

Amending the NHL Collective Bargaining Agreement to Limit (Brain) Damages: A Proposed Solution to the NHL Concussion Class Action Litigation

*Aaron Schwartz**

I.	INTRODUCTION	2
II.	BACKGROUND OF THE NFL AND NHL CONCUSSION LITIGATIONS	3
	<i>A. The NFL Concussion Litigation History</i>	4
	<i>B. The NHL Concussion Litigation Background</i>	5
	<i>C. Section 301 of the Labor Management Relations Act (LMRA)</i>	10
III.	ANALYSIS	12
	<i>A. Section 301 Preemption Test</i>	12
	1. The Preemption Test in Professional Sports	13
	2. The Preemption Test and the NHL	14
	<i>a. The Derek Boogaard Holdings</i>	15
	3. The NFL Concussion Settlement Puts Pressure on the NHL	17
	<i>a. After Effects of the NFL Litigation</i>	18
	<i>B. Bettman, the NHL Concussion Protocol, and the CBA</i>	22
	1. Bettman’s Denial	22
	2. The NHL Collective Bargaining Agreement and the NHL Concussion Protocol.....	24
IV.	PROPOSAL	26
	<i>A. In the Interest of Protecting Players, The NHL Should Recognize That a Link Between NHL Hockey and CTE Exists.</i>	26
	<i>B. The NHL Should Take Note of the NFL’s Settlement Plan for Retired Players</i> ...	28
	<i>C. Amend and Implement Concussions, Brain Injuries, and CTE into the NHL CBA</i>	30
V.	CONCLUSION.....	33

**J.D., The John Marshall Law School, May 2018. As a former professional hockey player, this article touches close to home. I suffered several concussions while playing hockey and have watched teammates, friends, and acquaintances struggle with the long-term effects of concussions. I would like to thank my mother and father for their endless love, support, and encouragement. A special thank you to those who helped me research and provided their thoughts and experiences. Finally, this article is dedicated to those athletes, in all sports, who have lost their lives battling the long-term effects of concussions.*

I. INTRODUCTION

\$1 billion dollars—the approximate amount settled upon by The National Football League (NFL) and its roughly 5,000 retired players in a 2011 class action multidistrict litigation (MDL) suit (hereinafter NFL Concussion Litigation).¹ The suit, brought by retired NFL players suffering from long-term effects of concussions, alleged that the NFL failed to disclose the dangers of concussions and the associated long-term effects.² Less than two years later, on November 25, 2013, over two dozen former players of the National Hockey League (NHL) followed suit by filing suit (hereinafter NHL Concussion Litigation).³ The allegations in the NHL Concussion Litigation included the failure of the NHL to warn and protect the players from the long-term effects of concussions, including neurodegenerative diseases, the failure to provide adequate medical care following concussions, and “glorif[ying]” violence and fighting in the game.⁴ On August 19, 2014, the NHL concussion class action suits, like the NFL class action suits, were consolidated and brought within the jurisdiction of the United States District Court of Minnesota by the Judicial Panel on Multidistrict Litigation.⁵ The parties currently remain in litigation after Judge Susan Nelson denied the NHL’s motion to dismiss, a decision predicated upon labor law preemption.⁶

However, settlement, dismissal, or judgment of the NHL Concussion Litigation will not address the 2012 NHL Collective Bargaining Agreement’s (CBA) failure to explicitly delegate duties to the NHL to research and implement a curative concussion program.⁷ Furthermore, the

¹ *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438, 447 (3d Cir. 2016), *as amended* (May 2, 2016).

² *Id.*

³ David McAfee, *10 Former NHL Stars Bring Class Action Over Brain Injuries*, LAW360 (Nov. 25, 2013), <https://www.law360.com/articles/491574/10-former-nhl-stars-bring-class-action-over-brain-injuries> (describing the initial class action lawsuit initiated by former NHL players against the NHL).

⁴ *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, No. MDL 14-2551 SRN, 2015 WL 1334027, at *2 (D. Minn. 2015).

⁵ Sindhu Sunder, *JPML Sends NHL Concussion Suits to Minnesota*, LAW360, (Aug. 20, 2014), <http://www.law360.com/articles/569340/jpml-sends-nhl-concussion-suits-to-minnesota> (discussing the MDL decision to consolidate to Minnesota because it was more convenient for the Canadian residents involved in the suit).

⁶ *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F.Supp.3d 856 (D. Minn. 2016).

⁷ *See generally Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’*, NHL/NHLPA (Feb. 15, 2013), http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf (noting the lack of detail pertaining to concussions and their long-term effects or, more specifically, CTE) [hereinafter NHL Collective Bargaining Agreement].

current NHL CBA's door remains open for lawsuits outside the agreement because of its narrow, arguably absent, language on concussions.⁸

Thus, the purpose of this Note is twofold. First, it suggests amendments to the NHL CBA that would address with specificity the issues of concussions prospectively for current NHL players. Second, this Note proposes a remedy, similar to that found in the NFL's concussion litigation settlement, which would provide relief for retired NHL players not currently subject to the current CBA.

Part II of this Note will discuss the history of concussion litigation within the NFL and NHL, focusing more narrowly on the NHL and its CBA. It will define exactly what a concussion is and, more specifically, its long-term effects, including chronic traumatic encephalopathy (CTE). It will then discuss how and why NHL players have been able to file suit, circumventing their respective CBAs, and analyze each party's arguments. Part III will then propose a solution, irrespective of the class action suits, which will be found solely within the NHL's CBA. The end goals of this proposal are: (1) to keep concussion suits out of the courts and within the scope of the CBA, and (2) to provide a remedy for current and retired players who, presently or in the future, will qualify for relief based upon the incurrence of the long-term effects of concussions.

II. BACKGROUND OF THE NFL AND NHL CONCUSSION LITIGATIONS

Within the professional sports context, concussion litigation is a fairly new area of the law, so there is sparse case law to guide the courts when it comes to addressing concussion issues in light of collective bargaining agreements.⁹ The NFL set the stage for the influx of concussion claims that have begun to arise across many different sports.¹⁰ These cases provide crucial context to the present state of the law as it pertains to concussion litigation in professional sports, especially where a collective bargaining agreement is in place.¹¹

⁸ *Id.*

⁹ See Stephen M. Sellers, *Where Is Sports Concussion Litigation Headed?*, BNA (Feb. 19, 2016), <https://www.bna.com/sports-concussion-litigation-n57982067520> (discussing the rise of concussion litigation, spurred by the NFL's class action litigation that has paved the way for other similar suits).

