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MOVING PAST A “POCKET CHANGE” SETTLEMENT: THE THREAT OF PREEMPTION AND HOW THE LOSS OF CHANCE DOCTRINE CAN HELP NFL CONCUSSION PLAINTIFFS PROVE CAUSATION

*John Guccione**

I. INTRODUCTION

On August 29, 2013, retired Judge Layn R. Phillips¹ announced a “historic” \$765 million settlement proposal between the National Football League (“NFL” or the “League”) and over 4,500 retired football players.² The plaintiffs, former NFL

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¹ On July 8, 2013, U.S. District Court Judge Anita B. Brody appointed former federal prosecutor and federal judge, Layn R. Philips, as mediator to settle claims between the NFL and thousands of former players. John P. Martin, *Judge Sends NFL Concussion Case to Mediation*, PHILLY.COM (July 10, 2013), http://articles.philly.com/2013-07-10/news/40471942_1_phillips-nfl-concussion-case-mediator.

² The retired players who sued the league will be referred to as “concussion plaintiffs,” “plaintiffs,” and “former players/athletes.” The agreement is not final, as it is still pending the preliminary approval of Judge Brody. The settlement specifically allocates \$75 million for baseline medical exams, \$675 million for cognitive injury compensation, and \$10 million for research and education, along with monies for the costs of notice to the class, settlement administrator compensation, and legal fees. Press Release, Alternative Dispute Resolution Ctr., NFL, Retired Players Resolve

athletes, accused the League of being aware of, and actively concealing, evidence linking football to mild traumatic brain injuries and their resulting “pathological and debilitating” neurological effects.³ The plaintiffs alleged “intentional tortious misconduct” by the NFL, “including fraud, intentional misrepresentation, and negligence,” and sought “a declaration of liability, injunctive relief, medical monitoring, and financial compensation for the long-term chronic injuries” the plaintiffs sustained during their NFL careers.⁴

Reactions to the proposed agreement varied greatly. For a number of those closely involved in the litigation and settlement process, there was an initial attitude of satisfaction on both sides.⁵ For example, NFL Commissioner Roger Goodell remarked, “this [settlement is] best for the game going forward,” and “best for the players, and that’s what’s important.”⁶ NFL Executive Vice President Jeffrey Pash reiterated the League’s apparent commitment to the well-being of athletes and their families: “This agreement lets us help those who need it most and continue our work to make the game safer for current and future players.”⁷ Judge Phillips, who oversaw the parties’ negotiations, stated the proposed settlement would ensure retired NFL athletes received necessary financial support, at a time when they most needed it.⁸

On the players’ side, Kevin Turner, a former running back and a lead plaintiff in the litigation, assured the public that the

Concussion Litigation (Aug. 29, 2013) [hereinafter ADR Press Release].

³ Plaintiffs’ Amended Master Administrative Long-Form Complaint at 1, *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. July 17, 2014) (MDL No. 12-md-2323) [hereinafter Plaintiffs’ Master Complaint].

⁴ *Id.*

⁵ *See, e.g., What People Are Saying*, NFL CONCUSSION LITIG., <http://www.nflconcussionmdl.org/what-people-are-saying/> (last visited Mar. 28, 2014) (listing testimonials of former NFL players, reporters, and legal experts expressing relief and gratitude as a result of the NFL settlement).

⁶ Ian Begley, *Roger Goodell Defends Settlement*, ESPN (Sept. 4, 2013), http://espn.go.com/nfl/story/_/id/9633728/roger-goodell-defends-765-million-concussion-settlement.

⁷ ADR Press Release, *supra* note 2.

⁸ *Id.*

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benefits of the agreement would make a difference for thousands of former athletes, both now and in the future.⁹ Christopher Seeger, co-lead plaintiffs’ attorney, reiterated this message, stating that the agreement “will get help quickly to the men who suffered neurological injuries . . . [f]aster and at far less cost, both financially and emotionally, than could have ever been accomplished by continuing to litigate.”¹⁰

Despite such positive responses, other commentators and former players expressed immediate dissatisfaction. A number of experts and former NFL players spoke out against the settlement, highlighting a number of terms that clearly favored the League.¹¹ In addition, simply by settling (regardless of the final terms) the NFL was afforded a number of protections they would have lost had the litigation continued. For example, as with most settlements, the proposed terms expressly articulated that the agreement in no way represented an admission of liability on the part of the NFL.¹² Many commentators also noted that by agreeing to settle, the NFL avoided an extremely damaging discovery process.¹³ Should the case have moved forward, plaintiffs’ counsel likely would have deposed the League’s staff and obtained access to internal documents and e-mails through the

⁹ *Id.*

¹⁰ *Id.*

¹¹ Former running back Leroy Hoard, for example, expressed concern regarding the fact that the second half of settlement monies are distributed over a long 17-year period, while punter Chris Kluwe and former linebacker Aaron Curry worried that the settlement, while helpful, would not provide sufficient compensation. *Reaction to the Concussion Deal*, ESPN (Aug. 30, 2013), http://espn.go.com/nfl/story/_/id/9612672/reaction-nfl-concussion-settlement.

¹² ADR Press Release, *supra* note 2.

¹³ *See, e.g.*, LaMar C. Campbell, Opinion, *NFL Concussion Settlement Raises Questions*, CNN (Sept. 9, 2013), <http://www.cnn.com/2013/09/08/opinion/campbell-nfl-lawsuit/> (“[T]he league does not have to face the discovery and deposition process and therefore leaves many questions unanswered.”); Daniel Engber, Opinion, *NFL Concussion Settlement Doesn’t Show Us How Dangerous Football Really Is*, THE BUFFALO NEWS (Sept. 8, 2013), <http://www.buffalonews.com/opinion/nfl-concussion-settlement-doesnt-show-us-how-dangerous-football-really-is-20130908> (“[T]hey would have been forced to put a huge library of internal documents on the record.”).

discovery process, revealing exactly what the NFL knew and allegedly concealed from players and the general public.¹⁴ Owners would have faced “continuing accusations of abusing players,” as highly skilled and motivated plaintiffs’ counsel would have conducted “nothing less than a strip search of NFL records.”¹⁵ Escaping an admission of liability also meant the NFL avoided one of the Plaintiffs’ key allegations: that the League knew the dangers and risks of repeated concussions, that it voluntarily undertook the responsibilities of studying NFL head injuries, and ultimately concealed their long term effects.¹⁶ In the words of former NFL Players Union President and Pro-Bowler, Kevin Mawae, while the settlement was great for older players in need of immediate help, it constituted “\$700 million worth of hush money that [the NFL] will never be accountable for.”¹⁷

Issues with the proposed settlement extend beyond the League’s ability to avoid admitting liability and evade discovery process disclosure. A number of critics have also expressed doubt with regard to the adequacy of the underlying settlement amount, going so far as to call it “barely a drop in the bucket.”¹⁸ Indeed, for an organization that currently generates approximately \$9 billion a year in revenue, the \$765 million settlement amount reflects “less than half of what ESPN alone pays the League

¹⁴ See Campbell, *supra* note 13.

¹⁵ Lester Munson, *Mediation Could Be the Answer*, ESPN (July 9, 2013), http://espn.go.com/espn/otl/story/_/id/9462264/questions-answers-judge-decision-send-nfl-concussion-lawsuit-mediation.

¹⁶ See Plaintiffs’ Master Complaint, *supra* note 3, at 23, 32.

¹⁷ Barry Wilner, *NFL Concussion Settlement Draws Mixed Reactions From Former Players*, HUFFINGTON POST (Aug. 30, 2013), http://www.huffingtonpost.com/2013/08/30/nfl-concussion-settlement-former-players_n_3845954.html.

¹⁸ Bill Barnwell, *What You Need to Know About the NFL’s \$765 Million Concussion Settlement*, GRANTLAND (Aug. 29, 2013), http://www.grantland.com/blog/the-triangle/post/_/id/72867/what-you-need-to-know-about-the-nfls-765-million-concussion-settlement; See Arthur L. Caplan & Lee H. Igel, *What’s Unsettled About the NFL Concussion Settlement*, FORBES (Aug. 30, 2013, 6:26 PM), <http://www.forbes.com/sites/leeigel/2013/08/30/whats-unsettled-about-the-nfl-concussions-settlement/>.

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annually.”¹⁹ Some early commentators predicted that the suit could be worth as much as \$10 billion, assuming each injured player and their family received an award of \$500,000.²⁰ In January 2013, Paul M. Barrett of Businessweek hypothesized a \$5 billion agreement.²¹ Even the more grounded figures initially sought by the plaintiffs were in excess of \$2 billion; over 260% more than the proposed settlement amount.²² As former Minnesota Vikings player and current plaintiff Brent Boyd lamented, “\$765 Million? The breakdown is \$1.2 million over 20 years per team. What is that, a third of the average salary? There is no penalty there. It’s pocket change.”²³

Presiding U.S. District Judge Anita Brody ultimately validated these concerns on January 14, 2014 by refusing to grant the settlement preliminary approval.²⁴ Before the proposed class action settlement agreement could take effect, Judge Brody had to give her approval pursuant to Federal Rule of Civil Procedure

¹⁹ Patrick Hruby, *Q&A: The NFL’s Concussion Deal*, THE ROTATION (Aug. 30, 2013), <http://therotation.sportsonearthblog.com/qa-the-nfls-concussion-deal/>. In 2011, ESPN agreed to a deal extending through 2021 where the NFL would receive \$1.9 billion a year in return for ESPN’s right to broadcast mainly Monday Night Football. Richard Sandomir, *ESPN Extends Deal with NFL for \$15 Billion*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/2011/09/09/sports/football/espn-extends-deal-with-nfl-for-15-billion.html>.

²⁰ See Glenn M. Wong, *SN Concussion Report: NFL Could Lose Billions in Player Lawsuits*, SPORTING NEWS (Aug. 22, 2012), <http://www.sportingnews.com/nfl/story/2012-08-22/nfl-concussion-lawsuits-money-bankrupt-players-sue-head-injuries>. This prediction was made when only 3,000 former players were involved. Applying this \$500,000 per player award to the number of plaintiffs ultimately involved in the settlement would result in even greater damages. *See id.*

²¹ Paul M. Barrett, *Will Brain Injury Lawsuits Doom or Save the NFL?*, BUSINESSWEEK (Jan. 31, 2013), <http://www.businessweek.com/articles/2013-01-31/will-brain-injury-lawsuits-doom-or-save-the-nfl>.

²² Steve Fainaru & Mark Fainaru-Wada, *Players Sought \$2 Billion From NFL*, ESPN (Sept. 1, 2013), http://espn.go.com/espn/otl/story/_/id/9622926/players-initially-sought-2-billion-plus-nfl-concussion-settlement.

²³ See Wilner, *supra* note 17.

²⁴ *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014).

23(e).²⁵ In class actions such as this, the court “must assure ‘to the greatest extent possible that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests.’”²⁶ Because class action settlements can bind absent class members who did not participate in the litigation, Rule 23(e) requires judges to ensure the agreement is “fair, reasonable, and adequate” irrespective of the parties’ approval.²⁷ While the Judge noted that Plaintiffs’ counsel “believed” the aggregate sum of the settlement was sufficient based on “analysis conducted by the independent economists or actuaries retained by the parties,” she had concerns about the settlement’s “fairness, reasonableness, and adequacy,” as such analyses were not actually provided to the Court.²⁸ Brody refused to grant preliminary approval until documentary proof of the settlement’s fairness was provided.²⁹

Judge Brody also expressed concern that the funds would be insufficient to compensate all class members who received a “Qualifying Diagnosis” (such as dementia, Alzheimer’s, or Parkinson’s Disease), resulting in the settlement’s largest payouts.³⁰ Brody noted that the settlement “contemplates a 65-year lifespan,” and was expected to cover a class of around 20,000 individuals. She found it “difficult to see how the Monetary Award Fund would have the funds available over its lifespan to pay all claimants at these significant award levels.”³¹ As of April 2014, the settlement remains on hold.³²

Given the apparent inadequacies of the proposed settlement, and assuming that such amounts may not be increased in the future, litigation may be the only way that former-NFL players

²⁵ FED. R. CIV. P. 23(e); *In re NFL*, 961 F. Supp. 2d at 713–14.

²⁶ *In re NFL*, 961 F. Supp. 2d at 713 (citation omitted).

²⁷ FED. R. CIV. P. 23(e)(2).

²⁸ *In re NFL*, 961 F. Supp. 2d at 716.

²⁹ *Id.*

³⁰ *Id.* at 715.

³¹ *Id.*

³² Sam Farmer, *Federal Judge Holds Off Decision on NFL Concussion Settlement*, L.A. TIMES (Apr. 16, 2014), <http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-concussions-20140416,0,579644.story>.

