**POLICY ANALYSIS OF THE RECENT CONCUSSION LAWSUIT FILED AGAINST THE NATIONAL FOOTBALL LEAGUE (NFL)**

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1. INTRODUCTION

By all accounts, professional football appears to be thriving. According to a survey taken in January 2014 by the Harris Poll, adult fans aged 18 and over voted professional football to be their favorite sport among those in the professional realm[[1]](#footnote-1). 35% of fans in this age bracket voted for the National Football League (NFL), producing a margin of victory of 21% over the second place finisher, Major League Baseball (MLB)[[2]](#footnote-2). This was the 30th consecutive year the results of this poll have shown that the NFL was deemed to be the most popular sport among target responders[[3]](#footnote-3). Not only is the NFL the most popular of all professional sports, but it is the most valuable. For the 2013 league year, the NFL will bring in a little over $9.3 billion[[4]](#footnote-4), making it not only the most lucrative sports league in the United States, but in the entire world[[5]](#footnote-5).

However, for all the success that the NFL has enjoyed over the past three decades, a number of threats may be looming as a result of the fallout from the recent lawsuit filed against the league by former players. This lawsuit began as a series of smaller suits that were eventually consolidated into one. The various lawsuits were filed over the course of the past decade by approximately 4,500 former NFL players, alleging that the league knowingly concealed information regarding the potential long-term risks of suffering a concussion, most notably chronic traumatic encephalopathy (CTE). In August of 2013, the NFL proposed a $765 million settlement to this lawsuit in an effort to appease the plaintiffs, while also hoping to avoid further litigation. Despite the fact that a settlement was reached in the case, it appears this is not the last that the NFL and we in the public sphere will hear about this issue because of the repercussions surrounding it, both intended and unintended.

This thesis will explore a number of elements surrounding the concussion lawsuits filed against the NFL and its subsequent settlement. In part one, I will explore in-depth what exactly a concussion is, what the consensus on proper treatment of one should be, and the definition and discovery of chronic traumatic encephalopathy (CTE) in the brains of former NFL players. In part two, I will examine the lawsuit itself, providing details in chronological order as a means to educate the reader. The reason for this is that while I believe most people know that a lawsuit had been filed against the NFL, they may not know exactly why it was filed. In part three, I will explore the intended consequences of the lawsuit and what changes, if any, they hoped to bring about. In part four, I will perform a qualitative policy analysis of the lawsuit and its settlement by analyzing the various dimensions it encompasses, including legal, economic, ethical (in regards to the rules of the game), and medical. This analysis will also look at both the future of the game at the professional level and the league, in addition to the possibility of the case setting any legal precedent that could be used in the future. In undertaking this particular element of the thesis, I understand that there is no way to isolate all of the potential unintended outcomes that could result from the plaintiffs taking legal action against the NFL. But, by focusing on how the settlement of the suit has been received thus far, coupled with certain outcomes that were not originally detected, I will try to situate the lawsuit in a much wider and long-term context, while also attempting to predict its potential effect.

1. PART ONE: WHAT IS A CONCUSSION?

In the recent past, these injuries were described as “being shaken up” or “having your bell rung,” but today the term “concussion” is frequently heard when discussing these injuries in professional football. Every Sunday, or so it seems, at least one player is either forced from the game with a concussion or concussion-like symptoms. The word is now so prevalent in the modern lexicon of the league that it would appear that everyone with any level of stake in it, be it fan or player, knows exactly what it entails. This is not the case. Too many people surrounding or involved with the NFL know little about what a concussion truly is and how extremely severe an injury it can be. This section will serve to educate the reader on this matter.

I have used the term concussion thus far in the thesis, both in the introduction and to this point. Yet in doing so, I have technically been remiss because that is an incorrect term. Concussions actually should be referred to as “mild traumatic brain injuries,” or mTBI’s[[6]](#footnote-6). The reason for this is twofold. For one, this is the preferred clinical term by those who are involved in concussion science[[7]](#footnote-7). A second reason is that the term concussion, unfortunately, carries a long history of underestimation, at least in terms of its use in the United States[[8]](#footnote-8). It has been only during the last 30 or so years that in-depth and concentrated research has been conducted on mTBI’s, yielding “disturbing evidence regarding the profoundly deleterious and long-term effects of accumulated concussions[[9]](#footnote-9).” Contrary to what was once thought, a concussion really is a form of a traumatic brain injury, albeit one that could be considered mild (to put it in perspective, a more severe brain injury would be one that could be found in car accidents[[10]](#footnote-10)). As a result of this, the injury “should be labeled as such as a reflection of the gravity of what is at stake[[11]](#footnote-11).” However, for the rest of this thesis, I will refer to the injury as a concussion rather than an mTBI. This is not only because of the ease of comprehension for the reader, but also because at a recent International Conference on Concussions in Sport, the panel (comprised of 28 people with one or more of the following: MD, PhD, MBBS, MB, and BS) chose to refer to the injury as a concussion[[12]](#footnote-12). The panel determined that a concussion is “the historical term representing low velocity injuries that cause brain “shaking”[[13]](#footnote-13).” Since a concussion is a subset of a TBI (traumatic brain injury), the panel chose to continue to refer to the injury as such. I will do the same.

This brings us back to the main question at hand – what exactly is a concussion? According to the consensus reached at the International Conference on Concussions in Sport in November of 2012, a concussion is “a brain injury and is defined as a complex pathophysiological process affecting the brain, induced by biomechanical forces[[14]](#footnote-14).” They may be caused either by a “direct blow” to the head, face, and neck, or a blow to another spot on the body where an “impulsive force” can be transmitted to the head[[15]](#footnote-15). Concussions typically result in the “rapid onset of short-lived impairment of neurologic function that resolves spontaneously,” although in some cases the impairments may start to appear over a number of minutes to hours[[16]](#footnote-16). For the most part, concussions result in a “functional disturbance rather than a structural injury” and have a “graded set of clinical symptoms,” which may or may not include the loss of consciousness[[17]](#footnote-17). The resolution of the clinical and cognitive symptoms traditionally follows a particular order, but it is extremely important to be aware of the fact that, unfortunately, in some cases symptoms may be prolonged[[18]](#footnote-18). The panel found that the majority (which in this case was between 80% and 90%) of concussions subside within 7 to 10 days, which is a relatively short period of time when considering the fact that this is an injury to the brain[[19]](#footnote-19).

Another oft-asked question when discussing concussions concerns the identification of symptoms. According to the panel, the suspected diagnosis can include symptoms of a somatic nature (such as a headache), a cognitive nature (such as the individual feeling like he/she is in a fog), or an emotional nature (such as lability[[20]](#footnote-20)). Symptoms of a concussion can also include physical signs (such as a loss of consciousness or memory), behavioral changes (such as irritability), cognitive impairment (such as a delayed reaction time), and sleep disturbance (such as insomnia[[21]](#footnote-21)). If one or more of the aforementioned symptoms appears to be present, a concussion should be suspected and should be dealt with through the appropriate channels[[22]](#footnote-22).

But what exactly are the appropriate channels? And who defines them? According to those on the panel, when a player takes a blow to the head, neck, face, or body that causes the head to be affected and the player begins to show one or more of the symptoms of a concussion, the player should be evaluated by the physician or healthcare provider that is onsite using “standard emergency management principles[[23]](#footnote-23).” Once observed by a licensed onsite physician, the “appropriate disposition of the player” must be determined in a “timely manner[[24]](#footnote-24).” Upon exiting the playing surface, the panel determined that the concussed or potentially concussed player should not be left alone following the injury and should be closely monitored[[25]](#footnote-25). If the player is deemed by the physician to have a concussion he/she will be barred from returning to play on the day of the injury whether they are a non-elite athlete (a D3 football player, for example) or an elite one (NFL player, for example), something that was unanimously agreed upon by the panel[[26]](#footnote-26). The reason for this is that data from high school and college level athletes show that those athletes who suffered a concussion and were allowed to re-enter the game on the same day may “demonstrate neuropsychological deficits post-injury that may not be evident on the sidelines and are more likely to have delayed onset of symptoms[[27]](#footnote-27).”