¹⁰ See *id.* (discussing the influx of concussion litigation that stemmed initially from the NFL's concussion litigation settlement).

¹¹ See *id.*

A. *The NFL Concussion Litigation History*

In 2002, Dr. Bennet Omalu, a forensic pathologist and co-founder of the Brain Injury Research Institute, confirmed the first case of CTE in a professional football player.¹² Dr. Omalu discovered and named CTE after the suicide of former NFL player Mike Webster:¹³

I preferred chronic traumatic encephalopathy. It accurately described what I found in Webster's brain. Chronic means long-term, traumatic is associated with trauma, and encephalopathy refers to brain damage, disease or malfunction . . . Chronic traumatic encephalopathy, or CTE, thus became the name of the disease I observed in Webster's brain.¹⁴

The study's conclusion highlighted the following:

[There are] potential long-term neurodegenerative outcomes in retired professional National Football League players subjected to repeated mild traumatic brain injury. The prevalence and pathoetiological mechanisms of these possible adverse long-term outcomes and their relation to duration of years of playing football have not been sufficiently studied. We recommend comprehensive clinical and forensic approaches to understand and further elucidate this emergent professional sport hazard.¹⁵

In June of 2012, a multidistrict class action concussion-related suit, consolidating eighty individual class action suits, was filed on behalf of nearly 2,000 former NFL players in the United States District Court for the Eastern District of Pennsylvania against the NFL.¹⁶ The claim alleged negligence on the part of the NFL for failing to warn players of the adverse long-

¹² CNN Library, *NFL Concussions Fast Facts*, CNN (Sept. 22, 2017), <http://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts>.

¹³ *Id.*; Bennet Omalu, *Concussions and the NFL: How the Name CTE Came About*, CNN (Dec. 22, 2015), <http://www.cnn.com/2015/12/21/opinions/omalu-discovery-of-cte-football-concussions>.

¹⁴ *Id.*

¹⁵ BENNET OMALU ET AL., CHRONIC TRAUMATIC ENCEPHALOPATHY IN A NATIONAL FOOTBALL LEAGUE PLAYER, NEUROSURGERY. 2005 JUL;57(1):128-34; DISCUSSION 128-34.

¹⁶ Sellers, *supra* note 9.

term effects of concussions.¹⁷ On August 29, 2013, the NFL and nearly 4,500 retired players reached settlement in the amount of \$765 million.¹⁸ The settlement purported to “fund medical exams, concussion-related compensation, medical research for NFL players and their families, and litigation expenses.”¹⁹ The NFL withheld any admission of wrongdoing.²⁰ However, on March 14, 2016, the NFL’s senior vice-president admitted that “there is a link between football and degenerative brain disorders like CTE.”²¹ On April 18, 2016, the United States Court of Appeals for the Third Circuit upheld the NFL concussion class action settlement after several revisions, affirming an amount that could potentially pay out \$1 billion.²² This monetary settlement plan encompasses players who retired, officially or unofficially, prior to July 7, 2014 and grants a settlement life plan of up to 65 years.²³

B. The NHL Concussion Litigation Background

During the summer of 2011, former and current NHL players Derek Boogaard, Rick Rypien, and Wade Belak passed away.²⁴ It is suspected that all three deaths were related to concussions and the resulting depression and/or drug abuse.²⁵ In November of 2013, ten former NHL players filed suit in the United States District Court for the District of Columbia, alleging that the “NHL’s active and purposeful concealment of the severe risks of brain injuries exposed players to unnecessary dangers they could have avoided had the NHL provided them with truthful and accurate information and taken appropriate action to prevent needless harm.”²⁶

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Ken Belson, *Appeals Court Affirms Landmark N.F.L. Concussion Settlement*, N.Y. TIMES (Apr. 16, 2016), <http://www.nytimes.com/2016/04/19/sports/football/nfl-concussion-lawsuit.html> (providing details of the appeals court’s decision and the 69-page opinion affirming the fairness of the settlement plan and discussing the special attention paid to CTE).

²³ *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 420 (E.D. Pa. 2015).

²⁴ See Mark Zwolinski, *Timeline: Class Action Lawsuit Against NHL*, THE TORONTO STAR (May 30, 2016), <https://www.thestar.com/sports/hockey/2016/03/30/timeline-class-action-lawsuit-against-nhl.html> (explaining the recent deaths of former NHL players and their relationship to alleged brain injuries and providing a timeline of the NHL Concussion Litigation and key players).

²⁵ *Id.*

²⁶ See Brian Stubits, *Ten Former Players File Class-Action Suit Against NHL Over Concussions*, CBS SPORTS (Nov. 23, 2016), <http://www.cbssports.com/nhl/news/ten-former-players-file-class-action-suit-against-nhl-over->

Furthermore, some of the players allege that they “sustained repetitive brain injuries while in the NHL and now suffer from latent or manifest neurodegenerative disorders and diseases, all of which, in whole or in part, were caused by the NHL’s acts and/or omissions.”²⁷ In August of 2014, the United States Judicial Panel on Multidistrict Litigation consolidated the various NHL concussion class action suits against the NHL to the United States District of Minnesota.²⁸

In February of 2015, former Chicago Blackhawks defenseman Steve Montador was found dead in his Mississauga, Canada home at the age of 35.²⁹ After Montador’s death, his brain was donated to research, and it was determined that Montador did, in fact, suffer from CTE.³⁰ Montador’s family then joined the NHL Concussion Litigation in December of 2015.³¹

The six class representatives of the NHL Concussion Litigation, Dan LaCouture, Michael Peluso, Gary Leeman, Bernie Nichols, David Christian, and Reed Larson represent two classes of plaintiffs.³² The two classes of plaintiffs are (1) retired players diagnosed with a brain disease, and (2) retired players who have not yet been diagnosed with a brain disease.³³ It is important to note that current NHL players are not parties to the suit.³⁴

concussions (discussing the initiation of the NHL concussion class action suit brought by 10 former NHL players, against the NHL, after settlement of the NFL concussion litigation in an amount close to \$1 billion); *see also* McAfee, *supra* note 3 (quoting the class action complaint filed by the NHL players and noting that Deputy Commissioner Bill Daly stated that the NHL intends to defend “the case vigorously and have no further comment at this time.” Further, Daly stated that the NHL was “completely satisfied with the responsible manner in which the league and the players’ association have managed player safety over time, including with respect to head injuries and concussions . . .”).