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can be assured of an adequate remedy. However, there are serious problems with the plaintiffs' claims.³³ First, plaintiffs must be wary of the possibility that their claims will be preempted by federal law, forcing them to be resolved through arbitration pursuant to the NFL-NFL Players' Association collective bargaining agreement (“CBA”), rather than a court proceeding. If the plaintiffs are forced to arbitrate, they lose the benefit of a trial where potentially sympathetic jurors might favor the many badly injured and allegedly misled plaintiffs, instead facing a more neutral decision-maker less likely to award significant damages.

Second, players must be able to prove causation—that is, that the NFL caused their injuries. This is no easy task when some athletes may already have had a predisposition to diseases like Alzheimer's, and may have sustained brain injuries in non-NFL football activities, such as high school and college football, and in their personal lives. To help resolve this issue, the courts and the plaintiffs should look to extend the “loss of chance doctrine,” traditionally applied only in medical malpractice lawsuits,³⁴ to the NFL. The doctrine allows injured parties to recover damages for the “reduction in odds of recovery” caused by a defendant's negative contributions, even if plaintiffs cannot show that the alleged injuries were “caused in fact by the defendant's

³³ One such issue this Note will not discuss is class certification, which has not occurred due to acceptance of the proposed settlement. Though NFL athletes could still bring individual suits for their injuries, certification will pose a major barrier for players, especially their medical monitoring claims. Since “liability turns on the specific facts of each class member's claimed exposure,” and class members may not share identical risks of harm, some argue such claims are not “indivisible,” and that class certification would be denied. Sheila B. Scheuerman, *The NFL Concussion Litigation: A Critical Assessment of Class Certification*, 8 FIU L. REV. 81, 105 (2012); see also TIMOTHY LIAM EPSTEIN, SMITHAMUNDSEN LLC, NFL CONCUSSION CLASS ACTION LITIGATION, available at http://www.dri.org/DRI/course-materials/2012-AM/pdfs/39b_Epstein.pdf.

³⁴ For a discussion of the “loss of chance doctrine,” see generally Margaret T. Mangan, Comment, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279 (1997).

negligence.”³⁵ As long as an injured party can demonstrate that a defendant’s actions lessened their ability to recover, the defendant may be held liable for that reduction.³⁶

Through the loss of chance doctrine, plaintiffs can argue that despite possible neurological disease predispositions and brain injuries arising outside of the NFL, the League conflated these risks and should therefore be held liable for the plaintiffs’ resulting reduced changes of recovery. Given the unfavorable terms of the proposed settlement³⁷ and the risk it will ultimately be rejected, an extension of loss of chance to nonmedical malpractice torts (though it must be limited, and has its risks³⁸) provides a great opportunity for plaintiffs to succeed on their merits and hold the NFL accountable.

Fortunately, even if Judge Brody ultimately approves the settlement of *In re National Football League Players’ Concussion Injury Litigation*,³⁹ disgruntled plaintiffs will have an opportunity to opt out.⁴⁰ Although doing so would significantly delay resolution of the opting-out plaintiff’s claims, those that can afford to do so should strongly consider it, as they could continue litigating along with former football players not currently

³⁵ Andrew S. Kaufman, *Determining Valuation in Loss of Chance Cases*, N.Y. L.J., Dec. 21, 2009, available at <http://kbrlaw.com/kaufman3.pdf>.

³⁶ *Id.*

³⁷ See, e.g., Steve Fainaru & Mark Fainaru-Wada, *Some Players May Be Out of NFL Deal*, ESPN CHICAGO (Sept. 20, 2013), http://espn.go.com/chicago/story/_/id/9690036/older-players-cut-nfl-settlement-concerns-growing-whether-enough-money-exists; Patrick Hruby, *Don’t Settle*, SPORTS ON EARTH (Sept. 16, 2013), <http://www.sportsonearth.com/article/60617808/>.

³⁸ See generally David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605 (2001). One concern is that the doctrine, once accepted widely, becomes difficult to limit and may “swallow” the traditional more-likely-than-not rule. *Id.* at 606–07. If this happened, there are concerns that all negligent actors could wrongly become liable for injuries they did not cause but somewhat contributed to, an extremely uncertain determination in many contexts.

³⁹ *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014).

⁴⁰ Class Action Settlement Agreement at 59–61, *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014) (MDL No. 12-md-2323).

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involved in the lawsuit but interested in pursuing individual claims. While threat of federal law compelling arbitration pursuant to the CBA is possible, preemption should not apply here. Additionally, while proving causation will be difficult, there are methods available for the plaintiffs to do so, including through a potential extension of the loss of chance doctrine.

Part II will discuss the adequacy of the proposed concussion litigation settlement, specifically whether it provides sufficient sums to compensate former players and provide for their medical care, and how the uncertainties of litigation and the necessity for immediate relief incentivized the plaintiffs to accept an unfavorable settlement. Part III will discuss the threat of preemption, and why it should not be applied to this case. Part IV will discuss the issues inherent in proving causation and offer a potential solution through judicial extension of the loss of chance doctrine. Should NFL concussion plaintiffs pursue litigation, avoid preemption, and prove causation, they will be able to hold the NFL accountable for its actions, and may better assure themselves and their families of fair compensation.

II. ISSUES OF TIMING AND CERTAINTY INDUCED PLAYERS TO SETTLE

A. Adequacy and Timing

The proposed settlement agreement has various components. First, the NFL will provide \$675 million over an extended period to compensate former players for their injuries, with various payments depending on the player's individual diagnosis.⁴¹ For example, the settlement awards a maximum of \$3 million for “moderate dementia,” \$3.5 million for Alzheimer's or Parkinson's Disease, \$4 million for death with chronic traumatic encephalopathy (CTE), a degenerative brain disease associated with multiple concussions, and \$5 million for amyotrophic lateral

⁴¹ Class Action Settlement Agreement, Exhibit B-5 at 6, *In re* NFL Players' Concussion Injury Litig., 961 F. Supp. 2d 708 (E.D. Pa. 2014) (MDL No. 12-md-2323).

sclerosis (ALS), or Lou Gehrig's Disease.⁴² The NFL will also provide an additional \$75 million for medical testing, \$10 million for educational purposes, and \$4 million for class notice costs.⁴³ It also provides for over \$110 million in attorney's fees⁴⁴ and an additional \$37.5 million contribution if the Settlement Administrator determines the Injury Fund is inadequate.⁴⁵ Settlement funds are expected to last for sixty-five years.⁴⁶

Despite a proposed settlement that appears to include a large amount of funds, there is good reason to support the doubts of Judge Brody and a large number of journalists, experts, and members of the class action. Though Christopher Seeger (lead co-counsel for the plaintiffs) made public assurances that forthcoming reports from experts, economists, and actuaries would confirm that the proposed settlement will be "sufficiently funded," some basic mathematics have brought that claim into serious question.⁴⁷ Judge Brody expressed concerns that the settlement provides insufficient compensation if "even . . . only 10 percent" of retired players qualify for one of the tiers outlined above.⁴⁸ Indeed, enrollment numbers in prior NFL player injury compensation programs have indicated that the number of players with serious brain injuries may be high enough to quickly empty

⁴² These maximum awards are reduced if the former player played less than five "Eligible Seasons," and/or if the player was diagnosed after the age of forty-five. *Id.* at 11–13.

⁴³ ADR Press Release, *supra* note 2.

⁴⁴ Sofia Pearson & Jef Feeley, *NFL's \$914 Million Concussion Deal Submitted for Approval*, BLOOMBERG (Jan. 7, 2014), <http://www.bloomberg.com/news/2014-01-06/nfl-s-765-million-concussion-deal-submitted-for-approval.html>.

⁴⁵ Jason Lisk, *NFL Reaches Proposed Settlement with Former Players in Concussion Litigation, For Over \$765 Million Plus Attorney's Fees*, THE BIG LEAD (Aug. 29, 2013), <http://thebiglead.com/2013/08/29/nfl-reaches-proposed-settlement-with-former-players-in-concussion-litigation-for-over-765-million-plus-attorneys-fees/>.

⁴⁶ Class Action Settlement Agreement, *supra* note 40, at 32.

⁴⁷ Fainaru & Fainaru-Wada, *supra* note 37.

⁴⁸ *In re NFL Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014).

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the fund.⁴⁹

One such program is the NFL’s “88 Plan,” implemented in 2007.⁵⁰ The 88 Plan is a program designed to provide nearly \$100,000 in yearly aid for the medical and custodial expenses of qualified former players suffering specifically from dementia, including “dementia due to head trauma.”⁵¹ The League designed the 88 Plan partly in response to increasing media attention and player complaints regarding the effects of concussions.⁵² Since 2007, 223 former NFL players have qualified for the program, and the League has approved over \$23 million in assistance.⁵³ It is likely many of these individuals would also qualify for the proposed settlement’s larger payment tiers, which includes awards of \$3 million for dementia and \$5 million for Alzheimer’s,⁵⁴ since the 88 Plan was specifically designed to aid players diagnosed with dementia.

Patrick Hruby of Sports on Earth, an online sports blog, used numbers from 88 Plan enrollment to argue against the adequacy of the proposed settlement. He accounted for the 233 athletes that qualified for the 88 Plan, and added to that number, thirty-four former players who have already been diagnosed with CTE (a disease not covered by the 88 Plan, but covered under the

⁴⁹ See Patrick Hruby, *Don’t Settle*, SPORTS ON EARTH (Sept. 16, 2013), <http://www.sportsonearth.com/article/60617808/>.

⁵⁰ Alan Schwartz, *Before Dementia Assistance, Help With N.F.L. Application*, N.Y. TIMES (Jan. 21, 2010), http://www.nytimes.com/2010/01/22/sports/football/22eckwood.html?_r=0.

⁵¹ The plan was named in honor of Hall of Famer John Mackey, who wore the number 88 on his football jersey. NFL PLAYER 88 PLAN 4 (2007), available at <http://nflretired.baughweb.com/Resources/88%20Plan.pdf>.

⁵² See Sally Jenkins & Rick Maese, *Do No Harm: Who Should Bear the Costs of Retired NFL Players’ Medical Bills?*, WASH. POST (May 9, 2013), http://www.washingtonpost.com/sports/redskins/do-no-harm-who-should-bear-the-costs-of-retired-nfl-players-medical-bills/2013/05/09/2dae88ba-b70e-11e2-b568-6917f6ac6d9d_story.html.

⁵³ *Id.*

⁵⁴ See Bruce Arthur, *Former NFL Players Facing Costly, Unwinnable Fight Over Concussion Settlement*, NAT’L POST (Sept. 22, 2013), <http://sports.nationalpost.com/2013/09/22/former-nfl-players-facing-costly-unwinnable-fight-over-concussion-settlement/>.

settlement).⁵⁵ He took the sum, 267, and multiplied it by an average award of \$2 million.⁵⁶ The amount, \$534 million, accounts for a vast majority of the available funds, without adding any newly diagnosed injuries whatsoever.⁵⁷ In addition, less than one third of retired NFL players were involved in the concussion litigation at issue, but under the proposed settlement, all retired NFL players would be eligible for this fund.⁵⁸ It is also possible that concussion-related, long-term injuries will only increase as time goes on. Younger players have generally played more football than their predecessors (from youth leagues to high school and collegiate football), during a period where athletes have generated greater impacts⁵⁹ and commonly used painkillers like Toradol,⁶⁰ which may have exacerbated concussion harms.⁶¹ In other words, not only may there already be enough retired NFL athletes to empty the settlement funds, but the number of retired players with qualifying diagnoses will likely increase with time.

The proposed settlement also has serious issues outside the amount of overall compensation. Many seriously impaired plaintiffs may not qualify for seven-figure awards, yet will need or are already receiving nursing home care, where residence

⁵⁵ Hruby, *supra* note 49.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* According to Hruby, there are between 15,000 and 18,000 living retired NFL players. The concussion litigation here had around 4,600 plaintiffs. *Id.*

⁵⁹ Michaelleen Doucleff & Adam Cole, *Are NFL Football Hits Getting Harder and More Dangerous?*, NPR (Feb. 1, 2013, 12:02PM), <http://www.npr.org/blogs/health/2013/01/31/170764982/are-nfl-football-hits-getting-harder-and-more-dangerous>.

⁶⁰ Tadarol, a painkiller with blood-thinning effects, was the subject of a 2011 lawsuit where players alleged that the drug's ability to dull pain made it more difficult for players to recognize concussion symptoms. *See* Ken Belson, *Ex-NFL Players Suing Over Use of Painkiller*, N.Y. TIMES (Dec. 5, 2011), <http://www.nytimes.com/2011/12/06/sports/football/nfl-sued-by-ex-players-over-painkiller-toradol.html>.