In terms of managing the concussion once it has been officially diagnosed, the panel agreed that the first thing that must happen is physical and cognitive rest (usually a period of between 24 and 48 hours) until the acute symptoms subside[[28]](#footnote-28). Once the symptoms have subsided, the panel listed a four-step process over the course of the next 96 hours (24 hours per each step) in order to get the athlete back up to speed and ready to compete the following week. The first step is light aerobic exercise, such as walking, swimming, or riding a stationary bike at less than 70% of maximum heart rate, in order to increase the heart rate and see how the body responds[[29]](#footnote-29). Step two in the process requires sport-specific exercise, such as an NFL running back going through a dynamic warm-up, in order to add movement without putting any risk of impact on the head[[30]](#footnote-30). The third step involves non-contact training drills, such as an NFL quarterback participating in some light throwing drills, in order to increase the level of exercise, coordination, and cognitive load[[31]](#footnote-31). Step four allows the player to go through a full contact practice with no restrictions, as if he/she had never suffered the concussion at all, in order to restore confidence and “assess functional skills by coaching staff[[32]](#footnote-32).” When all of these steps are completed with no set-backs or issues, then the panel agreed that the athlete should be allowed to be eligible to participate in the next game, as the player has demonstrated that there are no lingering after-effects and that he/she is symptom free.

It is important to note before going any further that football is not the only sport dealing with concussion issues. For example, while football is the number one athletic activity with the most concussions, girls soccer comes in at a close second, as it has seen a 58% increase in the amount of concussions suffered in the last decade[[33]](#footnote-33). However, given the incredible popularity of football, specifically the NFL, the problem it has been reconciling with receives far more attention despite the fact that it is not an issue exclusive to football.

The consequences of an athlete playing in a league like the NFL where there is contact on literally every single play returning before his concussion can properly heal could potentially be major. Not only are they at risk for suffering another concussion, but they could potentially be at risk for chronic traumatic encephalopathy (CTE). CTE was first described in 1928 as being characteristic of boxers who took considerable amount of punishment to the head[[34]](#footnote-34). The clinical symptoms then included “slight mental confusion, a general slowing in muscular movement, hesitancy in speech, and tremors of the hands[[35]](#footnote-35).” Degenerative effects of CTE, which were evidenced as early as 1928, include “marked truncal ataxia, Parkinsonian syndrome, and mental deterioration” so severe that in some cases institutionalization had to occur in order for proper care to be administered[[36]](#footnote-36). The reason for this severe cognitive degeneration is that repeated hits to the helmet over the course of an NFL career can potentially cause irreparable damage in the form of a toxic protein called tau developing in the brain[[37]](#footnote-37). When there is repeated trauma to the brain over a long period of time, the tau proteins begin to form and inevitably “choke off cellular life in the brain,” causing the aforementioned neurological deficiencies[[38]](#footnote-38). This is a distinctive disorder that the general population just simply does not develop (in other words, it stems from violent contact sports such as football) and only gets worse as the player diagnosed with it ages. Unfortunately, CTE cannot be tempered with early diagnosis, as the definitive diagnosis can only be made postmortem[[39]](#footnote-39)

Over the past decade, the NFL has been forced to deal with the reality of CTE present in the brains of their former players. The legal action brought forth against the league as it pertains to CTE has received significant amounts of media attention[[40]](#footnote-40). This has stemmed from the recent “high-profile” suicides of former NFL players. In February of 2011, former Chicago Bears safety Dave Duerson, member of the vaunted 1985 Bears defense famously dubbed “The Monsters of the Midway,” committed suicide by shooting himself in the chest so as to preserve his brain, which he had asked to be studied after his death[[41]](#footnote-41). Post-mortem pathology of his brain showed that he had “diagnostic evidence of CTE[[42]](#footnote-42). In May of 2012, former San Diego Chargers and New England Patriots linebacker Junior Seau, a fan favorite and 12-time Pro Bowler, committed suicide in a similar manner to Duerson’s, as he too shot himself in the chest. Pathology of his brain also showed to contain elements of CTE[[43]](#footnote-43).

Diagnosis has not just come from former players who have taken their own lives, though. In an article published in 2010 by *Sports Illustrated*, Dr. Ann McKee, an associate professor of neurology and pathology at Boston University who had been studying the brains of deceased former NFL players, was interviewed. In the interview, McKee revealed that in the past three years she was given the brains of 16 former NFL players by their families, some of whom suffered “dementia, ALS (amyotrophic lateral sclerosis), or severe depression[[44]](#footnote-44).” Rigorous testing had been performed on 14 of those brains, with a staggering 13 of them diagnosed with CTE[[45]](#footnote-45). In the brains of former offensive lineman Lou Creekmur and linebacker Wally Hilgenberg, McKee concluded that there were “hardly any areas untouched by the damage” and that the “incredible chaos in the brain” was so “widespread” that the two men were “demented” when they died[[46]](#footnote-46).

Evidence of CTE in the brains of former NFL players was present much earlier than 2010, though. In 2006, Dr. Bennet Omalu, a forensic pathologist at the University of Pittsburgh, examined the brains of deceased former NFL players Mike Webster, Terry Long, and Andre Waters[[47]](#footnote-47). All three men had suffered multiple concussions during the course of their NFL careers. Prior to their premature deaths (none of the men were older than 50 years of age), all three men had shown “clinical symptoms of sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression[[48]](#footnote-48).” Omalu concluded that CTE brought on by multiple concussions suffered during their NFL careers was a partial cause of their deaths[[49]](#footnote-49). After his final study of the brains of the former NFL players, Omalu asked himself “whether one should be surprised that CTE was evidenced in all three studies[[50]](#footnote-50).” Omalu answered his own question with a resounding “absolutely not[[51]](#footnote-51).” The aforementioned Dr. McKee would later agree with him, saying that she could say confidently that this was a “distinctive disorder” that the general population does not develop[[52]](#footnote-52). McKee also added that she had “never seen this disease in any person who does not have the kind of repetitive head trauma that football players would have[[53]](#footnote-53).”

In short, some of the leading professionals in their respective fields who have done extensive research concerning the matter have claimed that CTE brought on by suffering multiple concussions is an entirely unique condition, one that could only be attained by playing an inherently violent sport like football. This claim, coupled with over 4,500 former NFL players alleging that the league misdiagnosed their concussions, mismanaged their concussions, and misinformed them about concussions as a whole is the crux of the recent lawsuit filed against the league.

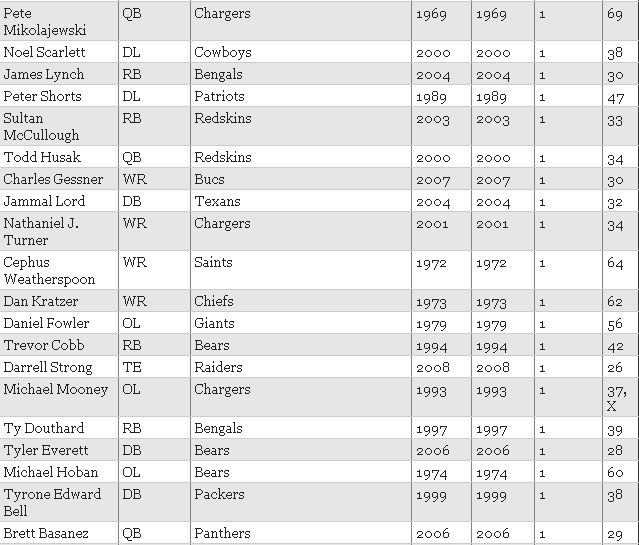
1. PART TWO: THE LAWSUIT

The lawsuit filed against the league began relatively unceremoniously, but quickly grew to unprecedented size in terms of legal action being taken against a professional sports league. The first complaints were filed almost immediately after the league experienced its most recent lockout. On July 19, 2011, 75 retired players filed a complaint in the Los Angeles Superior Court against the NFL alleging “negligence, fraud, and a loss of consortium[[54]](#footnote-54).” The claim arose as a result of concussion-related injuries suffered by the plaintiffs during their playing careers that included some variation of “memory loss, headaches, dementia, tingling in the head and neck, sleeplessness, poor vision, and dizziness[[55]](#footnote-55).” The plaintiffs mandated that the NFL knew “for decades” the dangers associated with suffering multiple violent blows to the head, but “nevertheless failed to fulfill its assumed duty to protect its players from such dangers[[56]](#footnote-56).” They alleged that the league knew as early as the 1920’s of the harmful effects stemming from suffering a concussion, yet “concealed these facts from the coaches, trainers, and players until 2010[[57]](#footnote-57).” It was argued in the complaint that the plaintiffs were completely unaware of these dangers and relied on the NFL to protect them[[58]](#footnote-58).

