprises that engage in sponsorship like that of the NFL's business partners are principally concerned with deriving economic value from the sponsorship through increased brand awareness and positive association with the sponsored entity, *e.g.*, the NFL. Negative publicity for the NFL or decreased attention to the NFL (*e.g.*, television ratings) lessens the economic value of the business partner's sponsorship. NFL player health issues have created negative attention for the NFL through lawsuits, news articles, and other means. This negative attention has the potential to spread to the NFL's business partners through a "guilt by association" mindset.^e Thus, this may be the moment where economic and ethical interests align, such that business partners can take on a more prominent role in pressing for protection of player health.

E) Enforcement of Legal and Ethical Obligations

In the absence of any existing legal or ethical obligations for NFL business partners concerning NFL player health, there can be no enforcement of any such legal or ethical obligations.

e Such concerns are not hypothetical. In 2014, five sponsors (Sony, Emirates Airlines, Castrol, Continental and Johnson & Johnson) pulled their sponsorship of FIFA's World Cup due to extensive allegations of corruption within the international soccer organization. See Peter Sharkey, Cup Joy's a World Apart From FIFA 'Toxic Brand', Birmingham Post (UK), Jan. 29, 2015, available at 2015 WLNR 2794660.



d The business partners' conduct must also be viewed in light of Guiding Principle No. 24, which states that "[w]here it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable." Thus, some business partners might believe there are issues of a human rights nature that deserve greater attention and immediacy than their involvement in NFL player health matters.

F) Recommendations Concerning NFL Business Partners

NFL business partners, due to the power of their purses, have a unique ability to influence the NFL to make positive changes concerning player health. Below we make recommendations that can improve business partners' approaches to player health issues, to the benefit of both players and the business partners. In making these recommendations, we also stress that while we recommend and encourage business partners to act independently when necessary, that if business partners collaborated and worked collectively on these issues they would be more likely to achieve positive changes quickly and effectively.

Goal 1: To encourage NFL business partners to work towards advancing a culture of health for NFL players.

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

Recommendation 19:1-A: NFL business partners should not remain silent on NFL player health-related policies.

During the 2014 season, the NFL's business partners condemned the NFL's failures to handle and address domestic violence issues. Several of the business partners' statements reflected on the NFL's place in our society and emphasized the need for ethical conduct and leadership.¹⁸ However, none of the business partners have ever made any statements concerning the risks players face in playing professional football and the tolls of such a career. Moreover, the business partners never made any statement concerning the allegations in the Concussion Litigation (*see* Chapter 7: The NFL and NFLPA) that for many years the NFL misrepresented the risks of playing professional football to players. Why this asymmetry? It is quite possible that business partners' comments on the domestic violence issue were in response to greater public pressure, and the more diffuse public pressure on player health has not yet reached the same crescendo.

Nevertheless, for the same reasons business partners commented on the NFL's domestic violence issues, they should also make their voices heard on player health-related issues. Business partners, like everyone in the professional football universe, need to understand and accept their responsibilities and role concerning player health.

A recent useful example is the energy bar company Clif Bar. Clif Bar sponsors adventure sports athletes, including mountain climbers. After determining that some of these athletes were taking risks that were excessive (such as not using safety ropes or BASE jumping), Clif Bar pulled their sponsorships of some of these athletes and issued a statement clarifying the types of risks Clif Bar felt comfortable supporting. Of particular relevance, Clif Bar indicated that it "no longer [felt] good about benefitting from the amount of risk certain athletes [we]re taking[.]"¹⁹

Recommendation 19:1-B: NFL business partners should consider applying pressure on the NFL to improve player health.

The NFL is a business and, like any business, does not want to suffer a drop in revenue. Individually, the business partners might not represent a significant portion of the NFL's revenue, but collectively the business partners' sponsorship fees comprise more than 10 percent of the NFL's revenue. Thus, collectively, the business partners have leverage, *i.e.*, the ability to force the NFL to make change at the threat of losing hundreds of millions of dollars. The business partners, consistent

Recommendations Concerning NFL Business Partners – continued

with the spirit of the Guiding Principles and other social responsibility initiatives and aspirations they have, should use their power of the purse to help the players from whom they derive considerable financial value.^f

To be fair, business partners might reasonably be concerned that any exercise of such leverage will only result in the NFL replacing them with a competitor. However, the NFL has reasons to maintain continuity with its business partners. Sponsor turnover is bad for brand loyalty and identification for both the sponsor and the NFL, thus decreasing the value of the replacement partner's sponsorship. For example, Pepsi is currently the official soft drink of the NFL. If Pepsi were to be replaced by Coca-Cola, many fans might still believe Pepsi is the official soft drink or be confused as to which brand is the official soft drink, decreasing the value of Coca-Cola's sponsorship and the amount it would be willing to pay to the NFL.²⁰

The recommendations made in this Report and other outlets that have discussed changes to player health provide guidance on the types of issues for which business partners should exercise leverage.

