

The NFLPA's Potential Legal Liability to Former Players for Traumatic Brain Injury

Related Lawyers: **Michael D. Hausfeld, Swathi Bojedla**

Related Practice Areas: **Sports and Entertainment, Mass Torts and Public Health Threats**

Hackney Publications Launches Concussion Litigation Reporter, Providing Timely Analysis on Developments and Strategies in the Emerging Legal Practice Area of Sports Concussions.

With the recent filing of the master amended complaints in retired players' concussions litigation against the NFL, a common question concerns whether the NFLPA should be a target of litigation. Thus far, the NFLPA has escaped scrutiny and legal action based on their failure to protect retired players from both the occurrence of concussions during their playing days as well as the short- and long-term effects of traumatic brain injury after their playing careers have terminated.

NFLPA's Commitment to Provide Detection, Treatment and Care for Traumatic Brain Injury

The link between repeated head injuries and chronic traumatic encephalopathy, or CTE, has long been known in the academic world. For example, a 1962 study showed a heightened incidence of CTE in boxers, and a similar study the following year found that neurological damage stemming from repeated head injuries manifested in the form of dementia and impaired motor function. However, until recently, the NFL ignored established medical evidence, instead choosing to refute or deny the link between repeated head trauma and the myriad symptoms facing retired NFL players. During that same time, the NFLPA was silent despite their knowledge of the mounting evidence of retiree injury and medical causation.

Recently, the NFLPA has acknowledged its own failure to protect retired players and to promote their health and safety. In 2009 and 2010, the United States House of Representatives' Committee on the Judiciary held hearings to investigate the legal issues relating to football and head injuries. During those hearings, NFLPA Executive Director DeMaurice Smith testified that, "as Executive Director, my number one priority is to protect those who play and have played the game. There is no interest greater than their health and safety." Smith noted that the NFL had spent years suppressing and denigrating legitimate medical studies that detailed the link between repeated concussions and long-term side effects. He went on to acknowledge that the NFLPA "in its past has not done its best" and that the union was "complicit in the lack of leadership and accountability" in terms of acknowledging and dealing with traumatic brain injury and its effects on retired players.

In his testimony to Congress, Smith made a pledge to retired players: "To men like John Mackey and Brent Boyd and to the families of Mike Webster and Andre Waters, and other players that suffered and continue to suffer daily, I commit and we commit to this as our mission. We will not fail them or their families." The NFLPA took the stance that they would protect and promote the health, safety, and welfare of retired NFL players. This promise has, to this day, remained unfulfilled.

NFLPA's Continuing Complicity and Moral Failure

Despite Smith's testimony that the NFLPA owed an "obligation" to "prevent, treat and manage the long-last effects of these injuries", the NFLPA continued to block retirees' efforts to enact meaningful change.

In 2011, the NFLPA filed suit against the NFL to enjoin the lockout. Shortly before that, former player Dave Duerson committed suicide, shooting himself in the chest in order to preserve his brain for medical study. This dramatic action heightened the need for medical monitoring and careful attention to retiree issues as separate and distinct from those facing current players. Once Duerson was found to indeed have extensive CTE, De Smith commented that the finding, "makes it abundantly clear what the cost of football is for the men who played and the families." Partly to address those issues, and shortly after the NFLPA filed suit, a group of former players led by Hall of Famer Carl Eller (the Eller Plaintiffs) filed their own suit in order to bargain for pensions, benefits, and health and safety issues on behalf of all retired players.

However, despite the NFLPA's many representations that repeated head trauma and the health and safety of retirees desperately needed to be addressed, the 2011 CBA included almost nothing relating to those issues. Article 65 of the CBA created a new neuro-cognitive benefit, which the NFLPA often points to in order to show its commitment to the issue. That benefit only protects players up until their 55th birthday or for 15 years, whichever period is shorter. Players like Ray Easterling, who committed suicide in April at the age of 62, would not be eligible. Furthermore, this benefit does not cover the medical monitoring needed to help identify those players who might apply for this and other benefits.

Instead of providing for needed programs and benefits for retirees, the NFLPA usurped the negotiating responsibilities delegated to the Eller Plaintiffs. Representatives of retiree interests were cut out of the negotiating process, and the NFLPA bargained for retiree issues without the consent of those they sought to represent. Indeed, as eloquently stated by Robbie Fergusson in a recent article in the *International Business Times*, "one of the real losers of the new collective bargaining agreement were ex-players, who arguably needed union help more than the players of today." How many lives would have been changed or saved if, instead of acting out of apparent greed, the NFLPA acted in response to need? Is this continued failure an act of malfeasance, exposing the NFLPA to legal accountability?