²⁷ *See* Stubits, *supra* note 26; *see also* McAfee, *supra* note 3.

²⁸ *See* Sunder, *supra* note 5 (discussing the MDL decision to consolidate to Minnesota because it was more convenient for the Canadian residents involved in the suit, although, “[t]he NHL had sought to consolidate the suits in D.C., while the plaintiff groups had preferred to consolidate the suits where they had each filed them, namely New York, D.C., and Minnesota).

²⁹ *See* Will Green, *Former Blackhawks D Steve Montador Found Dead at His Home*, SPORTS ILLUSTRATED (Feb. 15, 2015), <http://www.si.com/nhl/2015/02/15/former-chicago-blackhawks-defenseman-steve-montador-found-dead-home> (noting that Montador was found dead at his home in Ontario, Canada and was found to have died of natural causes, last playing in the KHL in 2013/14).

³⁰ *See* Barbara Brotman, *Late Steve Montador, a Former Blackhawks Player Had CTE Brain Damage*, CHI. TRIB. (May 12, 2015), <http://www.chicagotribune.com/sports/hockey/blackhawks/ct-steve-montador-brain-disease-20150512-story.html> (discussing that Steve Montador knew something was wrong with his brain and made sure that after his death, his brain would be donated to further the study of brain injuries’ impact. Montador’s brain was donated to the Canadian Sports Concussion Project at the Krembil Neuroscience Centre in Toronto, which concluded that he did in fact suffer from CTE. Montador was involved in 69 fights during his NHL career, and towards the end of his life suffered from depression, memory loss, and lack of basic brain functioning).

³¹ Mark Zwolinski, *Timeline: Class Action Lawsuit Against NHL*, THE TORONTO STAR (Mar. 30, 2016), <https://www.thestar.com/sports/hockey/2016/03/30/timeline-class-action-lawsuit-against-nhl.html>.

³² *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, No. MDL 14-2551 SRN, 2015 WL 1334027, at *2 (D. Minn. 2015).

³³ *See* Brian Amaral, *NHL Concussion Suit Needs More Discovery, Judge Rules*, LAW360 (May 18, 2016), <http://www.law360.com/articles/797701/nhl-concussion-suit-needs-more-discovery-judge-rules> (discussing the

The plaintiffs, collectively, have asserted six separate counts against the NHL. Count I seeks a declaratory judgment that the NHL knew or should have known of the risks the plaintiffs endured from the “head impacts” while playing in the NHL, and that those impacts would lead to a “substantially” greater risk of developing neurodegenerative diseases.³⁵ Plaintiffs further allege that the NHL had a duty to advise the plaintiffs of these risks, but willfully and intentionally concealed pertinent information relating to the risks.³⁶ Count II claims that, due to the NHL’s failure to warn the plaintiffs of the aforementioned risks, plaintiffs now have an increased likelihood of developing neurodegenerative diseases.³⁷ Thus, the plaintiffs are pleading for medical monitoring to detect and diagnose the stated “conditions.”³⁸ Counts III and IV allege negligence in that the NHL owed a duty of reasonable care to its players, by way of player safety management, and to keep the players informed of the adverse neurological risks from head injuries resulting from playing hockey in the NHL.³⁹ The players allege that the NHL breached its duty by “promoting a culture of violence” and omitting warnings to players surrounding the risks of such head injuries.⁴⁰ The players also allege that, as a result of the breaches of duty by the NHL, “they have suffered or are suffering long-term neurological damage.”⁴¹ Negligent misrepresentation is further alleged in counts III and IV, in that “a special relationship existed between the NHL and [p]laintiffs by virtue of the NHL’s superior knowledge of material medical information that was not readily available to players and the public.”⁴² Furthermore, plaintiffs alleged that the NHL undertook to disseminate “some safety information” to the players and the public, and that the “NHL had a duty to disclose accurate information to [p]laintiffs.”⁴³ Counts V and VI are for fraudulent concealment “based on the NHL’s alleged knowing concealment of

decision of the district court judge to deny the NHL’s motion to dismiss the master complaint holding that “[d]iscovery is necessary to shed light on the nature of plaintiffs’ claims, when those claims accrued, and which—if any—CBAs might be relevant.” Further, that “if a full record ultimately reveals that plaintiffs’ claims accrued while they were subject to a CBA, and that those claims are substantially dependent on interpretation of the CBA, then the court could properly determine that the claims are preempted by labor law preemption.”).

³⁴ *Id.*

³⁵ *In re Nat’l Hockey League Players’*, 2015 WL 1334027, at *2.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

material information regarding the risks of head injuries suffered while playing in the NHL.”⁴⁴ Moreover, plaintiffs allege that the NHL intended for the players to “rely on its silence and fraudulent concealment, and [p]laintiffs’ alleged reasonable reliance on that silence to their detriment.”⁴⁵

The complaint also mentions The NHL Concussion Program, created in 1997, to study concussions and their effects on NHL players between 1997 and 2004.⁴⁶ The program, which was initiated by both the NHL and the National Hockey League Players Association (NHLPA), sought to “improve the understanding” of concussions by studying the post-concussion symptoms and “time loss” (*i.e.*, time between the injury and medical clearance by the physician to return to competitive play).⁴⁷ The study results found 559 concussions during regular season games, and that “the estimated incidence was 1.8 concussions per 1,000 player-hours.”⁴⁸ The most prominent post-concussion symptom was headaches, found in 71% of the concussed players.⁴⁹

The study used two distinct definitions of a concussion.⁵⁰ The first definition, used from 1997-2002, included:

any traumatically induced alteration in brain function characterized or manifested by one or more of the following:

- Alteration of awareness of consciousness (including but not limited to loss of consciousness), “ding,” having one’s “bell rung,” being dazed or stunned, having a sensation of “wooziness,” “fogginess,” seizures or any type of amnesia;
- Any signs or symptoms consistent with brain injury or post-concussion syndrome, including but not limited to one or more of the following: headache, vertigo, light-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Brian W. Benson, et al., *A Prospective Study of Concussions Among National Hockey League Players During Regular Season Games: The NHL-NHLPA Concussion Program*, CANADIAN MED. ASS’N. J. (May 17, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3091898/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

headedness, loss of balance, unsteadiness, syncope, near-syncope, cognitive dysfunction, memory dysfunction, difficulty concentrating, sleep disturbance, hearing difficulty, ringing in the ears (tinnitus), blurred vision, double vision (diplopia), personality change, drowsiness, lethargy, fatigue and inability to perform daily activities;

- Transient or persistent neurologic signs;
- Symptoms or signs as outlined above after a suspected or diagnosed head injury or concussion that occurs during or after a return to activity.⁵¹

The second definition, used from 2002-2004, was taken from the Vienna Concussion in Sport Agreement Statement:

Concussion is defined as a complex pathophysiologic process affecting the brain, induced by traumatic biomechanical forces. Concussion results in a graded set of clinical syndromes that may or may not involve loss of consciousness or memory dysfunction. Concussion typically results in a functional disturbance with the rapid onset of short-lived impairment of neurologic function that resolves spontaneously.⁵²

The conclusion of the NHL Concussion Program study, which the plaintiffs claim was inadequate, was that “more should be done to educate all involved with the sport about the potential adverse effect associated with continuing to play while exhibiting symptoms, failing to report symptoms to medical staff, and failure to recognize or evaluate any suspected

⁵¹Aubry, et al., *Summary and Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001. Recommendations for the Improvement of Safety and Health of Athletes Who May Suffer Concussive Injuries*, 36 BRITISH J. OF SPORTS MED. 6, 6-10 (2002).

⁵²*Id.*

concussion.”⁵³ The plaintiffs allege that the study, which offered a benign conclusion, was merely a tactic to conceal facts that would have put the plaintiffs “on notice” of the risks of the long-term effects of concussions endured while playing in the NHL.⁵⁴ However, the plaintiffs argued that the only uncertain conclusion reached was that “more study was needed.”⁵⁵ The players concede that they assumed the risk of being injured while playing in the NHL, however, they did not realize that they faced the possibility of brain damage.⁵⁶

On May 18, 2016, Judge Nelson held for the players on the NHL’s motion to dismiss based upon Section 301 of Labor Management Relations Act 29 U.S.C.A. § 185 (LMRA).⁵⁷ The ruling advanced the NHL suit further in the litigation process than that of the NFL concussion suit, moving the case into the discovery phase.⁵⁸

C. Section 301 of the Labor Management Relations Act (LMRA)

Under Section 301 of the Labor Management Relations Act, jurisdiction to the federal courts is established in disputes involving labor organizations and employers.⁵⁹ “When resolution of a state law claim is ‘substantially dependent’ upon the terms of an existing collective bargaining agreement, that claim shall be treated as a Section 301 claim or can be dismissed as preempted by federal-labor contract law.”⁶⁰ One of the key components of Section 301 is using arbitration to preserve the efficiency of collective bargaining agreements.⁶¹ In evaluating whether a state law claim is preempted by federal labor law, the test is whether the evaluation of the state law claim is “inextricably intertwined” within the terms of the collective bargaining agreement.⁶²

⁵³ Benson, *supra* note 47; *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, No. MDL 14-2551 SRN, 2015 WL 1334027, at *2 (D. Minn. 2015).

⁵⁴ *In re Nat’l Hockey League Players’*, 2015 WL 1334027, at *2.

⁵⁵ *Id.*

⁵⁶ See Darren Heitner, *NHL Loses Motion to Dismiss NHL Concussion Cases*, FORBES (May 16, 2016), <http://www.forbes.com/sites/darrenheitner/2016/05/16/nhl-loses-motion-to-dismiss-concussion-cases/#593190d0213b> (discussing the recent decision by Judge Nelson to deny the NHL’s motion to dismiss based upon Section 301 labor preemption and noting the fact that the plaintiffs (players) “admit that they signed up to play in the NHL knowing that they could be injured and dinged, but that they did not sign up for avoidable brain damage.”).

⁵⁷ *Id.* (discussing that the court held the players’ allegations did not arise out of the NHL CBA, and thus were not preempted, and that it was not clear at the current stage of litigation which CBA would even apply to the various class members).

⁵⁸ Heitner, *supra* note 56.

⁵⁹ 29 U.S.C.A. § 185.

⁶⁰ *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

⁶¹ *Id.* at 219.

⁶² *Id.* at 213.

Complete preemption exists where a federal statute is so broadly construed as to inhibit an entire area of the law that any civil suit brought on that subject matter will be completely preempted by federal law.⁶³ Ordinary preemption exists as a defense to state law claims, in that the state law claim is superseded by federal law.⁶⁴ Ordinary preemption prohibits either state or federal courts from hearing disputes that should have been resolved through dispute resolution methods available under the collective bargaining agreement.⁶⁵ “As long as the state-law claim can be resolved without interpreting the agreement itself, the claim is “independent” of the agreement for Section 301 preemption purposes.⁶⁶

From the holdings of the court thus far, it is likely that tort claims related to concussion injuries and their long-term effects could have been preempted, and thus kept out of the court system, if they were addressed more explicitly in the NHL’s CBA.⁶⁷ As previously mentioned, a judgment in the NHL Concussion Litigation will not implement any explicit change in the NHL CBA.⁶⁸ In fact, the judgment will likely question the adequacy of the agreement as it pertains to concussions and their long-term effects because the courts have already struggled with deciding whether the NHL Concussion Litigation claims were preempted by the collective bargaining agreement in initial pre-trial motions. However, convincing the NHL to concede to a link between the sport and the long-term effects of concussions is tantamount to asking them to concede liability in the NHL Concussion Litigation. Interestingly, little is mentioned in the NHL CBA about concussion injuries, so the NHL conceding to a link at this stage would effectively expose the NHL to liability outside of the NHL CBA’s arbitration clause.⁶⁹

⁶³ *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F.Supp.3d 856, 864 (D. Minn. 2016).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *In re Nat’l Hockey League Players’*, 189 F.Supp.3d at 866 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)).