⁶¹ *See* Hruby, *supra* note 49.

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costs can average \$80,000 per year—and often much more.⁶² The proposed settlement also disqualifies awards for the families of former players diagnosed with “football-related brain damage” who died prior to 2006, precluding a number of wrongful death suits.⁶³

In addition, while the proposed settlement will take care of some of the plaintiffs’ legal fees,⁶⁴ many former athletes may still have to pay significant portions of any awards to their attorneys. Instead of fees being paid out of the settlement, dozens of plaintiffs’ attorneys would collect fees directly from their clients pursuant to previously negotiated agreements.⁶⁵ This means not only will some attorneys get as much as one-third of their clients’ settlement monies directly from the players, but they may be paid twice, receiving a share of the League’s settlement fund as well.⁶⁶

Nonetheless, Commissioner Goodell defended the proposed settlement against such concerns about its inadequacy, attempting to dispel the notion that the NFL could have afforded a higher settlement. Goodell noted that despite the NFL grossing approximately \$10 billion per year, because “there’s a difference between making (money) and revenue,” the settlement was best for the plaintiffs and a “tremendous amount of money.”⁶⁷ This

⁶² See Caplan & Igel, *supra* note 18.

⁶³ Class Action Settlement Agreement, *supra* note 40, at 29. The NFL hoped to bar all wrongful death claims from the settlement whose two-year statute of limitations (typical for most states) had expired. While negotiations extended the provisions to players dying after 2006, the families of those dying prior to that year were not included. See Fainaru & Fainaru-Wada, *supra* note 37.

⁶⁴ See ADR Press Release, *supra* note 2.

⁶⁵ See Fainaru & Fainaru-Wada, *supra* note 37.

⁶⁶ See *id.*

⁶⁷ Begley, *supra* note 6 (alteration in original). Some, like Goodell, were quick to evaluate the effectiveness of the settlement solely based on the dollar amount, without reference to the staggering costs and debilitating injuries sustained by former players. For example, on the day of the settlement announcement, *Sports Illustrated* writer Peter King tweeted sarcastically: “I love everyone calling \$765m chump change.” Peter King, TWITTER (Aug. 29, 2013, 1:30PM), https://twitter.com/SI_PeterKing/status/373135592684396544.

argument was lampooned by Deadspin writer Reuben Fischer-Baum, who noted the League will generate approximately \$180 billion in profits by the time the entire settlement is paid out to the plaintiffs.⁶⁸ The proposed settlement would account for only 0.425% of this projection.

Although the parties' agreement raises serious questions, some individuals have considered it a necessary evil. Many commentators, former and current NFL athletes, and legal experts examined the settlement from the players' perspective, and noted that while settling could cause the plaintiffs to lose billions of dollars and an admission of liability, an agreement assured the plaintiffs of both timeliness and certainty.⁶⁹ As Brett Romberg, an initial plaintiff in 2010, stated, although the NFL "messed up in the past," the \$765 million "will be a much-needed Band-Aid, especially for those who suffered injuries 20 and 30 years ago."⁷⁰

Timing was perhaps the paramount issue for the former players with the most developed injuries and diseases.⁷¹ Kevin Turner, a 44-year-old former running back suffering from ALS or Lou Gehrig's disease,⁷² stated that "[f]or those who are

⁶⁸ Reuben Fischer-Baum, *Infographic: The NFL's Puny Concussion Settlement, Visualized*, DEADSPIN (August 29, 2013, 4:14 PM), <http://deadspin.com/infographic-the-nfls-puny-concussion-settlement-visualized-1222822576>. This is likely a conservative estimate, as it assumes the NFL maintains, and will not exceed, its current profit levels.

⁶⁹ See Patrick Rische, *Time, Certainty Explain Why NFL Players Settled for Less in Concussion Lawsuit*, FORBES (Sept. 4, 2013 1:34 PM), <http://www.forbes.com/sites/prishe/2013/09/04/time-certainty-explain-why-nfl-players-settled-for-less-in-concussion-lawsuit/>.

⁷⁰ *Romberg Supports Proposed NFL Deal*, WINDSOR STAR (Aug. 30, 2013), <http://www2.canada.com/windsorstar/news/story.html?id=30957b5d-5fbc-41bd-9f27-f361a63626fd>. Romberg eventually removed himself from the litigation, and unretired in order to sign with the Atlanta Falcons in 2012. *Id.*

⁷¹ See Jim Litke, *NFL Settlement a "Win-Win" for Everyone*, ASSOCIATED PRESS (Aug. 29, 2013), <http://bigstory.ap.org/article/column-nfl-settlement-win-win-everyone> ("The [settlement] benefits proposed are . . . desperately needed. It won't restore lives . . . nor heal broken minds But it would provide help right away to generations of past players still suffering the effects of concussion-related injuries.").

⁷² ALS is a "progressive neurodegenerative disease that affects nerve cells

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hurting, this will bring comfort *today* The compensation in this settlement will lift a huge burden off the men who are suffering *right now*.”⁷³ Indeed, the plaintiffs include former players as old as eighty-four years old, many of whom played less than three years in the League, some of whom never made it on an NFL roster, and many of whom have been rendered incapable of holding a job.⁷⁴ These factors have created a large class of individuals who have serious long-term injuries but little money, placing a huge burden on these players and their families.⁷⁵ Mary Lee Kocourek, widow of Dave Kocourek—a nine-year professional and four-time AFL All-Star—described the hardships the couple faced less than a year before Dave passed away.⁷⁶ Doctors diagnosed Dave with dementia before his sixty-fifth birthday, and his condition deteriorated to the point that Mary Lee had no choice but to place him in a nursing home.⁷⁷ Although she received some financial help from the NFL, the cost of nursing home care was close to \$80,000 annually, while Dave’s yearly salary as a professional never exceeded \$35,000.⁷⁸

By agreeing to settle with the NFL, the former players and their families in the most need would receive immediate help,

in the brain and the spinal cord,” eventually leading to paralysis and death. *What is ALS?*, ALS ASS’N, <http://www.alsa.org/about-als/what-is-als.html>. One study showed that the risk of ALS and Alzheimer’s disease among football players is between three and four times greater than that of the general population. See Everett J. Lehman et al., *Neurodegenerative Causes of Death Among Retired National Football League Players*, 79 *NEUROLOGY* 1 (2012).

⁷³ Mike Jensen, *Former Players React to NFL Concussion Settlement*, PHILLY.COM (Aug. 31, 2013), http://articles.philly.com/2013-08-31/sports/41622028_1_retired-players-nfl-chris-kluwe (emphasis added).

⁷⁴ See Nathan Fenno, *Many Ex-Redskins Among Those Suing NFL Over Effects of Brain Injuries*, WASH. TIMES (Jun. 20, 2012), <http://www.washingtontimes.com/news/2012/jun/20/price-of-pain-many-ex-redskins-among-those-suing-n>.

⁷⁵ See Melissa Segura, *The Other Half of the Story*, SPORTS ILLUSTRATED (Sept. 10, 2012), <http://si.com/vault/article/magazine/MAG1205982/1/index.htm>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

rather than waiting until litigation is resolved, possibly years down the road. Rejecting settlement offers and proceeding with the lawsuit could have easily delayed monetary aid to the plaintiffs for at least another two years, given the complexities of the suit, and possibly resulted in even less compensation.⁷⁹ These are people who need funds now. If Judge Brody eventually grants preliminary approval, the decision will likely be appealed, which will prevent class members from opting out of the settlement and fully pursuing their own claims until all appeals are fully exhausted.⁸⁰ Given these harsh realities, and the fact that the terms of the current settlement require the NFL to pay approximately fifty percent of the settlement amount over the next three years, it is not surprising that many concussion litigation plaintiffs support the proposed settlement.⁸¹ Though there is substantial evidence that the current agreement is not the best agreement that the plaintiffs could have achieved, it nonetheless provides some immediate help to those suffering the most.

B. The Problem of Certainty

Certainty of the outcome of litigation was another major issue for the players. If the plaintiffs do not receive any assistance from the NFL, many will be unable to continue paying for their medical care.⁸² The figures of the proposed settlement, despite its inadequacies, at least guaranteed the plaintiffs some assistance with medical bills. Paul D. Anderson, attorney and concussion litigation expert, asserted that despite the settlement's shortcomings, "when balanced against the lives of many players and families that are on the verge of bankruptcy and death, the urgency is clear. Guaranteed money now is much better than no

⁷⁹ Rishe, *supra* note 69.

⁸⁰ Jacob Gershman, *Concern Raised Over Opt-Out Terms of NFL Concussion Settlement*, WALL ST. J. LAW BLOG (Jan. 28, 2014, 1:11 PM), <http://blogs.wsj.com/law/2014/01/28/concern-raised-over-opt-out-terms-of-nfl-concussion-settlement/>.

⁸¹ The balance of the settlement would be paid over the subsequent seventeen years. See ADR Press Release, *supra* note 2.

⁸² See Jenkins & Maese, *supra* note 52.

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money after years of litigation.”⁸³ The settlement was partly induced by fears that should the former players fail to settle, their lawsuit could end in dismissal or a judgment for the NFL.⁸⁴ Paramount among these fears was the issue of preemption by the NFL-NFL Players’ Association (“NFLPA”) CBA, the challenges of obtaining class certification, and the difficulty associated with proving tort causation.

While avoiding preemption and proving causation will be difficult, the apparent inadequacies of the proposed settlement may make going to trial necessary, as litigation may be the only route to ensure fair compensation.⁸⁵ Subsequent examination of the proposed terms indicate that while the settlement could lessen the burden on those injured plaintiffs in the most need, many others would not receive the security they envisioned and deserve. In addition, further pursuing a lawsuit would allow for discovery, disclose the NFL’s private information, and could force the League to admit liability. Though the road is uncertain, preemption should not affect the plaintiff’s claims, and increasing medical evidence—along with a possible extension of the loss of chance doctrine—could allow plaintiffs to succeed at trial.

III. THE THREAT OF PREEMPTION

A. Section 301

If the plaintiffs did not agree to settle, they faced the possibility that the Labor Management Relations Act of 1947

⁸³ Paul D. Anderson Consulting, LLC, *Report: Judge Brody Threatened to Dismiss the Heart of the Players’ Case*, NFL CONCUSSION LITIG. (Sept. 3, 2013), <http://nflconcussionlitigation.com/?p=1508>.

⁸⁴ *Id.*

⁸⁵ Attorney Paul Anderson expressed his extreme dissatisfaction with the settlement—and no longer able to refrain from taking an active role in concussion litigation—wrote that while the deal may be adequate for former players currently suffering the worst symptoms, the settlement “falls well short for the thousands of other players that are on the borderline.” Paul D. Anderson Consulting, LLC, *The Fight Must Go On*, NFL CONCUSSION LITIG. (Dec. 3, 2013), <http://nflconcussionlitigation.com/?p=1548>. Anderson filed a concussion lawsuit against the Kansas City Chiefs on December 3, 2013. *Id.*

(“LMRA” or the “Taft-Harley Act”) would preempt their claims against the NFL. In its memorandum in support of their motion to dismiss dated August 30, 2012, the NFL focused on preemption and section 301 of the LMRA.⁸⁶ This section has been interpreted to preempt all state law claims “the resolution of which is substantially dependent upon or inextricably intertwined with the interpretation of the terms of a collective bargaining agreement, or that arise under the collective bargaining agreement.”⁸⁷ The NFL argued that the plaintiffs’ tort claims required the interpretation of several terms in the CBA,⁸⁸ and therefore, any adjudication must take place pursuant to the CBA’s agreed-upon grievance procedures. This would require arbitration, and thus dismissal from federal court.⁸⁹

Under section 301 of the LMRA, federal law governs any lawsuit concerning a violation of a contract between an employer and a labor organization (here, the NFLPA).⁹⁰ Because it would be an excessive burden to require bargaining parties to reach an agreement that complies with the laws of all fifty states, section 301 seeks to ensure “uniform interpretation” of bargaining agreements through the use of federal law.⁹¹ As Justice William

⁸⁶ Memorandum of Law of Defendants National Football League and NFL Properties LLC in Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds at 14, *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014), 2012 WL 3890252 [hereinafter Defendants’ Motion to Dismiss]. Section 301 is codified as 29 U.S.C. §185(a) (2012).

⁸⁷ *Id.* See also *Lingle v. Norge Div. Magic Chef, Inc.*, 486 U.S. 399, 413 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209–10 (1985).