Did the NFLPA's Failure to Act Constitute Legal Negligence?

In many states, when a person does not have a duty to assist somebody, but nevertheless undertakes that duty, the person is charged with acting reasonably under the circumstances. This is known as the Good Samaritan theory of negligence. For example, if you walked by a lake, and you noticed somebody drowning, you would have no obligation to help them and you would not be liable for any injuries that arose from your inaction. However, if you chose to swim out and help the drowning person, you would have an obligation to act reasonably in your rescue efforts; if your actions were unreasonable in a way that caused injury to the drowning person, you would be held liable.

In the same way, when the NFLPA interfered with the negotiating responsibilities of the Eller Plaintiffs, the NFLPA undertook a Good Samaritan duty not to harm retirees while acting on their behalf. Retired players were represented throughout the negotiations process by the Eller Plaintiffs, and made such representation known. The NFLPA ignored that fact, and undertook a gratuitous, Good Samaritan duty to purportedly help retired players.

With a limited fund to be divided between the League and the players, it would have been virtually impossible for the NFLPA to act reasonably with regards to the interests of retired NFL players. The interests of retired and active NFL players are inherently antagonistic. Every dollar that goes to a retired player in the form of pensions and benefits represents some amount of money that would not have been available for active players. Since the NFLPA's bargaining unit is made up of active players and not retired players, the NFLPA actually had a disincentive to advocate for retired players. The NFLPA was structurally incapable of reasonably representing the interests of the retirees.

Furthermore, the NFLPA conducted no detailed analysis into the shortfalls in pensions and benefits before negotiating for the so-called "Legacy Fund", which as designed addresses only a fraction of those shortfalls. As such, the amount dedicated in the 2011 CBA to retiree health, safety, pensions, and benefits, was far below the level needed to address the myriad issues facing retirees. This amount is not tied to the rapidly increasing revenues received by the NFL and active players; rather, it remains stagnant over the period of the CBA, accounting for a declining percentage of overall revenues up until the CBA expires. Given the fact that the current CBA is locked in for ten years, and the window in which to negotiate for any modifications or new provisions is closed until 2020, retired NFL players are stuck with the inadequate benefits and pensions that the NFLPA negotiated through the end of the decade.

The NFLPA also ignored the need for action to mitigate the effects of repeated head trauma on retirees. During the negotiations prior to the drafting of the 2011 CBA, the Eller Plaintiffs and other retiree advocates made several proposals relating to detailed medical monitoring systems. Such a system would have allowed all retired players to receive diagnostic testing to determine their risk for concussions-related effects and monitor the development of any such effects over time. Despite De Smith's statements to Congress about the need to help these players and their families, no such system, or anything resembling a diagnostic regime, was included in the 2011 CBA. One could argue that the lack of any medical monitoring system, or any effort whatsoever to identify and treat retired NFL players suffering from the effects of repeated head trauma, provide evidence that the NFLPA's failed to act reasonably with respect to retired players and caused substantial injury to retirees by attempting to bury these issues through silence.

The NFLPA undertook to represent retired NFL players, despite the retired players' independent representation and lack of consent to being represented by the union. The NFLPA's actions caused long-term injury to retiree interests, by way of depressed pensions and benefits and a conspicuous lack of medical monitoring of head trauma. These shortfalls in care will remain in place through 2020, until a new CBA can be reached. Meanwhile, the salaries paid to active NFL players will continue to grow as revenues increase. As Fergusson notes, "it's a sad indicator that one of the strongest and most powerful unions in America is driven by pure greed and the accumulation of money." The NFLPA may well have violated a duty to fairly and reasonably represent retired NFL players with respect to pensions and benefits, as well as medical monitoring relating to brain injury.

Conclusion

Claims against the NFLPA with regards to retired player safety and health issues are less straightforward than those against the NFL. Nevertheless, by its own admission, the NFLPA was complicit with the League in neglecting or recklessly disregarding these issues. Retired NFL players will have to define the duty owed to them and the actions resulting in the breach of that duty in order to properly establish any liability to them by reason of the NFLPA's actions or omissions.

Michael Hausfeld is the Chairman of Hausfeld in Washington, DC. He represents former NFL and NCAA players in a variety of litigation. Swathi Bojedla is an Associate at Hausfeld.