⁶⁷ *See id.* at 875 (holding that the NHL failed to identify any relevant NHL CBA provision that would allocate a duty to the NHL in connection with any of the plaintiffs, stating that “[p]laintiffs have identified several documents—a presentation, a letter, emails, and a news article that seem to demonstrate even Defendant’s belief that it was not bound by the CBA when dealing with certain matters of player safety. Thus, “it is premature to determine whether Plaintiffs’ negligence claims are preempted on the grounds that resolution of those claims would be substantially dependent upon the interpretation of the terms of any CBA).

⁶⁸ *Infra* Part II(A); NHL Collective Bargaining Agreement.

⁶⁹ NHL Collective Bargaining Agreement (noting the lack of detail pertaining to concussions and their long-term effects or, more specifically, CTE).

III. ANALYSIS

Collective bargaining agreements have the ability to keep concussion-related suits brought by players out of the court systems and within the limits of arbitration.⁷⁰ Through the bargaining process, this substantially reduces liability on the NHL's part, and gives notice to the players that concussions and their long-term effects are a real and acknowledged risk stemming from playing in the NHL.⁷¹ Essentially, the NHL may argue that the concussion claims arise within the collective bargaining agreement and thus are subject to merely a remedy within CBA arbitration.⁷² This quandary arises by way of Section 301 of the LMRA.⁷³ The allegations in the concussion litigation suits are state law claims, so they are preempted by their respective bargaining agreements if "they are substantially dependent upon, are inextricably intertwined, or arise under the CBAs."⁷⁴ More simply, "if the CBAs address an element of the players' claims—such as duty—or if the court is required to analyze various provisions to determine the scope of those duties, it is vulnerable to being dismissed" by way of preemption.⁷⁵ In light of the requirements for a claim to be preempted and the fact that both CBAs have a section pertaining to player safety, one might think that both the NFL and NHL concussion suits would have been dismissed in pre-trial motions.⁷⁶ However, this is not always the case.⁷⁷

A. Section 301 Preemption Test

This section narrows the scope of Section 301 preemption as it applies to the NHL, starting with a broad definition, narrowing its application to the NFL, and then finally to the

⁷⁰ See *The Almighty CBA*, NFL CONCUSSION LITIG., (Aug. 30, 2012), <http://nflconcussionlitigation.com/?p=1080> (discussing the authority vested in the NFL CBA as it pertains to the NFL concussion litigation, which is substantially similar to the facts and allegations in the NHL concussion litigation).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Collective Bargaining Agreement Between National Football League and National Football League Players'*, NFL/NFLPA (Aug. 4, 2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf; see also *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players'* (September 26, 2012), http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

⁷⁷ See Amaral, *supra* note 33 (noting that the court needed more discovery on the timeline of issues and that the court denied the NHL's motion to dismiss based upon preemption); see also *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438, 447 (3d Cir. 2016), *as amended* (May 2, 2016) (holding a settlement plan of up to \$1 billion dollars for up to 65 years to the players is approved).

NHL and its respective collective bargaining agreement. It is important to recognize that a general sports context will not suffice for this analysis because the NFL and NHL's CBAs differ, so a further background within the different NFL and NHL realms is more appropriate.

1. The Preemption Test in Professional Sports

The stated purpose of the LMRA is:

to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.⁷⁸

Whether a state law claim is preempted by a collective bargaining agreement is not an easy answer, and courts have struggled with consistent holdings.⁷⁹ However, there is case law, in the context of professional sports, that lays a foundation for analysis.⁸⁰ Although the Supreme Court has not explicitly provided a test, lower courts have interpreted that one does exist through

⁷⁸ 29 U.S.C.A. § 141(b).

⁷⁹ See *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009); see also *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007); *Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010 (N.D. Ill. 2015); *Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at *1 (N.D. Ill. 2012) (noting the similarity of facts and inconsistency of holdings).

⁸⁰ See, e.g., *Stringer*, 474 F. Supp. 2d, at 900 (S.D. Ohio 2007) (holding that to determine whether a state law tort claim is preempted, the court must look to whether the right claimed by plaintiff is created by the CBA or by state law; if created by the CBA then the claim is preempted, if not, then court looks to whether proof of the state law claim requires interpretation of the CBA, and if resolution of the state law claim is substantially dependent on terms of the CBA, or inextricably intertwined, then claim is preempted.); see also *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 378–79 (S.D.N.Y. 2002) (holding that tort claims are preempted if “inextricably intertwined with consideration of the terms of the labor contract” or if “the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement” (quoting *Allis-Chalmers*, 471 U.S. at 213 and *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 362 (1990)).

a “patchwork” of various holdings.⁸¹ “A state-law claim is preempted by Section 301 if either (1) resolution of that claim would substantially depend upon analysis of the terms of the CBA, or (2) the alleged duty arises from the CBA.”⁸² Essentially, the second prong dictates that “if the duties alleged in the complaint are duties that only exist because of the CBA, then the CBA must necessarily be interpreted to examine the nature and scope of those duties.”⁸³ In the context of concussions, inquiry into whether the claim is preempted depends upon whether the duties owed to the players arise from the CBA or from common law.⁸⁴

2. The Preemption Test and the NHL

The court in the NHL Concussion Litigation provided some guidance in the professional sports context, holding that the players’ claims did not reference any provision in the CBA. The court further held that the NHL, in arguing that the claims were preempted, failed to cite any provision that imposed a duty upon which the players’ claims depended.⁸⁵ The court reasoned that nothing in the pleadings “suggested players’ claims were substantially dependent on the interpretation of the NHL CBA.” The Court distinguished the instant case from *Allis-Chalmers Corp. v. Lueck* and *United Steelworkers of Am. and AFL-CIO-CLC v. Rawson*, noting these former cases were decided on summary judgment with a “full record.”⁸⁶ In both *Allis-Chalmers* and *Rawson*, the defendant-employers being sued in state court by the plaintiff-employees successfully pointed to a provision of the relevant CBA that either required interpretation or created a duty in itself within the CBA.⁸⁷ The Court further distinguished from *Allis-Chalmers* and *Rawson* by noting that some of the retired NHL players were not subject to any current CBA, and the NHL was not subject to a CBA at all until 1995.⁸⁸ The court then held it was

⁸¹ Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1850 (2014).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1851.