⁸⁸ The NFL specifically referred to a number of CBA provisions it felt required interpretation, including medical care provisions “relating to assessment, diagnosis, and treatment of player injuries,” player rights and obligations provisions including the ability to choose surgeons and obtain second opinions, rule-making and player safety provisions in order to help make the sport safer, and provisions discussing player benefits and grievance procedures. Defendants’ Motion to Dismiss, *supra* note 86, at 12–15.

⁸⁹ *Id.* at 14.

⁹⁰ 29 U.S.C. §185(a).

⁹¹ Nicole M. DeMuro, *Reestablishing the Role of Arbitration in Labor Law: Avoiding the Perils of Williams with the Rationale of Pyett*, 21 SETON HALL J. SPORTS & ENT. L. 467, 474 (2011).

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Douglas made clear in *Textile Workers Union of America v. Lincoln Mills of Alabama*, the purpose of section 301 was not only to give federal courts jurisdiction over labor disputes, but to evidence “a federal policy that federal courts should enforce [collective bargaining] agreements . . . and that industrial peace can best be obtained only in that way.”⁹² Should bargaining parties agree to a dispute resolution provision in their CBA, Congress intended it to be enforced: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”⁹³

Therefore, if resolution of a state law claim is “substantially dependent upon analysis of the terms” of a labor contract between the parties, it is preempted by federal law and may be dismissed pursuant to the parties’ collective bargaining agreement.⁹⁴ Hence, if plaintiffs’ dispute is “dependent on” or “intertwined with” the NFL-NFLPA CBA’s provisions, it will be adjudicated pursuant to the CBA, which compels arbitration.⁹⁵ Resolution through arbitration gives the NFL a distinct advantage: while plaintiffs in employment disputes succeed in thirty-six percent of federal court cases, only twenty-five percent of such plaintiffs succeed through arbitration, with the average award being less than eighteen percent of what prevailing receive on average from federal courts.⁹⁶ Arbitration also requires adjudication pursuant to

⁹² 353 U.S. 448, 455 (1957).

⁹³ 29 U.S.C. §173 (2012).

⁹⁴ Eric C. Surette et al., *General Rule of Federal Preemption—“Section 301” Claims Under Labor Management Relations Act*, 41 CAL. JUR. 3D LABOR § 319 (2014) (citing *Haney v. Aramark Unif. Servs., Inc.*, 17 Cal. Rptr. 3d 336 (Cal. Ct. App. 2004); see also *Dep’t of Fair Emp’t & Hous. v. Verizon Cal., Inc.*, 133 Cal. Rptr. 2d 258 (Cal. Ct. App. 2003); *Lujan v. Southern California Gas Co.*, 117 Cal. Rptr. 2d 828 (Cal. Ct. App. 2002)).

⁹⁵ See generally 2011 NFL-NFLPA Collective Bargaining Agreement, art. 43.

⁹⁶ See Robert M. Sagerian, *A Penalty Flag for Preemption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act*, 35 T. JEFFERSON L. REV. 229, 264 (2013).

contract law, rather than tort law, making punitive damages (to disincentivize the NFL from engaging in such conduct in the future) unavailable.⁹⁷ Finally, unlike a public trial, arbitration pursuant to the NFL-NFLPA CBA must be confidential, preventing the public from learning the specifics of the proceeding.⁹⁸

Before agreeing to settle, the plaintiffs were justifiably concerned that their claims would be preempted. A news report released on September 1, 2013, prior to the settlement agreement, claimed presiding Judge Anita Brody “signaled” that she would accept some part of the NFL’s preemption argument, and that the “bulk” of the players’ case would be dismissed.⁹⁹ In addition, the NFL and its teams have often successfully argued for LMRA preemption in the past.¹⁰⁰ For example, in *Givens v. Tennessee Football Inc.*, former player David L. Givens sued his former team, the Tennessee Titans, alleging bad faith in performing contractual obligations, negligence, and outrageous conduct for withholding important medical information regarding Given’s knee.¹⁰¹ Ultimately, the Tennessee Titans successfully argued for preemption, since Article XLIV of the CBA required team physicians to advise a player of any conditions that could affect their health or performance.¹⁰²

In addition, in *Stringer v. NFL*, the court found the plaintiff’s wrongful death claim was preempted after her husband, Pro Bowl lineman Korey Stringer, died of heat stroke during training camp.¹⁰³ Although the court held that the plaintiff’s claim did not

⁹⁷ *Id.* at 264–65.

⁹⁸ *Id.* at 265–66.

⁹⁹ Fainaru & Fainaru-Wada, *supra* note 22.

¹⁰⁰ See Paul D. Anderson Consulting, LLC, *The Almighty CBA*, NFL CONCUSSION LITIG. (Aug. 30, 2012), <http://nflconcuSSIONlitigation.com/?p=1080>; see also *Stringer v. Nat’l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007) (holding the plaintiff widow’s wrongful death claim, where plaintiff’s husband died from heat stroke, was preempted by section XLIV of the CBA).

¹⁰¹ 684 F. Supp. 2d 985, 988 (M.D. Tenn. 2010).

¹⁰² *Id.* at 990.

¹⁰³ 474 F. Supp. 2d 894, 915 (S.D. Ohio 2007).

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arise out of the CBA (which made no mention of preventing or treating heat-related illnesses),¹⁰⁴ the court did find that resolving her claim was “substantially dependent” on the interpretation of CBA Article XLIV’s team trainer and physician regulations.¹⁰⁵

The plaintiffs in the current NFL lawsuit, to avoid preemption, argued that the NFL owed them a duty of care completely independent from the CBA.¹⁰⁶ First, plaintiffs argued that the NFL assumed the duty to act as a guardian of player safety since the NFL’s inception in the 1920s, decades before the first CBA.¹⁰⁷ Additionally, the plaintiffs asserted that because the CBA provisions cited by the League make no mention of the NFL itself, “the duties they impose on teams are legally irrelevant to the NFL’s separate duty to safeguard players from neurological injuries.”¹⁰⁸ Second, the plaintiffs argued that the NFL assumed a duty of care based on its “unrivaled access to neurological-injury data,” and its voluntary creation of a committee to “opine on the risks of brain injuries in football.”¹⁰⁹

B. The Failures of the Mild Traumatic Brain Injury Committee

The “committee” the plaintiffs referred to was the Mild Traumatic Brain Injury Committee (“MTBIC”). The League formed the MTBIC in 1994 to study the effects of concussions and brain injury in football.¹¹⁰ Dr. Elliot Pellman, a former New York Jets team doctor and rheumatologist, was appointed chair of the panel despite little experience in neurology (Pellman was not

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 906, 911, 915.

¹⁰⁶ Surreply of Plaintiffs in Response to Defendants National Football League’s and NFL Properties LLC’s Reply Memorandum of Law in Further Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint at 1, *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014) [hereinafter Plaintiffs’ Surreply].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Barrett, *supra* note 21.

a neurologist) or the type of brain injuries at issue.¹¹¹ He remained chairman until he resigned in 2007,¹¹² in large part because of increasing controversy and negative press about his tenure as chairman, including his troubling lack of expertise and support of incorrect and misleading research that he conducted and disseminated during his tenure.¹¹³

The details of Dr. Pellman's incompetence and deception border on the absurd. *The New York Times* reported that Pellman had "exaggerated several aspects of his medical education and professional status."¹¹⁴ For example, Dr. Pellman maintained he received his medical degree from SUNY Stony Brook, when in reality he attended a school in Guadalajara, Mexico.¹¹⁵ Further, Pellman claimed he was an associate clinical professor, but was actually a non-teaching assistant.¹¹⁶ He also purported to be a fellow of the American College of Physicians, though he had not held the title for over six years.¹¹⁷ In addition to questionable credentials, Dr. Pellman displayed questionable judgment. It was, in the eyes of many experts and critics, very troubling that the individual entrusted with the serious task of studying mild traumatic brain injuries in order to ensure player safety was attributed the following quote: "Concussions are part of the profession, an occupational risk. [A football player is] like a steelworker who goes up 100 stories, or a soldier."¹¹⁸ Dr. Pellman garnered little respect amongst his colleagues: "When neuropsychologists sit around telling jokes, we call him 'Mr.

¹¹¹ Patrick Hruby, *The Wrong Man for the Job*, SPORTS ON EARTH (May 16, 2013), <http://www.sportsonearth.com/article/47668524/>.

¹¹² *Id.*

¹¹³ Alan Schwartz, *N.F.L. Doctor Quits Amid Research Doubt*, N.Y. TIMES (Mar. 1, 2007), <http://www.nytimes.com/2007/03/01/sports/football/01nfl.html>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Michael Farber, *The Worst Case*, SPORTS ILLUSTRATED (Dec. 19, 1994), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1006087/2/index.htm>.

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Pellman.”¹¹⁹ Another colleague told a reporter “I would hear him say things in speeches like, ‘I don’t know much about concussions, I learn from my players’”¹²⁰

In addition, the scientific findings of MTBIC under Dr. Pellman baffled many and garnered much criticism. In evaluating numerous studies linking concussions to serious long-term harm, “Pellman’s committee . . . repeatedly questioned and disagreed with the findings of researchers who didn’t come from their own injury group.”¹²¹ In compiling their own research, Dr. Pellman’s studies “didn’t include results from hundreds of NFL players.”¹²² A troubling 2006 MTBIC study asserted:

[M]any NFL players can be safely allowed to return to play on the day of the injury after sustaining a mild [traumatic brain injury]. [T]here were no adverse effects, and the results once again are in sharp contrast to the recommendations in published guidelines and the standard of practice of most college and high school football team physicians.¹²³

In the words of an anonymous scientist who reviewed the Committee’s work,

[t]hey’re basically trying to prepare a defense for when one of these players sues They are trying to say that what’s done in the NFL is okay because in their studies, it doesn’t look like bad things are happening from concussions. But the studies are flawed beyond belief.¹²⁴

After Dr. Pellman’s resignation, the NFL recast the MTBIC as its “Head, Neck, and Spine Medical Committee” in 2010.¹²⁵

¹¹⁹ Peter Keating, *Doctor Yes*, ESPN (Nov. 6, 2006), http://espn.go.com/nfl/story/_/id/9793720/elliott-pellman-says-okay-play-nfl-suffering-concussion.

¹²⁰ *Id.*

¹²¹ *Id.* (internal quotations marks omitted).

¹²² *Id.*

¹²³ Elliot J. Pellman & David C. Viano, *Concussion in Professional Football*, 21 *NEurosurgical Focus* 1, 10 (2006).

¹²⁴ Keating, *supra* note 119.

¹²⁵ National Football League, *NFL Names New Co-Chairs of Head, Neck*

The new members of this group, now headed by two neurosurgeons, sought to distance themselves from Dr. Pellman's research. These new members made it very clear that "they would not use any of the old committee's data or ongoing studies on helmets and retired players' cognitive decline—all of which had been overseen by Dr. Pellman and blasted by Congress as 'infected'—because they didn't want their 'professional reputations damaged,'" given the studies' widely reported inaccuracies.¹²⁶

C. The NFL's Arguments

The MTBIC's failures, while appalling, now provide the basis for the plaintiffs' strongest argument against section 301 preemption. The plaintiffs' counsel in the current NFL action argue that the duty to prevent concussions and related brain injuries is completely separate from the CBA. While the CBA regulates a number of "health-related duties" associated with NFL *teams* and *team* doctors, the plaintiffs argued that the CBA does not impose any such duties on the NFL itself.¹²⁷ Instead, these duties are wholly independent of the CBA, and arose voluntarily through the League's creation of the MTBIC, its involvement in concussion research, and its long history of providing for player safety through rule changes and equipment requirements in order to prevent injuries.¹²⁸

However, the NFL maintained its stance that the CBA preempted the plaintiffs' claims, positing that CBA terms that facially constrained only individual teams, actually applied to the "League" itself as well. The NFL argued the plaintiffs could not escape preemption by trying to make an "artificial" distinction

& Spine Medical Committee (Mar. 16, 2010, 4:21 PM), <http://www.nfl.com/news/story/09000d5d816fbbea/article/nfl-names-new-cochairs-of-head-neck-spine-medical-committee>.

¹²⁶ Hruby, *supra* note 111.

¹²⁷ Plaintiffs' Surreply, *supra* note 106, at 7.

¹²⁸ The plaintiffs referenced, for example, the League's making helmets mandatory in 1943, and making it illegal to strike at an opponent's head, neck, or face in 1980. Plaintiffs' Master Complaint, *supra* note 3, at 14–19.

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between the NFL and its member clubs, as the NFL is simply an “unincorporated association of 32 member clubs,” engaging in a “joint enterprise” to organize and promote professional football.”¹²⁹ Essentially, the NFL argued that because the teams and the larger league are essentially the same entity, CBA terms that explicitly constrain only NFL *teams* are still applied to the NFL as well, and are therefore not independent of the agreement.