Over the next six months, more former players dealing with similar symptoms as a result of suffering concussions during their playing days either joined the complaint in the Los Angeles Superior Court or filed their own. These actions led to the Judicial Panel on Multidistrict Litigation issuing an order on January 31, 2012 that consolidated several of these lawsuits against the NFL into one “”master” case of Multidistrict Litigation[[59]](#footnote-59). Like the initial complaint, these lawsuits also claimed “tortious[[60]](#footnote-60) conduct on the part of the NFL resulting in neuro-degenerative disease and injury” to the plaintiffs[[61]](#footnote-61). Just over nine months later, in June of 2012, attorneys representing over 2,500 individual lawsuits against the NFL filed a motion in the United States District Court for the Eastern District of Pennsylvania seeking to consolidate the aforementioned suits into a single class action suit[[62]](#footnote-62). Accompanying the motion was a “petition for relief,” which presented all the “factual allegations and legal theories of recovery[[63]](#footnote-63).” The petition filed against the league sought damages for “wrongful death, several varieties of fraud, negligence broken down over different time periods (pre-1968, post-1968, 1987-1993, and post-1994), and negligent hiring/retention[[64]](#footnote-64).” The motion was granted.

Just over a year later, the number of former players either filing similar suits against the league or joining suits already filed nearly doubled. On January 24, 2013, it was reported that well over 4,000 retired players, more than one-third of players to ever sign an NFL contract, had filed or joined suits against the NFL pertaining to head injuries they suffered in their careers[[65]](#footnote-65). Among the plaintiffs were marquee stars, relative unknowns, player spouses, and even estates of players who had committed suicide as a result of their debilitating neurological conditions[[66]](#footnote-66). Some plaintiffs played as many as 282 NFL games, like former defensive lineman Jim L. Marshall, some in as few as 1, like former quarterback Pete Mikolajewski[[67]](#footnote-67). The following figures will help provide a visual representation of the wide range of the plaintiffs involved in the suit:

  
*Figure 1[[68]](#footnote-68)*

  
*Figure 2[[69]](#footnote-69)*

One of the largest complaints lodged by the plaintiffs in the suit was that the league was negligent, both in terms of properly informing the players of the potential risks of concussions despite knowing that there were indeed serious consequences of multiple traumatic head injuries and in terms of properly researching the harmful effects of concussions. This is where the 1994 Mild Traumatic Brain Injury Committee becomes extremely important in order to understand the consolidated lawsuit.

In 1994, the NFL made its first attempt to address the issue of the increasing number of head injuries being suffered by its players. Then-NFL Commissioner Paul Tagliabue established the Mild Traumatic Brain Injuy (mTBI) Committee as a means to further study the effects of concussions on NFL players[[70]](#footnote-70). The committee, led by Dr. Elliot Pellman, a rheumatologist and then-head physician of the New York Jets, performed studies over the course of 14 years[[71]](#footnote-71). During that time, the committee found that there were only 0.41 reported concussions per NFL game between the 1996 and 2001 seasons[[72]](#footnote-72). It was figures like these that allowed Pellman to conclude the following after nearly a decade and a half of research:

[B]ecause a significant percentage of players returned to play in the same game as they suffered an mTBI and the overwhelming majority of players with concussions were kept out of football-related activities for less than 1 week, it can be concluded that mTBIs in professional football are not serious injuries.[[73]](#footnote-73)

However, it was right around this time that these reports were published that the aforementioned research by Dr. Omalau and Dr. McKee on CTE came to light. It should be noted that the Tagliabue-founded mTBI Committee did not discover any cases of CTE in NFL players, and that the league’s “official stance denied any increased risk of suffering injury after a concussion[[74]](#footnote-74).” In fact, the mTBI Committee had limited CTE cases to being reported “only in boxers and a few steeplechase jockeys[[75]](#footnote-75).” When Dr. Omalu concluded in an article written in 2005 for *Neurosurgery* that CTE brought on by multiple concussions partially caused the deaths of the three previously mentioned players’ brains he had studied, the NFL wrote a letter to the editor of the publication asking Omalu’s article to be retracted[[76]](#footnote-76). The NFL and its mTBI Committee claimed that Omalu had “misinterpreted and misapplied the applicable medical literature on CTE,” and questioned the amount of medically defined “traumatic” blows to the head that offensive lineman actually take[[77]](#footnote-77). This was in the face of multiple doctors finding Omalu’s football-CTE theory to be plausible and consistent with the similarities between football and boxing, as that was the sport most commonly associated with CTE[[78]](#footnote-78).

This would not be the first time that the NFL would attempt to dispute the football-CTE theories, thus providing support to the plaintiff’s allegations of negligence and denial on the part of the league. Also in 2005, Dr. Kevin Guskiewicz performed studies finding that former players who had suffered three or more concussions throughout their playing careers had “a five-fold prevalence of cognitive impairment[[79]](#footnote-79).” Three years later, Dr. McKee found CTE in the brains of two more former players who had recently died[[80]](#footnote-80). Similar to when Omalu’s research was published, the NFL was again highly critical of the two studies. The league mandated that there was “no magic number” as to how many concussions was too many and that each study was merely an “isolated incident[[81]](#footnote-81).” It was only in 2007 that the NFL acknowledged the true severity of concussions and began to modify rules to protect the current players, and not until 2010 when the league began warning current players of the long-term risks that come with suffering multiple violent blows to the head[[82]](#footnote-82).

It could be argued that these allegations of neglect and denial on behalf of the former players against the NFL were unsurprising; particularly after how the congressional hearings on the league’s concussion issue went in October of 2009[[83]](#footnote-83). Despite the recent findings published by Drs. Omalau, McKee, and Guskiewicz, current NFL Commissioner Roger Goodell elected not to definitively answer as to if there was “a link between playing professional football and the likelihood of contracting a brain-related injury such as dementia, Alzheimer’s, depression, or CTE[[84]](#footnote-84).” When asked directly about the matter, Goodell deferred to the “medical experts,” saying that they would know far better than him in regards to concussions[[85]](#footnote-85). At a later stage of the hearing, representative Linda Sanchez of California went as far to compare what she felt was the NFL’s “blanket denial” to that of tobacco companies prior to the 1990’s continually saying “there is no link between smoking and damage to [your] health[[86]](#footnote-86).” Shortly after the hearings concluded, the NFL instituted new guidelines which required teams to consult with independent neurologists when they were dealing with players who had suffered brain injuries[[87]](#footnote-87).

One could make the case that it was these events that inspired the former players filing suits against the league to unite and consolidate them into what has been called the Master Amended Complaint[[88]](#footnote-88). In the complaint, the plaintiffs mandated that the NFL had been aware of the “growing body of scientific evidence and its compelling conclusions that professional football players who sustain repetitive mTBI’s during their careers are at greater risk for chronic neurocognitive illness and disabilities[[89]](#footnote-89).” Given the knowledge that the plaintiffs alleged the NFL had about concussions and the subsequent neurological disorders they could potentially bring on later in life, the plaintiffs also argued that the league “sat on” the information and “ignored, minimized, disputed, and actively suppressed” the link between concussions and neurological diseases, along with the overall “broader awareness” of said link[[90]](#footnote-90). In addition, the plaintiffs also contended that the NFL “mythologized violence through the media,” marketed and glorified violence through the NFL Films production company, and that the league “was in a superior position of knowledge and authority and owed a duty to the players [to properly inform them][[91]](#footnote-91).” Furthermore, the plaintiffs argued that the NFL knew full well the “dangers and risks” that came with concussions and “voluntarily undertook the responsibility of studying head impacts in football, yet fraudulently concealed their long-term effects[[92]](#footnote-92).”