⁸⁵ *In re Nat’l Hockey League Players’ Concussion Injury Litig.*, 189 F.Supp.3d 856, 872 (D. Minn. 2016) (holding that neither plaintiffs nor defendants referenced any provision of the NHL CBA in arguing that duties did arise under the CBA, and instead offered letters and memoranda).

⁸⁶ *See id.* at 871 (distinguishing *Allis-Chalmers* and *Rawson* on grounds that the defendant, NHL, seeks dismissal based solely on the amended complaint, and documents not embraced by the pleadings); *see Allis-Chalmers*, 471 U.S. at 220; *see also Rawson*, 495 U.S. 362.

⁸⁷ *In re Nat’l Hockey League Players’*, 189 F.Supp.3d at 877.

⁸⁸ *Id.* at 872.

premature to decide the preemption issue, and denied the NHL's motion to dismiss.⁸⁹ The court's reasoning seemed to rely mostly on the complexity of the composure of the players and their respective classes in analyzing which CBA might apply, and noting the lack of a "full record" to do so.⁹⁰

a. *The Derek Boogaard Holdings*

Derek Boogaard was known as one of the NHL's toughest enforcers, amassing 589 penalty minutes in 277 NHL games and accruing over sixty-six fights.⁹¹ On May 13, 2011, Boogaard was found dead of an accidental overdose of prescription painkillers while under contract with the New York Rangers.⁹² Boogaard was found to have CTE.⁹³ It was determined that Boogaard was prescribed over 1,000 pills from roughly a dozen doctors during the 2008-2009 NHL season, in addition to other pain relief injections and sleeping pills.⁹⁴ The Boogaard lawsuit, which has remained detached from the NHL concussion suit, alleged that the NHL "breached its duty" to Boogaard by, among other things, failing to monitor his prescriptions or establish proper procedures for administering and tracking them.⁹⁵

The Substance Abuse and Behavioral Health Program (SABH Program) was established in 1996 by a joint program committee collectively bargained between the NHL and NHLPA to address substance abuse among NHL players.⁹⁶ The Boogaard lawsuit alleges that this substance-abuse program knew Boogaard violated its rules many times—including a series of

⁸⁹ See *id.* at 875 (distinguishing *Allis-Chambers* and *Rawson* because those cases involved matters under one CBA and both plaintiffs were current employees at the time of filing the suit).

⁹⁰ *Id.* at 875.

⁹¹ See John Branch, *In Suit Over Death, Boogaard's Family Blames N.H.L.*, N.Y. TIMES (May 12, 2013), <http://www.nytimes.com/2013/05/13/sports/hockey/derek-boogaards-family-sues-nhl-for-wrongful-death.html> (discussing the circumstances regarding Derek Boogaard's accidental overdose that stemmed from years of prescription drug abuse and suffering from the effects of CTE).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010, 1015 (N.D. Ill. 2015) (noting that the NHL SABH Program was collectively bargained); see also *NHL Substance Abuse Program*, SPORTS DOCUMENTS (July 10, 2013), <http://sportsdocuments.com/2013/07/nhl-substance-abuse-program/> (providing a copy of the "confidential" 1996 NHL/NHLPA SABH Program).

failed drug tests in his final months and his admission to buying painkillers illegally—yet never disciplined or suspended him, as program rules would have dictated.⁹⁷

The court held that resolution of whether the NHL assumed a voluntary undertaking to protect Boogaard, from both brain trauma and team doctors injecting him with painkillers, would require interpretation of the NHL CBA.⁹⁸ Further, the court held that a determination of whether the NHL had a duty to protect Boogaard from addiction would also require interpretation of the NHL CBA.⁹⁹ According to the court, the amount of control the NHL exerted over the players' welfare was in dispute, and the resolution would be determined only by interpretation of the CBA.¹⁰⁰ The Court reasoned it would be unlikely for a duty to have existed on the part of the NHL if there was a collective bargaining agreement provision that essentially divested the NHL from carrying out that duty.¹⁰¹ This is a crucial observation because the court's holding recognizes the potential power of a CBA to limit, assign, or absolve liability—outside of the CBA—among the parties.¹⁰²

After summary judgment in favor of the NHL, Boogaard moved to file a second amended complaint on grounds that his first amended complaint was completely preempted by Section 301.¹⁰³ The second amended complaint “alleged that the NHL *actively* harmed Boogaard.”¹⁰⁴ The second amended complaint proffered the viewpoint that the NHL actively “cultivated a ‘culture of violence’” in the NHL, which caused Boogaard to get into fights.¹⁰⁵ This, in turn, caused him to develop CTE and an addiction to opioids, which caused his death.¹⁰⁶ The court found this argument to have merit, and held that these claims were not preempted by the CBA.¹⁰⁷ Thus, if a plaintiff side-steps preemption, this could ultimately lead to an uncapped damages award, in contrast with arbitration awards available through the CBA.

⁹⁷ *Id.*

⁹⁸ Boogaard, 126 F. Supp. 3d at 1017.

⁹⁹ *Id.* at 1019.

¹⁰⁰ *See id.* at 1023 (noting that specific terms of the NHL CBA “could have arguably been read to divest the NHL of the authority to control players’ medical treatment”).

¹⁰¹ *See id.* at 1020 (noting that if the NHL CBA forbid the NHL from imposing certain medical procedures then the NHL could not be found to have “voluntarily assumed a duty to take those steps”).

¹⁰² *Id.*

¹⁰³ *See* Boogaard v. Nat’l Hockey League, 211 F. Supp. 3d 1107, 1109 (N.D. Ill. 2016).

¹⁰⁴ *Id.* at 1111 (distinguishing the second amended complaint from the first amended complaint in that the latter contained duties arising from the CBA, not a general duty that one person owes to others).

¹⁰⁵ *See id.* at 1112 (holding that under Illinois and Minnesota laws the tort claims were in fact viable and not preempted by the LMRA).