The NFL also pointed to a number of CBA provisions it believes preempted the former players’ claims.¹³⁰ These included several rule-making and safety provisions. For example, Article 50, section 1(a) of the 2011 CBA requires the maintenance of a “Joint Committee on Player Safety and Welfare.”¹³¹ This Joint Committee is tasked with discussing “player safety and welfare relating to equipment, playing surfaces, stadium facilities, playing rules, and more.”¹³² The NFL also referenced the CBA’s grievance procedures—including a broad arbitration clause requiring mediation of “all disputes involving the ‘interpretation of, application of, or compliance with, any provision of’ the CBA’s, player contracts, or any applicable provision of the [League] Constitution.”¹³³ According to the NFL, the plaintiffs’ negligence, fraud, and misrepresentation claims “bear directly on issues addressed by the CBA’s health and safety provisions,” though such provisions do not mention concussions or brain injuries explicitly.¹³⁴ Therefore, the NFL argued that the plaintiff’s claims should be preempted by federal law and arbitrated.

The NFL referenced several key cases to support its

¹²⁹ Reply Memorandum of Law of Defendants National Football League and NFL Properties LLC in Further Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds at 9–10, *In re NFL Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014) [hereinafter Defendants’ Reply Memorandum].

¹³⁰ Defendants’ Motion to Dismiss, *supra* note 86, at 7–8.

¹³¹ *Id.* at 9.

¹³² *Id.*

¹³³ *Id.* at 10. This specific provision can be found at Article 50, §1(a) of the 2011 CBA.

¹³⁴ *Id.* at 16.

preemption claims under section 301. In these lawsuits, courts consistently held that the CBA preempted the plaintiffs' claims. In *Duerson v. National Football League, Inc.*, the estate of former Chicago Bears safety, David Duerson, brought a wrongful death suit against the NFL.¹³⁵ The plaintiff alleged that Duerson committed suicide as a result of brain damage he sustained during his playing career.¹³⁶ In *Duerson*, the court held that the CBA preempted the estate's negligence claims.¹³⁷ The court explained that Article XLIV, section 1 of the 1993 CBA required club physicians to advise players if their condition "could be significantly aggravated by continued performance."¹³⁸ The court explained that resolving the plaintiff's claim required a determination of whether the club, by allowing Duerson to return to the field, "significantly aggravated" his injuries.¹³⁹ Therefore, the plaintiff's claims were "substantially dependent" on the interpretation of Article XLIV, implicating LMRA section 301 and requiring federal jurisdiction.¹⁴⁰ The court additionally hypothesized that other CBA provisions addressing player safety may create a general "duty on the NFL's clubs to monitor a player's health and fitness to continue to play football," a duty more than broad enough to include the plaintiff's claims in *Duerson*.¹⁴¹ The court further noted "preemption is still possible even if the duty on which the claim is based arises independently of the CBA, so long as resolution of the claim requires

¹³⁵ No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012).

¹³⁶ *Id.* at *1. Duerson suffered from the effects of CTE, including "intense headaches, lack of short term memory, language difficulties, vision trouble, and problems with impulse control." *Id.* The plaintiff's complaint alleged counts of negligence, fraudulent concealment, conspiracy to publish false information, and negligent failure to warn, against the NFL. *Id.*

¹³⁷ *Id.* at *4.

¹³⁸ *Id.*

¹³⁹ *Id.* (citation omitted).

¹⁴⁰ *Id.* at *6.

¹⁴¹ *Id.* Such provisions include those requiring each team to have a board-certified orthopedic surgeon, requiring that the NFL pay for any medical care rendered by club staff, and provisions regarding certification requirements for trainers. *Id.*

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interpretation of the CBA.”¹⁴²

The NFL also cited to the aforementioned decision in *Stringer v. National Football League*.¹⁴³ In *Stringer*, the widow of Corey Stringer, a former Minnesota Vikings offensive lineman, filed a five-count complaint against the League after Stringer died due to complications from heat stroke and exhaustion.¹⁴⁴ The plaintiff argued that the NFL had no contractual duty to protect players from heat-related illnesses, and that while individual teams were responsible for their players’ health and safety, the NFL voluntarily assumed the duty to “provide complete, current, and competent information and directions to NFL athletic trainers, physicians, and coaches about heat-related illnesses.”¹⁴⁵ This duty was assumed, Stringer argued, when the League issued a set of “Hot Weather Guidelines” for the protection of players.¹⁴⁶ Although the court agreed that the wrongful death claim did not arise under the CBA, it accepted the NFL’s argument that the CBA preempted Stringer’s wrongful death claim because resolution of the claim was still “substantially dependent” on the CBA.¹⁴⁷ The district court found that “the degree of care owed by the NFL in republishing the Hot Weather Guidelines . . . and what was reasonable under the circumstances, must be considered in light of pre-existing contractual duties imposed by the CBA on the individual NFL clubs concerning the general health and safety of the NFL players.”¹⁴⁸ In deciding that Stringer’s claims were “inextricably intertwined” with the CBA,¹⁴⁹ the majority noted a

¹⁴² *Id.*

¹⁴³ *Id.* at *5 (citing *Stringer v. Nat’l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007)).

¹⁴⁴ *Stringer*, 474 F. Supp. at 898.

¹⁴⁵ *Id.* at 905.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 908–09. More specifically, the court found the plaintiff’s claim implicated CBA Art. XLIV §2, requiring the certification of training staff, including instruction on how to “to prevent, recognize, and treat heat-related illness, *id.* at 910., and Art. XLIV §1, requiring team physicians to inform players if their physical condition “will be ‘significantly aggravated by continued performance,’” *id.*

¹⁴⁸ *Id.* at 910.

¹⁴⁹ *Id.* at 908–09.

CBA provision requiring team trainers to be “certified by the National Athletic Trainers Association.”¹⁵⁰ Since the “degree of care” that the NFL owed by republishing the Hot Weather Guidelines was dependent on whether or not team trainers were educated on treating heat-related illnesses as part of the certification process, the court decided the CBA must be interpreted, and the plaintiff’s claims preempted.

The NFL also relied on *Williams v. National Football League*, in which several players, including the plaintiffs, tested positive for the banned diuretic bumetanide.¹⁵¹ The players, who all testified they took StarCaps diet pills in order to control their weight, also stated that they did not know the supplement contained the banned diuretic.¹⁵² Plaintiffs argued that despite warnings about supplements, a hotline that provided banned substance information, and the League’s strict liability policy on banned substances—the NFL owed a duty to the plaintiffs because the NFL and its drug policy administrator knew StarCaps contained bumetanide, yet failed to disclose it.¹⁵³ Failure to advise players of this fact, the plaintiffs argued, constituted a breach of the League’s fiduciary duty to its players.¹⁵⁴ Plaintiffs also brought claims for negligence, gross negligence, and misrepresentation against the League.

However, the court held that the CBA preempted each of the players’ claims. Even though the players alleged that the duty to provide “an ingredient-specific warning for StarCaps” arose not under the CBA, but under Minnesota law, the court held that whether the NFL owed this duty to the players “[could] not be determined without examining the parties’ legal relationship and expectations as established by the CBA”¹⁵⁵ Further, the court held that the CBA preempted plaintiffs’ misrepresentation

¹⁵⁰ *Id.* at 910. The court also referenced Article XLIV, section 1, (the provision at issue in *Duerson*) requiring team physicians to advise athletes if a further game action would “significantly aggravate” the player’s injuries.

¹⁵¹ 582 F.3d 863 (8th Cir. 2009).

¹⁵² *Id.* at 871.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 872.

¹⁵⁵ *Id.* at 881.

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claims because “the question of whether the Players [could] show that they reasonably relied on the lack of a warning that StarCaps contained bumetanide cannot be ascertained apart from the terms of the [League’s drug policy].”¹⁵⁶ Finally, the court held that the CBA also preempted plaintiffs’ claims for intentional infliction of emotional distress, because determining whether the NFL engaged in “outrageous” conduct required an evaluation of the League’s drug policy, a part of the CBA.¹⁵⁷

D. The Plaintiffs’ Arguments

The plaintiffs and the NFL differed substantially in their interpretations of these key cases. In arguing their claims shouldn’t be dismissed, the plaintiffs attempted to distinguish the NFL’s precedent cases, including *Duerson*, *Stringer*, and *Williams*.¹⁵⁸ For example, the plaintiffs pointed to a key difference between their lawsuit and *Duerson*. They argued that unlike their own claims, the estate in *Duerson* never alleged that the NFL, as a whole, assumed a duty of care *independent* from that of the clubs and team doctors governed by the CBA.¹⁵⁹ In *Duerson*, the plaintiff barely referenced any duty assumed by the League itself, only referring to a “generic duty ‘to keep [players] reasonably safe.’”¹⁶⁰ The current plaintiffs also highlighted the NFL’s evasion of what the plaintiffs considered the “fundamental flaw” of *Duerson*: that the court merely speculated that CBA provisions *might* permit the League to exercise a lower standard of care, without ever identifying an “actual *dispute*” over a CBA term.¹⁶¹

The plaintiffs also attempted to distinguish the present case from *Stringer*. First, they argued that unlike the present litigation, the plaintiff in *Stringer* did not allege that the NFL misled athletes, making that case inapplicable to the player’s fraud

¹⁵⁶ *Id.* at 882.

¹⁵⁷ *Id.*

¹⁵⁸ Plaintiffs’ Surreply, *supra* note 106, at 20–25.

¹⁵⁹ *Id.* at 1.

¹⁶⁰ *Id.* at 21.

¹⁶¹ *Id.* at 22–23 (emphasis added).

claims here.¹⁶² Second, the plaintiff in *Stringer* alleged (arguably to her detriment) that “[a]thletic trainers in the NFL serve as the first line of treatment for players. It is their initial responsibility to recognize and treat football-related injuries or conditions, including heat-related illness.”¹⁶³ Therefore, preemption was only required in *Stringer* because *Stringer*’s claims referred specifically to a breach of duty by team trainers, implicating the CBA, which explicitly governs team medical staff.¹⁶⁴ By contrast, the plaintiffs argued, their concussion litigation sought to establish a duty *wholly independent* from that of team medical personnel.¹⁶⁵ Therefore, no interpretation of the CBA would be necessary to resolve their claims.

The concussion plaintiffs distinguished *Williams* based on divergent facts. Their attorneys focused on the difference between the “voluntary assumption of duty” on the part of the NFL and the assumption at issue in the concussion litigation.¹⁶⁶ As previously mentioned,¹⁶⁷ the current plaintiffs asserted that the NFL assumed a duty of care to protect athletes from brain trauma harm, arising from its historical assumption of duty for player care and safety, and the NFL’s formation of the MTBIC in 1994.¹⁶⁸ By contrast, in *Williams*, “the challenged steroid testing regime was set forth in a comprehensive written ‘Policy’ that the CBA ‘expressly incorporate[d].’”¹⁶⁹ Because the NFL’s drug policy was therefore part of the CBA, the CBA was obviously implicated in resolving the plaintiffs’ claims, and preemption was proper. In the present case, by contrast, the plaintiffs argued that “the NFL identifie[d] no written policy specifically governing head injuries, and certainly not one assigning responsibility for

¹⁶² *Id.* at 23.

¹⁶³ 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007) (internal quotation marks omitted).

¹⁶⁴ Plaintiffs’ Surreply, *supra* note 106, at 23.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 24.

¹⁶⁷ *See supra* text accompanying notes 106–09.

¹⁶⁸ Plaintiffs’ Surreply, *supra* note 106, at 6.

¹⁶⁹ *Id.* at 24.

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those injuries to the NFL.”¹⁷⁰

The NFL addressed many of the plaintiffs’ arguments,¹⁷¹ but not what attorney Paul Anderson considered “the strongest theory in the plaintiffs’ case”—that the creation of the MTBIC Committee, to “spearhead concussion research,” represented an independent assumption of duty by the NFL.¹⁷² Reviewing Third Circuit precedent, Anderson concluded that the NFL did create an independent duty through creation of the Committee, and therefore, “the case law should have foreclosed the dismissal of all negligence and fraud-based claims that relied upon the [MTBIC’s] conduct.”¹⁷³ Referencing the news report that Judge Brody threatened to dismiss the plaintiffs’ claims on preemption grounds, Anderson asserted that such a decision would be “an unpredictable shocker,” and hypothesized that the rumor’s source might have been “jockeying for a settlement in an attempt to counter the public’s perception that this deal was lousy.”¹⁷⁴

Federal precedent supports Anderson’s position: that the plaintiffs’ claims cannot be preempted by the CBA since the NFL assumed a duty of care through the MTBIC. In *Trans Penn Wax Corp. v. McCandless*, the Court of Appeals for the Third Circuit held that section 301 of the LMRA did not preempt the plaintiff’s claims.¹⁷⁵ The plaintiffs, former employees of Trans Penn, were given a written “contract” (separate from the parties’ CBA) by their employer guaranteeing their jobs, but were subsequently fired less than a year later.¹⁷⁶ The court held that the plaintiff’s claims were not preempted because they never alleged a violation of duties assumed specifically in the CBA.¹⁷⁷ The court reached the same conclusion in *Kline v. Security Guards, Inc.*,¹⁷⁸ noting that the fact that the CBA was simply *related* to the plaintiff’s

¹⁷⁰ *Id.* at 25.