Recommendation 19:1-C: NFL business partners should consider supporting organizations conducting due diligence into player health issues.

The Guiding Principles, generally speaking, instruct business enterprises to conduct due diligence into how their actions and business relationships affect others. If business partners are going to make fully informed decisions about their relationships with the NFL, it would be advisable that they consider research and data on NFL players and the issues they face. While the business partners themselves likely lack the capabilities or expertise to conduct research into player health issues, they have the resources to support organizations conducting such research.

Recommendation 19:1-D: NFL business partners should engage players concerning player health issues.

As discussed above, NFL business partners receive tremendous economic value from their association with, and from the work of, NFL players. In such situations, the Guiding Principles direct that the business enterprise should engage the stakeholders involved to understand the impact of the business enterprise's conduct on the health of the stakeholder. Such conversations have the possibility to improve relations between the stakeholder and business enterprise, the business enterprise's own business operations, and the health of the stakeholder. In this context, NFL business partners could hold conversations with current or former players to better understand them and the issues that matter to them. Additionally, through these conversations, the business partners could learn how they might adopt more consistent messaging concerning professional football, apply pressure on the NFL where appropriate, and what types of causes or organizations concerning football the business partners should support. Such conversations would establish a better dynamic between players and business partners and enhance the business partners' reputation for social responsibility.

f FIFA again provides a useful example. In 2015, major sponsors Coca-Cola, Visa, and McDonald's demanded FIFA take actions to address allegations of corruption and criminal activity and requested a meeting to voice their concerns. Brian Homewood, *FIFA to meet sponsors after reproaches from Coke, Visa, McDonald*'s, Reuters, (Jul. 24, 2015, 8:48 AM), http://www.reuters.com/article/2015/07/24/us-soccer-fifa-sponsors-idUSKCN0PY1IC20150724, *archived at* http://perma.cc/VF4G-JHJ4.

Endnotes

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- 5 Matthew Futterman, NFL Back On Field, And Deals Pile Up, Wall St. J., Sept. 6, 2011, http://online.wsj.com/news/articles/ SB10001424053111904900904576552773485086198, archived at http://perma.cc/6QXS-GP4K. Gatorade, Frito-Lay, and Quaker are all brands owned by PepsiCo and are included in Pepsi's deal with the NFL, which runs through the 2022 season.
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- See Spons-o-Meter: NFL Lines Up 26 Partners To Start '13 Season, 7 Sports Bus. Daily (Sept. 13, 2013), http://www.sportsbusinessdaily .com/Daily/Issues/2013/09/06/NFL-Season-Preview/Sponsometer .aspx, archived at http://perma.cc/U4S2-TLUJ (providing the bulk of the list's data); New Deal Establishes Nike As League's Official Uniform Provider, NFL (Oct. 12, 2010, 1:25 PM), http://www.nfl.com/news/story /09000d5d81b4559b/article/new-deal-establishes-nike-as-leagues -official-uniform-provider, archived at http://perma.cc/R7PZ-393X (discussing sponsorship agreement between Nike and NFL); Nationwide Insurance Teams Up With The National Football League As An Official Sponsor, Nationwide Ins. (Aug. 4, 2014), http://www.nationwide.com/ about-us/080414-nfl-announcement.jsp, archived at http://perma.cc/ K74G-4WZV (discussing sponsorship agreement between Nationwide and NFL); Extreme Networks Named Official Wi-Fi Analytics Provider of National Football League, Extreme Networks (Jan. 15, 2014), http://investor.extremenetworks.com/releasedetail.cfm?releaseid =819515, archived at http://perma.cc/9LFY-ZSBD (discussing sponsorship agreement between Extreme Networks and NFL).
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- 12 Id. at 17.
- 13 *Id.* at 19.
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- 15 *ld.*
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- 18 See Kulikowski, supra note 16 (Anheuser-Busch stating that the players' actions "so clearly go against our own company culture and moral code."; USAA stating: "USAA's founding values of service, loyalty, hon-esty and integrity will always govern how we ultimately move forward, and we've made this clear to the NFL."; PepsiCo CEO Indra Nooyi stating: "Given PepsiCo's long-standing partnership with the NFL, I know Roger Goodell. We have worked together for many years. I know him to be a man of integrity, and I am confident that he will do the right thing for the league in light of the serious issues it is facing.").
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