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

Lastly, the court held that the second amended complaint contained “the seed of a viable, non-preempted claim: that the NHL actively and unreasonably harmed Boogaard by *implicitly* communicating that head trauma is not dangerous.”¹⁰⁸ The Court agreed with Boogaard, stating that because the NHL “made a show” of studying concussions and the long-term effects among players, it led the players to reasonably believe that the findings of the NHL’s study would ‘apprise them of any and all long-term risks’.¹⁰⁹ More specifically, Boogaard argued and the court agreed, that,

[b]y gratuitously conducting scientific research and engaging in discussion of the long-term effects of brain injuries sustained by NHL players, and by publicly maintaining that its Concussion Program was thoroughly analyzing concussion data, the NHL gave its players the false impression that it was working on their behalf to keep them informed and up-to-date on all medical and scientific advancements related to repetitive head trauma.¹¹⁰

The court recognized that even silence or omission by the NHL, in the context of a link between hockey and concussions, may implicitly create a duty outside of the CBA, which would inhibit the NHL from arguing preemption, absent express terms to the contrary.¹¹¹

3. The NFL Concussion Settlement Puts Pressure on the NHL

In settling the NFL concussion suit, the NFL has stated that the settlement is a “significant step in implementing the clubs’ commitment to provide compensation to retired players who are experiencing cognitive or neurological issues.”¹¹² Furthermore, the NFL has acknowledged to Congress that a link does in fact exist between football and the long-term

¹⁰⁸ *Id.* at 1111.

¹⁰⁹ *Id.* at 1112.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See *Appeals Court Upholds \$1 Billion Concussion Settlement*, ESPN (Apr. 18, 2016), http://www.espn.com/nfl/story/_id/15229132/appeals-court-upholds-1-billion-nfl-concussion-settlement (discussing the NFL concussion settlement and statements from NFL that the settlement is a step in the right direction to furthering the safety of the players and addressing the risks).

effects of concussions, specifically, CTE.¹¹³ This admission to Congress, however, did not sway the court to reexamine the settlement on grounds that it was unlikely better terms would result.¹¹⁴ However, the Third Circuit Court of Appeals, in affirming the NFL concussion settlement said,

The NFL's statement is an important development because it is the first time, as far as we can tell, that the NFL has publicly acknowledged a connection between football and CTE. On the other hand, the NFL is now conceding something already known. The sheer number of deceased players with a post-mortem diagnosis of CTE supports the unavoidable conclusion that there is a relationship, if not a causal connection, between a life in football and CTE.¹¹⁵

A ruling was never made on the NFL's motion to dismiss because the NFL agreed to settle with the players.¹¹⁶ As per terms of the settlement, the NFL has not admitted any wrongdoing, so retired players who did not opt out are precluded from filing suit against the NFL on the same allegations.¹¹⁷ However, current and future players are not barred from filing suit on the same allegations, unless, and until, the NFL addresses the issues of concussion remedies in the CBA.¹¹⁸ There is no holding that may be applied as relevant law to the NFL concussion litigation.¹¹⁹ Judgment in favor of the NFL would have shown a preference for resolution under the CBA.¹²⁰

a. After Effects of the NFL Litigation

On July 25, 2016, the NFL and the NFLPA implemented a new policy to enforce the existing NFL Game Day Concussion Protocol, most likely in response to the settlement of the

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438, 443 (3d Cir. 2016), *as amended* (May 2, 2016) (affirming the approval of class certification and final approval of settlement in the NFL concussion suit and explicitly recognizing, at the very least, a "causal connection" between football and CTE).

¹¹⁶ See Michael McCann, *What's Next for Each Side After the NFL's Concussion Settlement*, SPORTS ILLUSTRATED (Apr. 18, 2016), <http://www.si.com/nfl/2016/04/18/nfl-concussion-lawsuit-settlement-retired-players> (noting that settlement of the NFL concussion suits relieves the NFL from future liability, per *res judicata*, but leaves open suits from current and future players unless the issue is addressed by way of the NFL CBA).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Philip Calabrese, *Far-Reaching Consequences of NFL Concussion Litigation*, LAW360 (Apr. 9, 2013), <http://www.law360.com/articles/436512/far-reaching-consequences-of-nfl-concussion-litigation> (discussing the consequences of the NFL concussion litigation for both parties).

NFL concussion litigation.¹²¹ The NFL Game Day Protocol, short for “NFL Head, Neck and Spine Committee’s Protocols Regarding Diagnosis and Management of Concussion,” was implemented in 2009, amended in 2011, and has further been adjusted in the last five years.¹²² Most recently, the NFL has announced disciplinary procedures against NFL clubs that violate the NFL Game Day Protocol.¹²³ The stated objective of the NFL Game Day Protocol is “to provide medical staffs responsible for the health care of the NFL players with a process for diagnosing and managing concussions.”¹²⁴

The NFL Game Day Protocol lays out specific guidelines for the NFL and NFL clubs to follow, identify, and treat concussions, and provides a systematic process for the return of players to the game.¹²⁵ The NFL Game Day Protocol also mandates “two medical spotters in the booth who watch the game with binoculars and video replay to identify injuries that others missed.”¹²⁶ Additionally, the NFL Game Day Protocol identifies seven observable symptoms:

(1) any loss of consciousness; (2) slow to get up following a hit to the head (“hit to the head” may include secondary contact with the playing surface) (3) motor coordination/balance problems (stumbles, trips/falls, slow/labored movement); (4) blank or vacant look; (5) disorientation (e.g., unsure of where he is on the field or location of the bench); (6) clutching of the head after contact; and (7) visible facial injury in combination with any of the above.¹²⁷

Further, the NFL Game Day Protocol identifies “potential concussion symptoms” that a player reports after direct or indirect contact, such as: “headache; dizziness; balance or

¹²¹ See NFL, *NFLPA Announce Policy to Enforce Concussion Protocol*, NFL (July 25, 2016), <http://www.nfl.com/news/story/0ap3000000676669/article/nfl-nflpa-announce-policy-to-enforce-concussion-protocol> (announcing the new disciplinary actions that will be implemented in NFL clubs for failing to follow the protocol).

¹²² See Adam Stites, *Explaining the NFL’s Concussion Protocol*, SBNATION (Sept. 18, 2016), <http://www.sbnation.com/nfl/2016/9/18/12940926/nfl-concussion-protocol-explained> (explaining the development of the NFL Game Day Concussion Protocol).

¹²³ Calabrese, *supra* note 120.