The 4,500 plus plaintiffs involved in the Master Amended Complaint set out fourteen different counts of legal claims going as follows: negligence-based claims and fraud-based claims, declaratory relief, medical monitoring, wrongful death and survival, fraudulent concealment, fraud, negligent misrepresentation, negligence, loss of consortium, negligent hiring, negligent retention, and civil conspiracy/fraudulent concealment[[93]](#footnote-93). Since the plaintiffs were making the case that the NFL made it appear that they were the “guardian and authority” of player safety, they also alleged that the league had no other choice than to uphold its “common law duty to provide players with rules and information that protect them as much as possible from short-term and long-term health risks[[94]](#footnote-94).” In short, the crux of their negligence-based claims was that the league failed to “make the game safer, earlier[[95]](#footnote-95).” The core of the fraud-based claims was centered on the “affirmative actions the NFL allegedly took to mislead players about the risks of head injury,” with the target being the league’s mTBI Committee[[96]](#footnote-96). The plaintiffs held that the mTBI Committee was the injurious party that published materials that “the NFL knew or should have known were misleading, downplaying, and obfuscating to NFL players the true and serious risks of repetitive traumatic head impacts[[97]](#footnote-97).”

These alleged tortious actions were brought forth against not only one of the “most popular entertainment products in the United States,” but the clear-cut favorite professional sport among those in the United States[[98]](#footnote-98). Had the plaintiffs made it to the trial portion of the litigation process, the NFL could have potentially been confronted with the very real and possibly devastating prospect of “paying out tobacco-like damages reaching upwards of billions of dollars[[99]](#footnote-99).” This would have been an unprecedented event in the realm of professional sports in the United States. However, the suit never got that far.

On August 29, 2013, the NFL and the plaintiffs reached a deal where the league agreed to pay $765 million to “fund medical exams, concussion-related compensation, medical research for retired NFL players and their families, and litigation expenses[[100]](#footnote-100).” The settlement would apply to all players who are retired as of the day Judge Anita Brody gives her preliminary approval to the settlement[[101]](#footnote-101). In terms of the settlement itself, it will be subject to a formal approval process, allowing plaintiffs to either oppose the settlement and try to obtain more money or elect to remove their name from the case as a means to “continue to pursue their own claims[[102]](#footnote-102).” The proposed $765 million will not include the attorney’s fees, as that matter will be dealt with separately in the future. $675 million of the settlement will be made readily available for those retired players who have medical evidence of having “severe cognitive impairment, dementia, Alzheimer’s, ALS, or to their families[[103]](#footnote-103).” Compensation for each player will be based on a series of mitigating factors, such as his age, length of his NFL career, and his diagnosis, and will be made by independent doctors working with settlement administrators that the court will appoint[[104]](#footnote-104). If all of the $675 million has been allocated before all plaintiffs have received their deserved aid, then the league will make a one-time additional payment with a ceiling of $37.5 million[[105]](#footnote-105). Of the remaining money left, a maximum of $75 million will be used for baseline medical exams of retired players, $10 million will go to a separate research and education fund, and $6 million will be devoted to administrative costs[[106]](#footnote-106). It was also decided during the settlement that it would have no impact on any of the benefits provided under the new labor deal between the NFL and the NFLPA (National Football League Players Association), and that it would also have no impact on the rights of current NFL players[[107]](#footnote-107).

On January 14, 2014, it was announced that Judge Brody had rejected the initial $765 million settlement, “fearing the sum may not be enough to cover the injured players[[108]](#footnote-108).” While this may appear to be a major issue, it is merely part of the process. Judge Brody was not expected to “rubber-stamp” the settlement, but actually “analyze whether [it] is fair and reasonable and meets those factors[[109]](#footnote-109).” In rejecting the initial sum, Judge Brody was attempting to insure that all plaintiffs involved in the suit would be compensated fairly and receive all that they were entitled to under the terms of the settlement. This does not necessarily mean that the settlement is off by any means, as there are subtle adjustments that can be made and “analysis from economists, actuaries, and medical experts” will be heavily relied upon in devising a more suitable figure that can take care of all the former players involved in the suit[[110]](#footnote-110). As of March 11, 2014 the settlement with a new dollar figure has not been re-submitted to Judge Brody for approval, but it is probable that it will occur prior to the start of the 2014 regular season.

1. PART THREE: INTENDED CONSEQUENCES OF THE LAWSUIT

It is at this juncture that we come to my thesis: that although the settlement of the lawsuit was completed in order to bring forth a number of well-planned intended consequences, in doing so there could be a number of potential unintended consequences that may or may not give the league issues in the future. But first, let us take a look at what the suit appears to have been designed to do.

It appears the biggest intention of the lawsuit was to bring about proper and adequate compensation for the plaintiffs who had been affected by the myriad neurological diseases stemming from repeated trauma to the head[[111]](#footnote-111). Dr. Glenn Wong, a sports law professor in the Isenberg School of Management at the University of Massachusetts, “conservatively” estimated that each of the plaintiffs in the suit could have received at least $500,000 in order to “adequately recover for their losses[[112]](#footnote-112)” had the suit reached the actual trial stage of the litigation process. This is a number that is presumed to be around $30-50,000 more than what the injured plaintiffs were currently receiving under the CBA (Collective Bargaining Agreement) between the NFL and the NFLPA[[113]](#footnote-113). Despite reaching a settlement to the suit, the plaintiffs have essentially been guaranteed of receiving exactly what they deserve, if not more, in order to have the necessary funds to cover the costs of their medical bills and to take care of their families.

In addition to properly taking care of the injured plaintiffs, it appears that the lawsuit was also intended to not only increase the awareness of the diseases and disabilities that can be brought on by suffering repeated contact to the head and neck, but to make the NFL take a greater role in terms of properly informing players about the dangers of concussions and protecting the safety of its players. After all, the crux of the plaintiff’s allegations stems from the aforementioned 1994 mTBI Committee, which they accused of being overall negligent and fraudulent. By filing an unprecedented suit (no other professional sports league in the U.S. has dealt with litigation coming from former players alleging negligence and fraud) of such great size (over 4,500 plaintiffs), it seems as though the NFL had no choice but to go to greater lengths to inform its players in a more in-depth manner about the severity of concussions. This observation can be supported by the fact that the league began to provide more information to the players about the long-term risks of suffering concussions at the start of the decade.

Furthermore, in the past five years there have been a series of rule changes brought about to better protect the current players from suffering head injuries and possibly winding up with conditions similar to the ones present in the plaintiffs. Specifically, in 2010 Commissioner Goodell enacted a new 15-yard penalty that would be enforced when a “defenseless[[114]](#footnote-114)” receiver received a blow to the head by a defensive player, in addition to heavier fines for those defenders that levied such hits[[115]](#footnote-115). Also, in 2011 the NFL mandated that the starting point for kickoffs be moved from the kicking team’s 30-yard line to their own 35-yard line[[116]](#footnote-116). The thought process behind this move was that with less ground to cover, the kicking team would not only be unable to generate enough speed and momentum to deliver blows to those on the returning team that could end up yielding a concussion, but that with the skill of the kickers more kickoffs would go out of the back of the end zone and be unable to be returned, thus reducing the risk of any concussions because there would be no play[[117]](#footnote-117). Furthermore, there seems to be a far more advanced knowledge about the dangers of suffering concussions and the subsequent neurological diseases they can later yield. The average person, in addition to current NFL players, appears to be much more well-versed as to just how severe an injury a concussion can be. Thanks to the lawsuit, it does not appear that concussion is a term that is underestimated in the United States anymore, as was previously feared by the panel of experts at the International Conference on Concussions in Sport in November of 2012[[118]](#footnote-118).

It also appears that the suit filed against the league appears to have been intended to improve the ability to diagnose any neurological diseases in former players at an early stage so that they can be properly and aggressively treated, and to improve the overall research of the diseases in general. This can be evidenced by the aforementioned allocations of a certain fixed dollar amount to both provide baseline neurological tests to former players and for research on the matter as a whole[[119]](#footnote-119). By filing the suit, the plaintiffs were able to secure not only an early diagnosis for other former players if a neurological condition is indeed present, but a more advanced understanding of said conditions because of the improved research and knowledge surrounding them. This goes hand-in-hand with the previously mentioned intention of what appears to be the NFL going to unprecedented lengths to ensure that its players, both former and current, are properly taken care of.