¹⁷¹ Defendants’ Reply Memorandum, *supra* note 129, at 15–18.

¹⁷² Paul D. Anderson Consulting, *supra* note 83.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 50 F.3d 217, 233 (3d Cir. 1995).

¹⁷⁶ *Id.* at 221.

¹⁷⁷ *Id.* at 232.

¹⁷⁸ 386 F.3d 246, 250 (3d Cir. 2004).

claims was not sufficient for the court to find preemption.¹⁷⁹ There, the plaintiff employees alleged their employer's surveillance practices, including the use of microphones to record oral communications, amounted to several torts including invasion of privacy.¹⁸⁰ Judge Stapleton asserted that "the mere fact that we must look at the CBA in order to determine that it is silent on any issue relevant to Appellants' state claims does not mean that we have 'interpreted' the CBA" for Section 301 purposes.¹⁸¹ Noting that the CBA did not mention the terms at issue (e.g., "surveillance," "video cameras," or "microphones"), the court found that no "interpretation" of the CBA was necessary to adjudicate plaintiffs' claims.¹⁸²

On May 14, 2014, the *In re National Football League Players' Concussion Injury Litigation* plaintiffs received welcome news that at least one District Court judge accepted similar arguments against section 301 preemption.¹⁸³ Judge Catherine D. Perry remanded *Green, et al. v. Arizona Cardinals Football Club, LLC*, a suit brought by three former players (and their spouses) against their former team, to state court, finding that "the merits of the plaintiffs' claims can be evaluated without interpreting [the 1977 or 1982 CBAs]...."¹⁸⁴ Judge Perry found the bargaining agreements did not bear on negligence claims "premised upon the common law duties to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware."¹⁸⁵ Similarly, Judge Perry noted that the players' negligent

¹⁷⁹ *Id.* at 256.

¹⁸⁰ *Id.* at 250. The employer alleged these claims were preempted by CBA clauses relating to "management rights" and "shop rules." *Id.* at 257.

¹⁸¹ *Id.* at 256.

¹⁸² *Id.* at 259.

¹⁸³ Paul D. Anderson Consulting, LLC, *Court Rejects NFL Team's Preemption Argument*, NFL CONCUSSION LITIG. (May 14, 2014), <http://nflconcussionlitigation.com/?p=1635>.

¹⁸⁴ *Green v. Ariz. Cardinals Football Club, LLC*, No. 4:14-cv-00461-CDP, 2014 WL 1920468, at *1-2 (E.D. Mo. May 14, 2014).

¹⁸⁵ *Id.* at *10.

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misrepresentation and fraudulent concealment claims could be resolved without CBA interpretation, as they arose from common law duties of an employer “‘to inform himself of those matters of scientific knowledge’ that relate to the hazards of his business, and relay that knowledge to his employees.”¹⁸⁶ Judge Perry’s decision may have enormous effects on the future of *In re National Football League Players’ Concussion Injury Litigation*. As one journalist noted, “[t]he outcome [of *Green*] also could result in the plaintiffs in the settled case to quit trying to persuade Judge Anita Brody to approve the settlement, opting instead to proceed with the litigation. If the players in that case secure the same victory Roy Green and others have realized in Missouri, the value of the claims would potentially skyrocket.”¹⁸⁷

Since the NFL has assumed a general duty to protect its athletes, and more specifically a duty to warn them of the risks of neurological injury (through its formation of the MTBIC), the plaintiffs’ claims should not be preempted. As in *Kline*, the NFL-NFLPA CBA makes no mention of the specific duty at issue. Just as terms like “surveillance” or “microphones” were not mentioned in the *Kline* CBA, discussion of concussions or brain injuries do not appear in the NFL-NFLPA CBA with any reference to the NFL itself, only to issues relating to *team* doctors.¹⁸⁸ Though the plaintiff’s claims in *Stringer* openly arose out of team duties to their athletes, the plaintiffs here look to the NFL itself. While the players’ claims may *relate* to the CBA terms the NFL highlighted (such as the creation of the Joint Committee on Player Safety and Welfare), such terms do not require *interpretation* to resolve the claims. This distinguishes the present litigation from *Williams*, where the drug policy at issue was expressly incorporated into the collective bargaining agreement. The CBA’s arbitration clause only applies to disputes

¹⁸⁶ *Id.* at *16.

¹⁸⁷ Mike Florio, *NFL Suffers Major Setback in Concussion Cases*, NBC PROFOOTBALLTALK (May 14, 2014, 9:28 PM), <http://profootballtalk.nbcsports.com/2014/05/14/nfl-suffers-major-setback-in-concussion-case/>.

¹⁸⁸ See *generally* NFL-NFL Player’s Assoc. Collective Bargaining Agreement (Aug. 4, 2011), *available at* <https://www.nflplayers.com/About-us/CBA-Download/>.

involving the CBA, player contracts, and the League Constitution. And as in *Trans Penn Wax Corp.*, none of the plaintiffs' claims refer to explicit duties in the bargaining agreement. None of the CBA clauses proffered by the NFL¹⁸⁹ relate specifically to a League concussion policy. Therefore, LMRA section 301 should not apply.

IV. PROVING CAUSATION AND THE LOSS OF CHANCE DOCTRINE

A. *Causation Issues: Tobacco Litigation, Team Trainers, Assumption of Risk and Contributory Negligence*

Even if concussion litigation plaintiffs avoid preemption, they must still prove causation in order to successfully prove negligence. This requires plaintiffs to demonstrate that the "head [injuries] players sustained while playing in the NFL" directly caused the plaintiffs' current health problems.¹⁹⁰ It may be extremely difficult for plaintiffs to show that the game of *professional* football caused long-term cognitive injuries, especially where high school or collegiate-level athletics, non-football activities, genetics, and diet also play a large role in the incidence of these diseases.¹⁹¹

In order to prove causation, some scholars have drawn parallels between the concussion litigation and big-tobacco lawsuits.¹⁹² Both the NFL and the tobacco industry sought to

¹⁸⁹ Defendants' Motion to Dismiss, *supra* note 86, at 7–9.

¹⁹⁰ Scott Fujita, *Mixed Feelings Over NFL Concussion Settlement*, N.Y. TIMES (Sept. 2, 2013), <http://www.nytimes.com/2013/09/03/sports/football/mixed-feelings-over-nfl-concussions-settlement.html>.

¹⁹¹ Michael McCann, *Examining What Happens Next in the Concussion Lawsuit Settlement*, SPORTS ILLUSTRATED (Aug. 29, 2013), <http://sportsillustrated.cnn.com/nfl/news/20130829/what-happens-next-in-nfl-concussion-lawsuit-settlement/>.

¹⁹² This idea gained traction after a 2009 congressional hearing was conducted to evaluate the League's concussion policy. There, Representative Linda Sanchez of California "analogized the denial of a causal link between NFL concussions and cognitive decline to the tobacco industry's denial of the link between cigarette consumption and ill health effects." Joseph Hanna & Daniel Kain, *The NFL's Shaky Concussion Policy Exposes the League to*

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discredit growing scientific data indicating a causal link to long-term illness and formed research committees to “refute the mounting evidence load that protected the vitality of their products.”¹⁹³ Despite the attractiveness of using big-tobacco litigation as a framework for pursuing concussion lawsuits against the NFL, some do not believe it is an apt comparison. Attorney Joseph Hanna succinctly explained the problem with comparing the tobacco litigation and the former players’ concussion claims:

[U]nlike tobacco use, the effect of individual concussions on a football player remains unclear. Further, the NFL retains medical personnel who are employed specifically to detect and prevent player injuries, whereas smoker plaintiffs were given no such attention. Lastly, because NFL players could have sustained permanent mental injuries at any point in their career (high school, college, etc.), proving the causal chain—i.e., that the NFL’s failure to warn resulted in injury—is difficult at best.¹⁹⁴

Although statistical evidence linking concussions to long-term disease such as CTE is becoming increasingly overwhelming,¹⁹⁵

Potential Liability Headaches, 21 ENT., ARTS & SPORTS L.J., no. 3, Fall/Winter 2010, at 33, 34.

¹⁹³ Daniel Kain, Note, “*It’s Just a Concussion: The National Football League’s Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*,” 40 RUTGERS L.J. 697, 717–18 (2009).

¹⁹⁴ Joseph M. Hanna, *Paying the Piper: NFL’s Concussion Policy Results in Huge Class Action Lawsuit*, THOMSON REUTERS NEWS & INSIGHT (Aug. 15, 2012), available at http://www.mosesport.com/Paying_the_Piper_-_NFL_s_Concussion_Policy_Results_in_Huge_Class_Action_Lawsuit.pdf.

¹⁹⁵ For example, Dr. Ann McKee has studied the brains of at least forty-six former NFL players and has found CTE in forty-five of them. Perhaps unsurprisingly, when asked to speak about her research in front of the MTBIC in 2009, Dr. McKee was allegedly confronted with aggressive questioning and mocking interruptions, especially from committee co-chair Ira Casson. *Transcript, League of Denial: The NFL’s Concussion Crisis*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/transcript-50/> (last visited Mar. 28, 2014); see also Mark Fainaru-Wada & Steve Fainaru, *League of Denial*, SPORTS ILLUSTRATED (October 7, 2013), <http://sportsillustrated.asia/vault/article/magazine/MAG1208801/index.htm>.

proving causation would require the NFL to answer questions avoided by the proposed settlement; including exactly what the NFL knew about the long-term effects of football-related brain injuries, when they knew it,¹⁹⁶ and whether they deliberately spread misinformation or remained willfully blind to the problem. Without this information, the NFL cannot be held accountable. Fortunately for the plaintiffs, there is already ample evidence that the NFL ignored or dismissed mounting evidence linking concussions to neurological damage.¹⁹⁷ In 1994, NFL Commissioner Paul Tagliabue responded to concerns over concussions by stating “the number [of concussions] is relatively small [T]he problem is a journalist issue.”¹⁹⁸ Further, the Pellman-lead MTBIC asserted that “[r]eturn to play does not involve a significant risk of a second injury either in the same game or during the season,” and argued that individuals “prone to delayed or poor recovery after MTBI” are actually “selected out” of organized football, and never reach the NFL.¹⁹⁹ The NFL also rejected the American Academy of Neurology’s 1997 return-to-play guidelines, including the suggestion that concussed players not return to the field until being symptom-free for at least a week.²⁰⁰ In addition, MTBIC co-chair Ira Casson’s famous 2007 “no, no, no” denial when asked about any link between football and depression, dementia, Alzheimer’s, or other long-term problems, further evidences that the League at least turned a blind eye to the problem.²⁰¹ It may be nearly impossible to show

¹⁹⁶ See Campbell, *supra* note 13.

¹⁹⁷ See generally Lauren Ezell, *Timeline: The NFL’s Concussion Crisis*, FRONTLINE (Oct. 8, 2013), <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ MTBIC doctors criticized the guidelines as not being supported by ample research, stating, “[W]e see people all the time that get knocked out briefly and have no symptoms.” James C. McKinley Jr., *Invisible Injury: A Special Report; A Perplexing Foe Takes an Awful Toll*, N.Y. TIMES (May 12, 2000), <http://www.nytimes.com/2000/05/12/sports/invisible-injury-a-special-report-a-perplexing-foe-takes-an-awful-toll.html>.

²⁰¹ Bernard Goldberg conducted the interview in 2007. REAL SPORTS WITH BRYANT GUMBEL (HBO May 14, 2007). *Ira Casson – No, No, No*,

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that the NFL alone caused the plaintiffs’ injuries, but mounting evidence suggests that it did spread misinformation, failed to disclose unpopular data, and relied on poor science. This, when coupled with the NFL’s strong denial of any causal links between playing football and long-term brain injuries, indicates that the NFL prevented players from making informed decisions about their health and contributed to the prevalence of such harm.