1. PART FOUR: UNINTENDED CONSEQUENCES OF THE LAWSUIT

It is difficult to dispute the fact that filing a lawsuit of such size and magnitude was designed to bring about certain consequences in order to benefit the plaintiffs. However, based on my qualitative analysis, I believe there could be a number of potential *unintended* consequences of the suit that could potentially prove to be problematic for the NFL moving forward. In this analysis, it becomes plausible that the league could face a number of unintended consequences in terms of the following categories: legal, economic, ethical (in regards to the rules of the game), and medical. The remainder of this section of the thesis will thus be broken down into sub-sections in order to provide as clear an explanation as possible for the reader.

*Legal*

In terms of any unintended legal consequences stemming from the lawsuit filed against the league, one of the biggest potential issues could be that reaching a settlement of such a large sum could set legal precedent for future plaintiffs who could make allegations similar to the ones by the plaintiffs in the suit at hand. In this context, the legal precedent seems as though it could be that if enough retired players unite and their allegations appear to be damaging enough and supported by sufficient, tangible evidence that a court would agree to hear their case and eventually be willing to take it to trial. The NFL, likely wanting to mitigate any negative press that may taint its public image by such allegations, likely would end up settling any suit filed against them as a means to protect the integrity of the league. My reason for thinking this is heavily supported by both the August 2000 verdict in favor of former running back Merril Hoge[[120]](#footnote-120), the only player to beat the NFL in court,[[121]](#footnote-121) and the recent settlement of the current suit.

Hoge played in the NFL for eight seasons as a running back with both the Pittsburgh Steelers and Chicago Bears[[122]](#footnote-122). In a preseason game for the Bears on August 22, 1994, Hoge suffered a concussion that he later described as being akin to an “earthquake,” yet stayed in the game for two ensuing plays before finally removing himself due to his concussive symptoms[[123]](#footnote-123). Despite the intenseness of Hoge’s concussion, he was cleared by the Bears’ team doctor to play the next week[[124]](#footnote-124). This was done despite Hoge saying that he was having trouble remembering what he was supposed to be doing on the plays the Bears were to run that week[[125]](#footnote-125). Six weeks later, Hoge suffered a second concussion. Ten days after suffering the injury, he was still plagued by post-concussion symptoms including “headaches, dizziness, lethargy, drowsiness, and memory deficiency[[126]](#footnote-126). As a result of these symptoms, Hoge was unable to compete in several of the Bears’ games until the results of his neurological exams arrived[[127]](#footnote-127). Despite the seriousness of his injury, it prompted seemingly little concern from the organization, as then-coach Dave Wannstedt remarked when asked about Hoge’s condition that “there [was] no damage or anything – it’s just a concussion[[128]](#footnote-128).” Upon receiving the results of his tests, Hoge was forced to retire from professional football on October 14, 1994 – in the middle of the regular season[[129]](#footnote-129). He was 29 years old.

In August of 1996, Hoge filed a suit against then-Bears team doctor John Munsell for allowing him to return to the field of play prematurely, alleging that Munsell “failed to warn him about the dangers and risks of sustaining subsequent and more severe concussions and negligently allowed [him] to return to competition without a follow-up exam[[130]](#footnote-130).” Hoge argued that Munsell had committed a tort against him in regards to Munsell’s failure to “exercise the skill and care of a physician for a football team who undertakes the return-to-play decision authority for a player who has sustained a concussion,” and that had he been properly informed about his post-concussive state that he never would have returned to the field until he had completely recovered from his first concussion during the 1994 season[[131]](#footnote-131). Munsell maintained that Hoge was voluntarily participating in a sport where risk of severe injury was present and that by doing so the “assumption of risk doctrine” provided Hoge with the knowledge and awareness of the particular hazards that could cause an injury like the one he suffered[[132]](#footnote-132). Although a player could be found to not have “knowingly and voluntarily” assumed both the long and short-term risks of an injury like a concussion if he was not properly informed of the risks of returning to play before it healed, Munsell felt that “a patient must assume part of the responsibility for his own recovery,” which he thought Hoge did not do[[133]](#footnote-133). When another member of the defense testified that Hoge had withheld his headache symptoms from the Bears after his first concussion in 1994, Hoge admitted to doing so because he had feared the Bears would not have let him play had they been aware of the symptoms[[134]](#footnote-134). Hoge would later allege that he was incapable to live a normal life until almost a year after suffering the concussions, and that he was still plagued by post-concussion symptoms[[135]](#footnote-135). He stated that he feared becoming “senile” as a result of his injuries, as he claimed that doctors had told him that he could become so at age 45 or 50 rather than 75 or 80, and that his injuries could speed the process[[136]](#footnote-136). The jury ultimately ruled in favor of Hoge, awarding him $1.55 million and the distinction of the only former player to file and win a suit against the NFL for improperly handling concussions[[137]](#footnote-137). Of the $1.55 million, $1.45 million covered the final two years of the contract he had signed with the Bears, with the other $100,000 for Hoge’s “pain and suffering[[138]](#footnote-138).”

The Hoge suit, legal precedent in itself, could be a potentially large reason why the NFL opted to settle the current lawsuit and why that decision could possibly create a legal precedent for future similar action. The NFL lost the Hoge lawsuit when it was taken to the trial stage of the litigation process, and that scenario bears a striking resemblance to the current one. After all, both suits alleged negligence in terms of having the concussions properly treated and a failure to be properly and completely informed of the dangers of the neurological injury that the plaintiffs had suffered. While Munsell did have what seemed to be a legitimate defense, it ultimately proved to be unsuccessful because the jury ruled in favor of Hoge. It is quite possible that the NFL could have used either a similar, or the same, defense as Munsell did had the current suit gone to trial. Instead, the league opted to avoid that stage completely and come to a settlement. It appears that their legal strategy in this instance was heavily influenced by the Hoge case, as the suits were remarkably similar. Possibly wanting to avoid any negative perception being attached to the product by suffering a much larger, more financially devastating and public loss in court, the NFL elected to settle, as it appears the league knew that it was getting into a case that it likely would be unable to win.

Having lost one suit regarding negligence and misinformation to one player and settling a second and much larger suit alleging similar claims, it begs the question as to what there is to impede future players from doing the same. This seems as though it is a potential unintended consequence of the lawsuit that perhaps was not considered when a decision was reached to settle. It appears that in settling, the league could be perceived as admitting defeat, dropping it to 0-2 or 0-1-1[[139]](#footnote-139), depending on how one keeps score, when it comes to lawsuits being filed by former players in regards to concussion management. Again – what, if anything, will stop current players from filing similar lawsuits in the future against the league? And what, if anything, would keep them from winning, as the potential legal precedent indicates that a victory, one way or another, would likely be assured? This is an unintended consequence of the suit that could potentially become a substantially significant problem for the league not only the short-term, but the long-term.

It is entirely possible that current players could have similar fodder and evidence in order to be able to file similar suits in the future against the league. The events of “Black and Blue Sunday” in mid-October of 2010 are one specific example that could be used for support by the players[[140]](#footnote-140). On this particular day, at least eleven players participating in games were concussed, amounting to approximately two more than the average number concussed on a given weekend[[141]](#footnote-141). A few of the hits were described as “cringe-worthy,” in that they were helmet to helmet hits that “lent themselves especially well to modern replay technology, where the elasticity of the human neck [was] on full display[[142]](#footnote-142).” The league reacted swiftly and harshly against those players levying the illegal blows, fining three of them a combined $175,000 and threatening suspensions for future infractions[[143]](#footnote-143). It was this weekend that helped to spur the recent changes in discipline for players administering illegal blows to the head.

The conclusion could be drawn that based on events like “Black and Blue Sunday” and based on the concussions that current players suffer on a weekly basis, a case could be made that there is enough cause for current players to file a suit similar upon retirement. It is possible the players could allege that prior to the league stiffening the penalties for players administering illegal hits that the league was not doing enough to adequately protect them, an allegation that was included in the lawsuit covered at length in previous sections. Furthermore, since the league did not begin to explain the potential long-term effects of concussions to current players until 2010, it is plausible that current players who suffered concussions prior to that information being made known to them could use that to support their claims of negligence on behalf of the league. Given the potential legal precedent that one could say was established in recent years, if a suit alleging something like this was filed it seems plausible that a court district would elect to take it to trial. This actually could have occurred in the most recent lawsuit, had the plaintiffs so desired.

The widow of former safety Ray Easterling was one of the approximately 4,500 plaintiffs involved with the lawsuit. When the settlement was reached, she was pleased, as it was the best possible outcome not only for her, but for all the other plaintiffs involved[[144]](#footnote-144). She acknowledged the fact that people “grumbling” about how the settlement amount of $765 million was not enough when the league makes north of $9 billion in a given league year were correct, because she and the other plaintiffs easily “could have held out for billions[[145]](#footnote-145).” But, in doing so, there would have been a large price to pay. As seen with the Hoge suit, it was filed in 1996 and a verdict was not reached until 2000. That is nearly five years before Hoge was able to receive the compensation the court deemed that he was owed as a result of his injuries. A case like the current lawsuit could easily have taken at least that long for a verdict to be reached. During this time period, those current plaintiffs suffering from irreversible neurological disorders more than likely would have continued to accumulate steep and burdensome medical bills, while also continuing to deteriorate in health. This is why Mrs. Easterling and the other plaintiffs opted to settle the suit immediately. For them, it was not about getting rich, but rather getting help for those plaintiffs that so desperately needed it[[146]](#footnote-146).

All of this leads to the potential unintended consequence that based on the statements and information above that it seems entirely possible that in the future the NFL could face another lawsuit brought forth by current players alleging similar claims as the plaintiffs in the current suit did, but who have no intentions of settling the case out of court. Instead, these potential future plaintiffs could elect to take the case to court, where it is plausible that they would have a very good chance of winning, thus perhaps forcing the NFL to pay out billions of dollars to the plaintiffs while potentially receiving unwanted negative attention. While this remains hypothetical, based on everything that has been discussed in the thesis thus far, it is not out of the realm of possibilities to hypothesize something like this occurring because of the evidence that is there. This is a potentially very large unintended consequence of the suit, one that maybe no one involved had thought about as the litigation process was ongoing, and something that could provide a major issue for the NFL in the future.

*Economic*

Looking at the potential unintended consequences of the recent lawsuits with an economic perspective, the biggest possible issue that could eventually arise could be the league’s bottom line and popularity could take a considerable hit. It appears as though this potential blow could come from either a drop in the amount of kids that play football at an early age or negative connotations being attached to the league as a result of the information that recently came to light during the litigation process.

There is no question that CTE is real and that it can only be brought on by suffering repeated blows to the head. Playing football for an extended period of time leaves an individual open to this perhaps occurring, thus putting him at risk to potentially develop CTE later in life. The term concussion is one that, for the first time in the U.S., actually carries some weight, as it has been transformed because of these recent findings. People are now genuinely concerned about the potential consequences that a concussion can bring later in life, so much so that there could be a significant decrease in the amount of kids who play football. This includes not only concerned former NFL players who are parents and the parents of current NFL players, but parents in general.

Retired quarterback and two-time NFL MVP Kurt Warner has been quoted as saying that the idea of his two school-age sons playing football is “a scary thing,” and that he would prefer that they elected to play a different sport[[147]](#footnote-147). Warner is a potential first-ballot Hall of Fame candidate and the first quarterback to take two different franchises to the Super Bowl. Football was unbelievably good to him, yet he seems to want no part of his sons playing the game that he loved and provided him with so much success. Tom Brady Sr. has been on record saying that he would be “very hesitant” on letting his son play football these days[[148]](#footnote-148). He agreed with Warner’s comments, saying that he was “100% correct” in doing everything in his power to protect his children from potential harm[[149]](#footnote-149). Brady Sr. is all for kids playing football, but only when they are fully developed, as he did not let his son start playing football until he was 14 years-old[[150]](#footnote-150). The late start did not end up hindering his son much, though – Brady Sr.’s son is current NFL quarterback Tom Brady, arguably the greatest quarterback in the history of the sport and one of the most recognizable faces of the league. Despite the fact that Brady Sr. is the father of a living legend and despite the fact he took the necessary precautions to protect his son by not letting him play football until he was fully developed, he would be even more leery now of letting his son play had he needed to make the decision today.

It is certainly alarming to hear decorated former players and parents of incredibly successful current players expressing concerns as to whether or not they would let their sons play football because of the potential risk of suffering a permanent neurological disorder. These are people who are either associated with or have achieved incomprehensible levels of success and wealth playing a game that they love. Yet, what is even more alarming is the fact that there are parents out there who have no affiliation with the NFL that are extremely hesitant to let their sons play football because of the inherent dangers of the sport. My parents are prime examples of this. I started playing football in 2003 when I was eleven years old, and I played right up until I completed my final season of eligibility at John Carroll University this past fall. All told, I ended up playing twelve years and emerged unscathed despite the physicality of the game and the aggressive nature in which I played it. Despite this, my parents are now very conflicted as to if my 13 year-old brother should continue playing. Like me, he has had no concussions since he started playing three years ago, yet they are legitimately worried about the possibility of him getting one because of the career-ending one my other brother suffered during his senior year of high school in 2011. At no point in my career was there any of that concern expressed, largely because the information that is so well-known and readily available about concussions now had yet to be released. Now, with all of this concussion information made public, my “football family” is having second thoughts about the whole thing.

The crises of conscience that parents across the U.S. are undergoing are what serve as a legitimate potential unintended consequence to the NFL, in that they are so consumed by the fear of their sons suffering a concussion that could leave them permanently impaired that they are not even letting them take the chance. It is very possible that because of what is now known about concussions and the risks of long-term brain damage that they pose that parents will dissuade their children from playing football and instead push them toward sports where there is less of a risk of suffering a concussions, such as basketball, baseball, or even golf. If this practice does indeed begin, gains traction, and continues over a longer period of time, it is possible that two potential things could occur that might damage the overall bottom line of the league.

The first would be a drop in the number of players in youth football. This may not seem like a huge problem at first glance, but it must be kept in mind the youth leagues feed the high school teams, which in turn feed college football teams, which in turn feed the NFL teams. Any drop in participants in youth football will eventually be felt by the NFL at some point. The possible risk of getting a concussion while playing football is not going away; therefore neither are concerned parents looking to protect their children from bodily harm by potentially keeping them from playing the game. If this move away from football starting at the lowest levels does begin to start, it is very possible the NFL could feel a financial hit, as teams could potentially have fewer players at their disposal in order to field a product. If there are not enough players for all 32 teams in the league to fill out their rosters, invariably contraction of one or more teams would potentially have to be discussed. By losing teams, the league would lose revenue, and thus that $9.3 billion a year that the league brings in would begin to drop because of a lower number of teams. While this whole situation is purely speculative and rather extreme, it could be plausible because if the feeder systems become depleted by concerned parents looking out for their children, the NFL will have to feel that impact eventually. This is something that perhaps no one involved in the recent suit has discussed yet, but is something that should be considered because of the huge ramifications it could pose.

The second unintended consequence stemming from the lawsuit that could potentially harm the bottom line of the NFL is the fact that if parents are indeed holding their children out of football because of the inherent dangers in the game that the product on the field could become less recognizable or perhaps even watered down. What is meant by this is that some of those kids that are held out of football by their parents may end up being NFL stars and have Hall of Fame careers, yet they would never be realized. The loss of a player of that caliber is enormous, as there are some casual fans who watch games just to see those players. If those fans do not watch anymore, then the league would be losing money. Now, imagine if the parents of such current NFL superstars and probable Hall of Famers like quarterback Aaron Rodgers (he of the State Farm “Discount Double-Check” ads), safety Troy Polamalu (he of the Head & Shoulders ads), or quarterback Drew Brees (he of the Wrangler Jeans ads) had kept them out of football because of their concerns about concussions. These are hugely recognizable, popular, and marketable names for the NFL, yet it is possible that had they been growing up today that they could be playing another sport. This could be a huge blow to the league’s revenue stream because the casual fan could potentially be less enticed to watch.

Furthermore, without these types of guys playing the game because they were pushed toward other sports by their parents for fear of concussions, the product may not be as good as it was in years past before the league began to feel the drop in numbers. This could lead older fans who had seen the game as it was played now by highly skilled players to conclude that it just was not the same because of the perceived lack of skill on display, potentially leading them to stop watching. This could wind up harming the league in an economic sense, as well. Again, while this is purely speculation, it is something that must be at the very least thought about, especially in light of the comments like the ones being made by Kurt Warner and Tom Brady’s father, because of the long-term consequences it could potentially pose for the league.