Importantly, the fact that NFL teams retain physicians does not mean that the League is not responsible for plaintiff’s injuries. While NFL teams do retain medical personnel “to detect and prevent player injury,” the physicians’ efforts do not preclude a finding that the League caused the litigation plaintiffs’ injuries, due to the doctors’ inherent conflicts of interest.²⁰² This conflict of interest exists because both trainers and doctors are paid by team management and thus they face pressure to return athletes to the field as soon as possible, hoping to keep their employer happy and retain their title as an “official” team medical provider or physician group.²⁰³ Although the NFL added independent neurological consultants to the sidelines in 2013,²⁰⁴ this does not solve all the problems associated with concussion diagnoses, and obviously does little to help the retired players comprising the plaintiffs in the current lawsuit. Some players do not show immediate symptoms, making an on-scene neurologist ineffective.²⁰⁵ Also, typical sideline chaos can cause a breakdown in protocol, and players tend to refuse to leave the game.²⁰⁶ Evidence, therefore, suggests that team trainers and physicians

YOUTUBE, http://www.youtube.com/watch?v=R4NbU_HaB3Y (last visited May 3, 2014).

²⁰² Kain, *supra* note 188, at 728–29.

²⁰³ *Id.* at 708–09.

²⁰⁴ Curtis Crabtree, *NFL Will Have Independent Neurological Consultants on Sidelines Next Season*, NBC PROFOOTBALLTALK (Jan. 31, 2013, 4:10 PM), <http://profootballtalk.nbcsports.com/2013/01/31/nfl-will-have-independent-neurological-consultants-on-sidelines-next-season/>.

²⁰⁵ Dom Cosentino, *Why the NFL’s New Concussion Protocols Aren’t Working*, DEADSPIN (Oct. 3, 2013, 11:40 AM), <http://deadspin.com/why-the-nfls-new-concussion-protocols-arent-working-1437228632>.

²⁰⁶ *Id.*

were not particularly effective at handling and treating injuries arising from concussions.

Two of the most potent defenses that the NFL would likely raise are assumption of risk and contributory negligence.²⁰⁷ Such defenses arise out of the belief that many football players, despite knowing that they risk injury or further injury, still “tough it out” on the field and fail to be honest with their team’s trainers and physicians. However, it is not clear that the NFL would be successful. In order to raise assumption of risk as a defense, the plaintiffs must, “knowing . . . the risk and appreciating its quality, voluntarily [choose] to confront it.”²⁰⁸ If plaintiffs voluntarily place themselves in harm’s way, despite the risks, they cannot later claim negligence if they are injured. Given the deliberate misinformation provided by the MTBIC, and the potential existence of data and information allegedly withheld by the NFL, proving athletes had “actual knowledge” of the risks that arose from concussions would be difficult to prove.²⁰⁹ In other words, while it is reasonable to argue that football players assume the risk of *being concussed*, it will be challenging for the NFL to argue players actually knew how these concussions would ultimately affect them, even if a substantial number of athletes may have tried to play through their injury regardless.

Contributory negligence may provide a better defense for the League.²¹⁰ In 2007, the NFL distributed a pamphlet to players giving players the burden of notifying team doctors and trainers of possible concussion symptoms, and advising that players should not return until they are entirely free of symptoms.²¹¹ However, it appears that many players have ignored this advice, likely contributing to their risk of long-term injury.²¹² The NFL

²⁰⁷ See Wong, *supra* note 20.

²⁰⁸ Dan B. Dobbs et al., *THE LAW OF TORTS* §235 (2d ed. 2000).

²⁰⁹ See Hanna & Kain, *supra* note 187, at 11.

²¹⁰ See *id.* at 11–12.

²¹¹ See National Football League, *NFL Outlines for Players Steps Taken to Address Concussions*, NFL.COM (Aug. 14, 2007), <http://www.nfl.com/news/story/09000d5d8017cc67/article/nfl-outlines-for-players-steps-taken-to-address-concussions>.

²¹² See Howard Fendrich, *NFL Concussions: Some Players Still Willing*

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has a long history of lauding “toughness” and the ability to play through injury, where if a player left a game with a “slight concussion,” they weren’t “giving it all” for their team.²¹³ For example, quarterback Peyton Manning admitted to intentionally underperforming on baseline concussion tests in order to lower his return-to-play standards.²¹⁴ By lowering his baseline, Manning hoped to return from concussions earlier than recommended, as he might later be able to meet his baseline after an injury, even if he were still suffering the concussion’s effects. Though some players may not have acted in the best interests of their health, this behavior cannot be viewed in a vacuum and should not affect the outcome of concussion litigation. It would be difficult for the NFL to prove that many of the plaintiffs hid concussive injuries, and it is likely that many players concealing brain injuries would not have done so absent the League’s deliberately cultivated “tough-it-out” culture and frequent minimization of concussion risks.

In addition, there is considerable incentive for NFL players to play down their own injuries. NFL contracts are not guaranteed beyond the season in which an injury occurs if the player cannot pass his team physical before the subsequent season, and football players can be terminated at-will if the team decides another player would increase team performance.²¹⁵ In order to keep their jobs then, many players do not reveal if they are suffering from any concussion symptoms.²¹⁶ Furthermore, even if players report their symptoms, those players are still under significant pressure to return before becoming completely asymptomatic in order to

to *Hide Head Injuries*, HUFFINGTON POST (Dec. 26, 2011), http://www.huffingtonpost.com/2011/12/26/nfl-concussions-hide-injuries_n_1169861.html.

²¹³ *Id.*

²¹⁴ Rick Reilly, *Talking Football with Archie, Peyton, Eli*, ESPN (Apr. 27, 2011), <http://sports.espn.go.com/espn/news/story?id=6430211>.

²¹⁵ Kain, *supra* note 187, at 710–11.

²¹⁶ For example, linebacker Dan Morgan, who had endured a number of concussions and missed significant playing time, restructured his contract bonus in order to remain on the Carolina Panthers through a calculation based on number of games played. Hanna & Kain, *supra* note 186, at 12.

stay in their club and coach's good graces, and retain their roster position.²¹⁷

Faced with these systemic issues, and the lack of information and misinformation provided by the League to its athletes, it is unlikely that the NFL could prove contributory negligence. For players entering the NFL today, however, both assumption of risk and contributory negligence arguments might bar future lawsuits, since much more information is becoming known and available to current and future professional football players. However, even if the plaintiffs here survive these defenses, proving the NFL caused the plaintiffs' injuries will require some creativity, as a wide variety of factors outside of professional football contribute to the long-term illnesses at issue.

B. The Loss of Chance Doctrine as a Basis for Proving Causation

Outside of the NFL concussion litigation context, proving that any one actor caused an illness is extremely difficult. The process of evaluating disease causation is "typically multifactorial," as "a large constellation of factors and variables coalesce to produce a particular person's unique set of illness experiences."²¹⁸ It is hard to find liability where elements such as genetics, upbringing, personal habits, and environment all play an indeterminate role in causation, in addition to any tortious activity. This issue is even more complex for the plaintiffs here, who not only have to prove the NFL caused neurological injury, but must separate its negative contributions to players' health from those of other levels of football (youth leagues, high school, college, etc.), genetic predisposition, previous head trauma from accidents unrelated to sports, and abuse of drugs or alcohol.²¹⁹

²¹⁷ See Kain, *supra* note 187, at 711–12.

²¹⁸ Daniel S. Goldberg, *Mild Traumatic Brain Injury, The National League, and the Manufacture of Doubt: An Ethical, Legal, and Historical Analysis*, 34 J. LEGAL MED. 157, 169 (2013).

²¹⁹ See Goldfinger Personal Injury Law, *NFL Agrees to Pay \$765 Million Settlement for Concussion Class Action Law Suit*, TORONTO INJURY LAWYER BLOG (Sept. 5, 2013), <http://www.torontoinjurylawyerblog.com/2013/09/nfl->

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In order to prove causation, the plaintiffs’ lawyers had intended to use “alternative causation (or ‘multiple-causation’) theory.”²²⁰ Alternative causation theory extends liability when multiple actors are negligent (for example, the NFL, the NCAA, and Riddell—the company that manufactures the League’s helmets), but only one actually caused the harm, and it is impossible to discern which.²²¹ In the seminal case *Summers v. Tice*, two hunters negligently fired their shotguns while hunting quail, injuring the plaintiff third hunter.²²² Though the court could not determine which defendant actually shot the plaintiff, it found that both should be found jointly liable.²²³ Therefore, once the negligence of the multiple tortfeasors is established, the burden shifts to each defendant to show they did not cause the plaintiff’s harm.²²⁴ If the defendants cannot meet this burden, both will become liable under alternative causation theory, even though one negligent actor may have caused no damage at all.²²⁵ In justifying its decision, the court in *Summers* noted that defendants typically have better access to evidence of the actual cause than plaintiffs, and that placing the burden of proof on plaintiffs would leave many without remedy.²²⁶ Because the “innocent” negligent actor made it difficult (or impossible) for the plaintiff to prove causation, “the defendants, rather than the innocent plaintiff, should bear the loss.”²²⁷

As attorney Paul Anderson hypothesized, plaintiffs using alternative causation will argue that while other actors contributed

[agrees-to-pay-765-million-settlement-for-concussion-class-action-law-suit.html](#).

²²⁰ Jared Berman, *A Look at the NFL Concussion Litigation: Q & A With Paul Anderson—Part 2*, RULING SPORTS (June 28, 2013, 11:09 AM), <http://rulingsports.com/2013/06/28/a-look-at-the-nfl-concussion-litigation-qa-with-paul-anderson-part-2/>.

²²¹ Dobbs et al., *supra* note 202, §193.

²²² *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). For another application of multiple causation theory, see *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952).

²²³ *Summers*, 199 P.2d at 5.

²²⁴ Dobbs et al., *supra* note 202, §193.

²²⁵ *Id.*

²²⁶ *Summers*, 199 P.2d at 4.

²²⁷ Dobbs et al., *supra* note 202, §193.

to the plaintiffs' harm, "[a]s the industry leader, it is appropriate for the NFL to be held jointly and severally liable for *substantially contributing* to the players' injuries."²²⁸ Unfortunately, alternative causation remains a tenuous strategy with no guarantee of success, and even Anderson admitted that it was a "legal stretch."²²⁹ This is in part because successfully finding alternative causation liability requires the presence of more than one negligent actor. In this case, "proof that one of the two actors is negligent simply does not aid the plaintiff at all."²³⁰ In order for concussion plaintiffs to use this theory successfully, they must be able to show that actors *other than the NFL* were also negligent, and in some jurisdictions, must have all tortfeasors joined as defendants, or show that each defendant created "qualitatively similar risks of harm."²³¹

In the alternative, plaintiffs' counsel may want to argue for an extension of the "loss of chance" (or "lost chance") doctrine.²³² Used almost exclusively in medical malpractice suits, loss of chance permits plaintiffs to recover for tortious actions substantially reducing their chance of survival, even if that chance was less than fifty percent.²³³ In *Herskovits v. Group Health*, the court found the plaintiff successfully proved causation by showing the defendant's failure to diagnose the plaintiff's lung cancer substantially reduced the plaintiff's chance of survival, even though Herskovits had less than a fifty-percent chance of living regardless of when the diagnosis was made.²³⁴

Use of the lost chance doctrine would mitigate the harshness of the usual "all or nothing" causation standard,²³⁵ and allow

²²⁸ Berman, *supra* note 214 (emphasis in original).

²²⁹ *Id.*

²³⁰ Dobbs et al., *supra* note 202, §193.

²³¹ *Id.*

²³² Use of the doctrine first arose in the English case, *Chaplin v. Hicks*, [1911] 2 K.B. 786 (Eng.).

²³³ J. Stephen Phillips, *The "Lost Chance" Theory of Recovery*, 27 COLO. LAW, Nov. 1998, at 85, 85.

²³⁴ 664 P.2d 474, 487 (Wash. 1983).

²³⁵ The traditional standard permitted a recovery only upon a preponderance of evidence—a fifty-one percent certainty of causation. *See*

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concussion plaintiffs to recover damages even if a plaintiff endured additional brain trauma outside the scope of their NFL employment, such as through college football or a car accident. Though loss of chance doctrine has been applied where malpractice reduces the plaintiff’s chance of survival (such as a missed or late diagnosis), courts generally prefer to use this doctrine when the individual suffered serious harm and partially contributed to the tortious activity, but the harm may have occurred absent the malpractice.²³⁶

In *Wendland v. Sparks*, the Supreme Court of Iowa held that “loss of chance of less than 50% is compensable,” where the defendant doctor failed to perform CPR to resuscitate a patient.²³⁷ There, even though the patient had entered cardiorespiratory arrest and had drawn (what would be) her last breath prior to the defendant’s negligence, the court found the doctor liable for his failure to attempt resuscitation.²³⁸ Noting that the patient had been successfully resuscitated multiple times prior, the fact that the patient never made a “no code” request,²³⁹ and that the doctor acted against the known wishes of the patient’s husband, the court found that even though “the chances of successful resuscitation were questionable, and any recovery for wrongful death would be severely limited . . . even a small chance of survival is worth *something*.”²⁴⁰ The loss of chance has been likened to the loss of a lottery ticket—although the ticket “represents a less than even chance of recovery,” the ticket nonetheless has “clear market value.”²⁴¹ In the concussion litigation context, the “ticket” represents someone who may have suffered from a concussion outside of the NFL but nonetheless might have been healthy—or at least healthier—had the NFL not withheld information and opposed reform, leading to even more concussions and neurological injuries.