*Ethical (in regards to the rules of the game)*

Looking at the potential unintended consequences through an ethical[[151]](#footnote-151) lens, the biggest possible problem is the fact that the recent rule changes enacted to ensure better player safety actually could wind up leading to more injuries being suffered by current players, both in terms of concussions and other serious injuries.

The 2011 rule change to move kickoffs up to the kicking team’s 35-yard line from their 30-yard line is a prime example of this potential unintended consequence. The thinking behind this change was that by moving the spot up five yards there would be less kickoffs returned because the ball would travel out of the end zone[[152]](#footnote-152), thus leading to less concussions suffered on those types of plays. A recent study by Scott Kacsmar shows otherwise, however[[153]](#footnote-153). While Kacsmar concedes that there is no question that there are fewer concussions on kickoffs now, 20 in 2011 as opposed to 35 in 2010, he mandates that the drop is due to “the rise in touchbacks and lack of returns[[154]](#footnote-154).” While a player can still suffer a concussion on a touchback, it is less likely because it will not provide as much contact as a real return, as the players on the field will see that the ball is being kicked out of play[[155]](#footnote-155). The increase in touchbacks has been enormous since the rule change was enacted. In 2010, the last year before the change, there were 416 touchbacks on 2,539 kickoffs, which wound up being 16.4% in terms of touchbacks on the year[[156]](#footnote-156). In 2012, the most recent data available in the study as it was being conducted during the 2013 season, there were 1,156 touchbacks on 2,620 kickoffs, which wound up being 44.1% in terms of touchbacks on the year[[157]](#footnote-157).

Looking at those numbers alone would make one think that the amount of concussions being suffered on kickoffs would have dramatically gone down, as nearly half of all kickoffs wound up being unreturnable. Yet, this is not exactly the case. Kacsmar’s study shows that in 2012 there were 26 concussions suffered on kickoffs[[158]](#footnote-158). In 2010, there were 35[[159]](#footnote-159). So, in two years since the rule change there was nearly a 26% drop in concussions suffered during kickoffs. While this absolutely appears to be huge progress, one needs to look at the study closer in order to see the full picture. In 2010, the rate of concussions suffered per kick was 1.72%, the year 35 concussions were suffered on kickoffs[[160]](#footnote-160). In 2012, the rate of concussions suffered per kick was *1.86%, the year 26 concussions were suffered on kickoffs*[[161]](#footnote-161). Despite the drop in the overall number of concussions suffered between the 2010 and 2012 seasons, the rate of concussions per kick was higher *after the 2011 kickoff rule was enacted*. Therefore, based on this study, kickoffs are actually *more dangerous* now than they were before the rules regarding kickoffs were changed. Kacsmar does admit that some of the past concussions rates were “no doubt exceedingly low as players were less likely to have reported a concussion years ago[[162]](#footnote-162).” Yet, his recent study is still extremely troubling in regards to the thought that the rule changes would lead to better player safety.

Kacsmar theorizes that kickoffs could be more dangerous now since “some return specialists need these opportunities to earn their roster spot[[163]](#footnote-163).” There is certainly merit to this thought. Return specialists are often just that – specialists. In today’s league, the majority of them are diminutive in size and therefore cannot take the rigors and pounding of playing a position like receiver, running back, or defensive back regularly. However, they have incredible speed that proves invaluable on kickoffs, as they can use it to hit the creases and seams that the blockers open up for them and ensure their teams’ either great field position for the offense or a touchdown. Thus, it is this particular skill that keeps them employed and on the active 53-man roster[[164]](#footnote-164). Kacsmar believes that it is “fair speculation” to think returners may be more willing to return a kick that is eight yards deep[[165]](#footnote-165) in the end zone in order to ensure themselves another opportunity to make an impact and show that they should be kept on the team[[166]](#footnote-166). When a decision to do this is made by the returner, in their head’s they are thinking “I better get to the 20-yard line,” because if they do not make it back there the special teams coaches will be extremely upset with the returner[[167]](#footnote-167). As a result of these two factors, what winds up happening is there is a “player running harder than ever to get out of his end zone and make something happen[[168]](#footnote-168).” It is no wonder why there is a higher rate of concussions per return then, even after the 2011 rule changes. This is a major potential unintended consequence of the suit, as it was intended to promote and provide far more adequate player safety, not put more players at risk for suffering traumatic injuries. Given the perceived success of the rule change, it appears that it could be said that this is a consequence that possibly no one saw coming, but is one that could plague the league until further adjustments are made.

The rate of concussions per kickoff are not the only injuries that are on the rise despite recent rule changes to better protect current players. In another Kacsmar study, he reported that in 2012 players suffered 1,496 severe injuries, where severe meant at least eight days were missed or that surgery was required[[169]](#footnote-169). This was the highest total in Kacsmar’s study that began in 2004, and he reported that “the frequency of severe injuries only continues to rise[[170]](#footnote-170).” Despite discovering this rise in frequency of injuries, Kacsmar struggled to answer as to why it was happening, citing the issue as “perplexing[[171]](#footnote-171).” He acknowledged that it may have something to do with the “bigger, faster, stronger” principle, in that players are getting more freakishly athletic as time goes on thanks to better genetics and training programs, but left open the possibility that it may go deeper than that[[172]](#footnote-172). Kacsmar has a point, as it could be said that the reason for these increases in serious injuries, particularly to the lower body, are stemming directly from defensive players fear of being fined for making illegal contact to the heads of receivers. As a result of this trepidation, these defensive players are hitting the intended receivers in the legs in order to disrupt the reception, but while doing so are inflicting serious harm to the receivers legs. This is another potential unintended consequence to the lawsuit that perhaps went foreseen when the fines for illegal contact to the head were made more stringent for the 2011 season.

The 2013 season, unfortunately, provided numerous examples of players on the receiving end of a pass being seriously injured by a defensive player attempting to disrupt it because the defensive player feared a fine for making contact with the receiver’s head. During the preseason, Houston Texans safety D.J. Swearinger dove into Miami Dolphins tight end Dustin Keller’s knee while trying to make a tackle downfield[[173]](#footnote-173). By doing so, Swearinger ended up tearing the ACL, MCL, and PCL in Keller’s right knee, while also dislocating his knee in the process[[174]](#footnote-174). It was a brutal injury, one that resulted in Keller being placed on injured reserve for the entirety of the 2013 season, while also putting his future in jeopardy. Keller had signed a one-year deal with Miami after playing out his rookie contract with the New York Jets in hopes of having a great year and signing a long-term deal with more financial security either with Miami or elsewhere. Now, Keller may be lucky just to be employed in 2014, as he will still likely be rehabilitating his injuries and may not be in peak physical condition. In December 2013, Cleveland Browns safety T.J. Ward attempted to tackle the legs of New England Patriots tight end Rob Gronkowski after a completed pass rather than risk hitting his head by tackling his chest[[175]](#footnote-175). Ward’s play resulted in Gronkowski being carted off the field with a torn ACL and MCL in his right knee[[176]](#footnote-176). Gronkowski had just been rounding into top form after spending much of the offseason and early parts of the regular season rehabilitating from back surgery. He now faces another long offseason spent in the training room trying to get healthy again.

The aftermath of injuries like these two particular ones is extremely vexing. Both Ward and Swearinger made similar comments when asked about the play. Swearinger said that he had gone low on Keller because “it had been impressed upon him not to hit high[[177]](#footnote-177).” He maintained his innocence, saying that he “was making a hit playing football,” and that in the NFL you have to hit receivers low because “if you go high you are going to get a fine…the rules say you cannot hit high, so I went low[[178]](#footnote-178).” Ward was quoted as saying that had he hit Gronkowski “up high, there was a chance I was going to get a fine[[179]](#footnote-179).” He asserted that defensive backs are “caught between a rock and a hard place” when making hits like the one he put on Gronkowski, in that “it is a decision you have to make, but you have to follow the rules at the same time[[180]](#footnote-180).” Ward said that he felt that he did nothing wrong as a result of this, saying that he had to “play football[[181]](#footnote-181).” It is extremely plausible that Ward and Swearinger are not the only two players who feel this way regarding low hits that wind up causing serious injury.

Muddling matters further is the fact that there are current NFL players saying that they would *rather* get hit in the head than the knees. When being interviewed about his hit, Swearinger said that “I would think you would rather have more concussions than leg injuries[[182]](#footnote-182).” His rationale for the claim was with a “leg injury, you cannot come back from that…a concussion, you would be back in a couple of weeks[[183]](#footnote-183).” Swearinger also said that he himself would personally rather take a hit to the head than to the knee[[184]](#footnote-184). He was not the only one. Atlanta Falcons tight end Tony Gonzalez retired after the 2013 season, but was outraged by the Keller injury. He felt that Swearinger’s claim that recent rule changes have forced defenders to lower their angle of attack when trying to make a tackle was insufficient, citing “a whole target area between the knees and neck where a defender [could] legally hit a player[[185]](#footnote-185).” Gonzalez elaborated on the topic further, saying that he would rather have a defender hit him in the head than to “knife” at his knee, and that those players who do so should be fined the same as if they were making contact with the head of a receiver[[186]](#footnote-186). Once again, it is very possible that Gonzalez and Swearinger are not the only two NFL players who share these sentiments in terms of the head or knee debate.

Based on these particular situations, it seems plausible to conclude that there is the potential for one of the unintended consequences of the lawsuit to be a rise in severe injuries because of the fear of being fined for making contact to the head. Kacsmar’s research and the testimonies from Swearinger and Ward support it. This could potentially wind up creating a very awkward situation for the league. The NFL has just agreed to pay at least $765 million to settle a lawsuit centered entirely on how they did not do enough to inform or protect former players about concussions and their dangers. There have been studies conducted and published proving the dangers of concussions and the long-term risks that they could pose. There have been major rule changes enacted in attempts to better ensure player safety by way of fines and modifications to the game itself. The league has made it a point to emphasize to players to avoid hitting each other in the head because of the inherent dangers in doing so and because of the penalties doing so will bring. And yet, there are current NFL players saying, pleading, “hit my head, not my legs” despite it all. An increase in severe injuries suffered by current players as a result of defenders attempting to avoid penalty for making contact to the head is certainly a viable potential unintended consequence of the lawsuit, and one that the league could be forced to deal with in the very near future for fear of too big an increase in severe injuries.

*Medical*

In terms of looking at the potential unintended consequences of the suit from a medical perspective, the biggest possible issue could stem directly from Dr. Omalu’s findings on concussions and future league protocol regarding them.

During the Congressional hearings on concussions in 2008, Dr. Omalu was asked to testify and agreed to do so. When Omalau was brought forth to testify, he explained in detail that “true recovery from a single episode of [an] mTBI might have to be measured in months rather than in hours or days[[187]](#footnote-187).” Omalu explained to the committee that when a concussion is suffered, it causes the “accumulation of amyloid precursor proteins[[188]](#footnote-188).” It is these proteins that Omalu felt played a role in the “so-called tau pathology that is the cause of CTE[[189]](#footnote-189).” Omalu explained himself further, saying the following:

These proteins do not disappear in your brain until about 99 days; I would usually say 3 months. So if we have pathologic evidence since 1980 that tells us the brain cells do not recover from a concussion until about 3 months, then the question leads to what is the basis, scientific basis, for the 2-week, 3-weel, 4-week threshold for a player to go back to play? And again, I would always advise the absence of symptoms does not mean the brain has recovered from a concussion[[190]](#footnote-190).

Omalu advocated that when a player suffered a concussion that rather than returning when the symptoms faded and the baseline neurological exams were passed that they should sit out at least 99 days, or what is essentially three months, to make absolutely sure that those amyloid precursor proteins were completely gone[[191]](#footnote-191). Otherwise, even if the player went through all the proper concussion protocols and tests, that player would still be very susceptible to suffering another concussion and thus putting him that much more at risk for developing CTE.

This is a hugely important claim that has been validated by medical research and one that could potentially pose a large problem for the league. As Omalu said in his testimony, he does not think that a player should return to the field of play after suffering a concussion for at least 3 months, if not more, and that this claim was based on science. This begs the question as to whether or not the NFL will eventually really listen to Omalu and require any player suffering a concussion to sit out the recommended 99 days in order to make sure they are completely healed and not at a higher risk for more concussions. After all, they have made it abundantly clear that player safety is their biggest priority, and adopting Omalu’s recommendation would ensure that safety even further.

This past season yielded evidence that this may potentially be the best and safest option to take. For example, on November 17, 2013, Denver Broncos wide receiver Wes Welker suffered a concussion in his teams’ game that week[[192]](#footnote-192). Despite having to leave the game, Welker managed to pass the league mandated concussion protocols and was cleared to play in the Broncos next game the following Sunday[[193]](#footnote-193). A few weeks later, on December 9, 2013, Welker suffered another concussion – his second in less than a month[[194]](#footnote-194). This time, Welker sat out much longer, missing the rest of the regular season before eventually returning for the Broncos’ playoff run in January 2014. Despite his return, one has to ask the question as to if Welker truly was recovered from his injuries. After all, Omalu says that those amyloid precursor proteins that are formed when suffering a concussion do not completely heal themselves for at least 99 days after the injury. Welker obviously did not wait 99 days after his injuries, at the most he may have waited 30.

It is situations like Welker’s that could potentially force the league to think long and hard about making drastic changes to their league-wide concussion protocols. If indeed the NFL truly has the player’s best interests at heart, and I absolutely believe that they do 100%, then it seems that in order to make the game as safe as possible for the players that the league could perhaps have no choice in the future but to adopt Omalu’s recommendation and mandate that a player diagnosed with a concussion must sit out at least 99 days to let the insidious brain proteins properly heal. Welker was not the only player to suffer multiple concussions this season, and he certainly will not be the last.

While this would be a policy with proven medical results intended for the player’s best interests, it could possibly be met with utter outrage by the players. For example, had Omalu’s recommendation been in play this past season, Welker would have been shut down for the season on November 17, causing him to miss what turned out to be a loss in the Super Bowl that February. It is probably safe to say that he would have not been happy about that. Football players are always going to want to do just that – play football. Yet, studies have shown that a week or two is not a sufficient enough time for a brain injury like a concussion to properly heal. Given the NFL’s commitment to player safety, it appears that something is going to have to be done to the concussion protocol in order to ensure that more players do not end up like Welker and suffer multiple concussions in such a short period of time. This could wind up potentially being a huge issue for the league, and is absolutely a viable possibility for being an unintended consequence of the suit filed against the NFL.

1. CONCLUSION

This thesis has explored a number of elements surrounding the recent concussion lawsuit filed against the NFL and its subsequent settlement. Part one explained what those in the medical community have said about concussions, how to properly treat one, and the potential neurological deficiencies that could potentially develop if multiple are suffered. Part two provided background information about the lawsuit itself. Part three looked at the intended consequences of the lawsuit and what eventual changes it appeared to have been designed to bring about. Part four was a qualitative policy analysis of the lawsuit and settlement through four different lenses of focus (legal, economic, ethical (in regards to the rules of the game), and medical) in which the future of the league and game was hypothesized. I believe that it should be noted that while I in no way, shape, or form think that I managed to isolate all of the potential unintended consequences that could eventually come about as a result of this recent legal action against the NFL, I do think that I have explored a number of potential unforeseen consequences that the league may be dealing with in the very near future because of the recent legal activity.

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20. Ibid; Lability is defined as something that is constantly undergoing change or something that is likely to undergo change. In this case, it would be the emotions of the individual changing as a result of the severity of the injury progressing. [↑](#footnote-ref-20)
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151. When I use the term “ethical” here, I mean it in regards to the rules of the game and how it is played by the players. [↑](#footnote-ref-151)
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164. NFL teams are only allowed to employ 53 players on their active rosters, and only allowed to put 46 of them in uniform during games. [↑](#footnote-ref-164)
165. Most returners initially start with their heels on the goal line. When they see how high and far the ball is kicked, they then move back in an attempt to field it. The end zone measures 10 yards from the goal line to the backline. Thus, a ball that is fielded by a returner eight yards deep is 80% into the end zone, and a mere two yards from being out of play. [↑](#footnote-ref-165)
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