Kaufman, *supra* note 35.

²³⁶ Phillips, *supra* note 228, at 85.

²³⁷ 574 N.W.2d 327, 333 (Iowa 1998).

²³⁸ *Id.* at 328.

²³⁹ Essentially, this is a “do not resuscitate” request.

²⁴⁰ *Id.* at 328, 332 (emphasis in original).

²⁴¹ Kaufman, *supra* note 35.

With the loss of chance doctrine gaining traction in a number of state courts,²⁴² the same policy reasons behind its acceptance support an expansion of the doctrine to other claims, and specifically, to concussion lawsuits. Loss of chance is not confined to suits dealing with negligent diagnoses and has been accepted for claims outside the malpractice context, albeit in narrow circumstances.²⁴³ A number of scholars have advocated for a limited extension of the doctrine to tort cases more broadly,²⁴⁴ arguing for the increased use of “probabilistic causation,” where tortfeasors are liable in proportion to the harm contributed, especially in mass tort contexts.²⁴⁵ Professor Glen O. Robinson noted the “lagged effects” of harm in toxic tort cases (an issue applicable to concussion litigation, where the long-term effects of traumatic brain injuries often arise years later), and posited that the search for “deterministic causes” (such as “substantial factor” or “but for” causation) was “both artificial and misleading,” arguing that “the basic objectives of tort law are better served if liability is based on risk of injury, than if it is based on the actual occurrence of a harm.”²⁴⁶ Even a “narrow” formulation of loss of chance, limiting the doctrine to “failure[s] to protect a person from a preexisting condition,” may permit recovery for concussion plaintiffs’ failure to warn claims, as failures to diagnose—like failures to warn—deal with “protection

²⁴² See Paul Speaker, *The Application of the Loss of Chance Doctrine in Class Actions*, 21 REV. LITIG. 345, 346 (2002).

²⁴³ *Wendland v. Sparks*, 574 N.W.2d 327, 332 (Iowa 1998). See, e.g., *Gardner v. Nat’l Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir. 1962) (where defendants were liable for a reduction in a deceased seaman’s chance of survival after failing to search for him); *Hake v. Manchester Twp.*, 486 A.2d 836 (N.J. 1985) (where defendants were liable for reduction in the chance of survival of deceased juvenile arrestee who had attempted suicide, by failing to perform CPR).

²⁴⁴ Fischer, *supra* note 38, at 606.

²⁴⁵ See, e.g., John Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability*, 67 N.C. L. REV. 1063 (1989); Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779 (1985).

²⁴⁶ Robinson, *supra* note 239, at 780–81, 783.

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against an external risk.”²⁴⁷

One prevailing policy justification for extending loss of chance doctrine is fairness.²⁴⁸ This argument has particular force in the concussion litigation context, where a traditional causation rule might bar concussion plaintiffs from recovery. Due to the harshness of the traditional “more-likely-than-not” causation standard, some advocate for loss of chance under fairness principles, where wrongful conduct not only increased the incidence of a future illness, but prevented a determination of whether the illness would have occurred “but for” the wrongdoing.²⁴⁹ This rationale applies to the concussion litigation context, where the alleged misrepresentations and omissions of the NFL and MTBIC may have increased the likelihood of long-term neurological injury by failing to properly address concussion concerns, and spreading misinformation, causing players to misjudge the risks involved. In addition, the possibility that the League intentionally concealed evidence about the seriousness of concussion injuries makes causation difficult to prove: how do we know if the plaintiffs’ long-term injuries would have occurred absent the NFL’s and the MTBIC’s alleged deception?

Deterrence is another popular policy justification for the extension of loss of chance to concussion litigation.²⁵⁰ The use of loss of chance prevents tortfeasors who have caused less than fifty percent of the plaintiff’s harm from escaping liability. By contrast, a more traditional rule incentivizes potential defendants who might substantially contribute to an injury, but not necessarily “more-likely-than-not” have caused it, to avoid additional precautions.²⁵¹ For example, under a traditional causation rule, a player who received four concussions in college

²⁴⁷ Fischer, *supra* note 38, at 606, 610.

²⁴⁸ *Id.* at 626–27.

²⁴⁹ Loss of chance should also be limited to cases where the duty owed by the defendant arose from a “special relationship,” a standard the NFL litigation likely satisfies. Joseph H. King, Jr., “*Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*,” 28 U. MEM. L. REV. 491, 535 (1998).

²⁵⁰ Fischer, *supra* note 38, at 627–35.

²⁵¹ *Id.* at 605–06, 632.

and two in the NFL could not argue the League caused more than fifty percent of his concussion-related injuries. Loss of chance allows him to argue that the NFL should still be liable for a third of the injury because it reduced his chances of survival or of living a healthy life.

Though opponents of this rationale argue that the traditional more-likely-than-not rule actually incentivizes actors to take additional steps because they may be liable for *more* harm than they actually caused,²⁵² this argument does not have as much force in the concussion litigation context, where it is more difficult to prove the NFL caused a majority of the alleged injuries. Still, a substantial number of states decline to use loss of chance at all, let alone an expansive application.²⁵³ The primary concern is that an extension of loss of chance will be highly difficult to limit. Because an extension of loss of chance “can apply to all cases where a tortfeasor creates a risk of harm and it is uncertain whether the harm has already occurred or will occur in the future,” there is fear that the loss of chance would “swallow the [traditional all-or-nothing] rule,” rather than remain the exception.²⁵⁴ Such jurisdictions fear that permitting loss of chance recovery allows the compensation of speculative or uncertain injuries. Therefore, a significant number of jurisdictions refuse to consider loss of chance when the victim had less than a fifty percent chance of survival,²⁵⁵ which would be problematic for concussion plaintiffs.

The Supreme Court of Florida rejected loss of chance in *Gooding v. University Hospital Building, Inc.*, concerned that “[r]elaxing the causation requirement might . . . create an injustice. Health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result.”²⁵⁶ This argument is

²⁵² *Id.* at 627–28.

²⁵³ Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L. REV. 591, 611 (2013).

²⁵⁴ Fischer, *supra* note 38, at 606–07.

²⁵⁵ Férot, *supra* note 248, at 611–12.

²⁵⁶ 445 So. 2d 1015, 1019–20 (Fla. 1984).

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problematic, however, as loss of chance does not create a “heightened duty” for all actors, but instead seeks to hold *negligent* tortfeasors liable for the reduction in a victim’s chance of recover.²⁵⁷ Nonetheless, many state courts remain concerned that innocent parties could ultimately become liable for injuries they didn’t clearly cause. In its Restatement (Third) of Torts, the American Law Institute stated it would not take a stance on loss of chance, noting that it would be a “drastic” expansion of traditional doctrine and left the issue to state courts.²⁵⁸

While loss of chance has been traditionally used only in individual suits, this doctrine should be applied here should future NFL concussion plaintiffs be certified as a class.²⁵⁹ There are compelling justifications for applying the loss of chance doctrine to class actions. In addition, loss of chance can actually facilitate class certification²⁶⁰ for former NFL class action plaintiffs, as it may increase the chance of satisfying the certification “commonality” requirement under Federal Rule of Civil Procedure 23(b).²⁶¹ Loss of chance has the capacity to “smooth over many of the differences” between individual class members by comparing them all to a “baseline in order to determine damages” (for example, the incidence of brain injury in non-NFL playing football players), and then applying those damages pro-rata to all members of the class.²⁶² Without the use of the relevant baseline in loss of chance determinations, courts would have to examine class members on an individual basis to determine the likelihood of injury absent the tortious behavior, a process that would lead to a wide variety of results that would likely “destroy

²⁵⁷ Férot, *supra* note 247, at 615.

²⁵⁸ Tory A. Weigand, *Lost Chances, Felt Necessities, and the Tale of Two Cities*, 43 SUFFOLK U. L. REV. 327, 352 (2010).

²⁵⁹ *See generally* Speaker, *supra* note 236, at 349. Professor Speaker argues that class action lawsuits are not only appropriate for the application of loss of chance, but are actually a “better fit” for the doctrine than individual claims. *Id.* at 353–54.

²⁶⁰ *Id.* at 366–68.

²⁶¹ *See* Scheuerman, *supra* note 33, at 104.

²⁶² *See* Speaker, *supra* note 236, at 365–68.

the commonality holding a potential class together.”²⁶³

Loss of chance, then, seems like a potentially viable alternate basis to alternative causation theory and will allow former NFL players to plead sufficient causation, despite the existence of other contributing factors. Though any extension of the loss of chance doctrine should be crafted with care,²⁶⁴ loss of chance is supported by principles of fairness and deterrence, and it provides an opportunity for former players to recover despite the role of other potential causes. Finally, loss of chance may aid in the class certification context by providing a baseline by which courts can apportion damages with less reference to the individualized concerns of specific plaintiffs.

V. CONCLUSION

The proposed settlement between the NFL and over 4,500 former football players is currently an insufficient remedy to the extensive damage caused by the League’s inaction, failure to warn, and spread of misinformation, with regard to concussions and repeated brain trauma. While the potential settlement could provide some immediate aid to former players suffering from the most serious effects of repeated head trauma, the amount itself will likely be inadequate compensation for most players. Further, the proposed settlement allows the NFL to avoid the discovery process and any admission of wrongdoing, allowing the NFL to escape a good deal of bad publicity and public pressure to reform. It is due to these terms that the proposed settlement is inadequate and therefore should be denied.

Given the proposed settlement’s insufficiencies, the plaintiffs may need to opt out and pursue litigation to receive adequate

²⁶³ *Id.* at 367.

²⁶⁴ The concern is that an extension of loss of chance will be highly difficult to limit. Because an extension of loss of chance “can apply to all cases where a tortfeasor creates a risk of harm and it is uncertain whether the harm has already occurred or will occur in the future,” there is fear that the loss of chance would “swallow the rule,” rather than remain the exception, “with probabilistic causation completely supplanting the traditional” all-or-nothing rule. Fischer, *supra* note 38, at 606–07.

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damages, unless the settlement is significantly reworked. In order for future plaintiffs to be successful they will need to be able to argue that section 301 of the LRMA did not preempt their claims. It is likely plaintiffs would avoid preemption, since the League—through its creation of the Mild Traumatic Brain Injury Committee—assumed a duty of care that is independent of the NFL-NFLPA’s collective bargaining agreement. Unlike precedent cases such as *Duerson* and *Williams*, the plaintiffs’ claims in *In re National Football League Players’ Concussion Injury Litigation* arise under a duty of care completely independent of the NFL-NFLPA collective bargaining agreement. Nor can the NFL rely on *Stringer*, as the plaintiffs here do not reference or implicate the duties of team trainers. While the plaintiffs’ claims may be “related” to the CBA, resolving them would not be “dependent on” or “intertwined with” the bargaining agreement’s interpretation, as Judge Perry recently found in *Green v. Arizona Cardinals*.

Proving causation will be more difficult. Current and future plaintiffs should be able to overcome potential defenses of assumption of risk and contributory negligence. While athletes knew they risked concussions, it was nearly impossible for them to fully appreciate this risk, given the NFL’s obstinacy in failing to take such injuries seriously and fighting the increasing weight of science in order to preserve its own image. While some players may have hid (and still hide) concussions from their teams, the desire to do so was borne largely from the tough-it-out culture that the NFL deliberately crafted. By successfully arguing for an expansion of the loss of chance doctrine, NFL concussion litigation plaintiffs may find a pathway to adequate recovery for the harm allegedly caused by the NFL’s negligence and seemingly active spread of misinformation, despite multiple factors potentially contributing to long-term cognitive illness and injury. As Pro Football Hall of Famer Frank Gifford stated in 1960, “Pro football is like nuclear warfare. There are no winners, only survivors.”²⁶⁵ Unfortunately, for many of those

²⁶⁵ *Events and Discoveries of the Week*, SI VAULT (July 4, 1960), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1071473/1/>

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survivors suffering from devastating illnesses, such as CTE, ALS, Alzheimer's, dementia, and Parkinson's Disease, the war continues.