¹²⁴ *NFL Head, Neck and Spine Committee’s Protocols Regarding Diagnosis and Management of Concussion*, NFL <http://static.nfl.com/static/content/public/photo/2013/10/01/0ap2000000254002.pdf> (last visited Oct. 2, 2017).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

coordination difficulties; nausea; amnesia for the circumstances surrounding the injury (i.e., retrograde/anterograde amnesia); cognitive slowness; light/sound sensitivity; disorientation; visual disturbance; tinnitus.”¹²⁸

Finally, the NFL Game Day Protocol mandates a five-step “Return-to-Participation Process” that must be adhered to in order for a player to return to games and/or practices. This entails: (1) rest and recovery; (2) light aerobic exercise; (3) continued aerobic exercise and introduction of strength training; (4) football specific activities; and (5) full football activity/clearance.¹²⁹

The recent enforcement policy, enacted on July 25, 2016, states that the “NFL and NFLPA will each designate a representative to monitor the implementation of the [NFL Game Day Protocol] and investigate potential violations.”¹³⁰ Interestingly, “[t]he investigation will not reach medical conclusions; it will only determine whether the [NFL Game Day Protocol] was followed.”¹³¹ Most notably, “[a]s jointly agreed to by the NFL and NFLPA, the Commissioner retains absolute discretion in determining penalties for violations of the concussion protocol.”¹³² The possible disciplinary fines include a first violation, which mandates medical team members attend “remedial education; and/or result in a maximum fine of \$150,000 against the club.”¹³³ A second or subsequent violation “will result in a minimum of a \$100,000 fine against the club.”¹³⁴ Additionally, if the parties agree that a violation included aggravating circumstances, the club

¹²⁸ *Id.*

¹²⁹ See Stites, *supra* note 122 (explaining the five-step procedure of the new mandated protocol as follows: Rest and recovery: Until a player returns to the ‘baseline level of signs and symptoms and neurological examination,’ only limited stretching and balance activities are recommended. Electronics, social media and team meetings are all to be avoided. Light aerobic exercise: The NFL recommends ten to twenty minutes on a stationary bike or treadmill without resistance training or weight training. The cardiovascular activity is monitored by an athletic trainer to “determine if there are any recurrent concussion signs or symptoms.” Continued aerobic exercise and introduction of strength training: Increased duration and intensity of aerobic exercise with strength training added. An athletic trainer will supervise to watch for recurrent concussions signs or symptoms. Football specific activities: The cognitive load of playing football will be added and players will participate in non-contact activities for the typical duration of a full practice. Full football activity/clearance: A player returns to full participation in practice, including contact without restriction.)

¹³⁰ Paul D. Anderson, *NFL to Enforce Concussion Protocol Violations*, NFL CONCUSSION LITIG. (July 26, 2016), <http://nflconcussionlitigation.com/?p=1900> (noting the legal consequences of the enforcement policy of the NFL concussion protocol in allocating a duty to the NFL in regards to concussions).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

may be subject to a fine of no less than \$50,000, all the while giving power to the Commissioner to determine the appropriate discipline such as forfeiture of draft picks or additional fines.¹³⁵

Reading between the lines of the timing and the clever structure of the enforcement policy, the NFL and the NFLPA appear to have responded to the courts' holdings in the various concussion suits by devising a policy that constricts concussion remedies to those within the collective bargaining agreement.¹³⁶

By making return-to-play decisions and any subsequent investigations and violations part of the collective bargaining agreement process (e.g., "Commissioner retains absolute discretion"), this will arguably trigger Section 301 preemption, forcing all such disputes to be resolved in arbitration rather than by a jury in state or federal court. Put another way, by agreeing to this policy, the NFLPA may have forfeited a player's right to seek redress for his injuries in a court of law.¹³⁷

The NFLPA has now limited the ability of players to recover for concussion-related injuries within the court systems.¹³⁸ Rather than being able to file a medical malpractice claim in state or federal court against an NFL club for failure to abide by the NFL Game Day Protocol, players are now restricted to arbitration.¹³⁹ Moreover, NFL teams now face a much lower amount of monetary liability, e.g., a \$100,000 fine issued by the league for its failure to adhere to the NFL Game Day Protocol, compared to a jury verdict that could produce a judgment in the millions.¹⁴⁰ However, some suggest that this anomaly is resolved because the players are now arguably safer, and still may elect to pursue a remedy for concussion-related injuries through the CBA by way of arbitration.¹⁴¹

¹³⁵ *Id.*

¹³⁶ Anderson, *supra* note 130 (noting the legal consequences of the enforcement policy of the NFL concussion protocol in allocating a duty to the NFL in regards to concussions).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

B. Bettman, the NHL Concussion Protocol, and the CBA

1. Bettman's Denial

Gary Bettman, the NHL Commissioner, has refused to acknowledge a link between the NHL, concussions, and CTE.¹⁴² Senator Gary Blumenthal, a Senator from Connecticut and a “ranking member of the Senate Subcommittee on Consumer Protection,” wrote a letter to Bettman on June 23, 2016, probing into the link between the NHL, concussions, and CTE.¹⁴³ Blumenthal also has suggested, quite expressly, that the NHL should concede to a link between concussions and NHL hockey.¹⁴⁴ It is clear from Bettman's response that the NHL is not in agreement with allegations of a link between hockey and CTE.¹⁴⁵ Bettman, in his response to Blumenthal, offered this explanation:

In 2012, it was the consensus of medical experts on concussions in sport, including Dr. Robert Cantu (the primary expert retained by plaintiffs' counsel in the concussion litigation currently pending against the NHL, and a member of

¹⁴² See Alex Prewitt, *U.S. Senator Appalled by Gary Bettman's Stance on Concussions*, SPORTS ILLUSTRATED (July 28, 2016), <http://www.si.com/nhl/2016/07/28/nhl-concussions-cte-gary-bettman-us-senator-richard-blumenthal> (discussing Senator Gary Blumenthal's letter to Gary Bettman about his denial of the link between hockey, concussions, and CTE).

¹⁴³ Richard Blumenthal, Letter to Gary Bettman, (June 23, 2016), <http://www.blumenthal.senate.gov/imo/media/doc/2016%2006%2023%20Letter%20to%20NHL%20re%20CTE.pdf>.

¹⁴⁴ *Id.* (probing into Gary Bettman's continued denial of a link between NHL hockey and CTE, on behalf of the Senate Subcommittee on Consumer Protection, Product Safety, Insurance and Data Security, asking nine separate questions: (1) Do you believe there is a link between CTE and hockey? If you do not, please explain how head trauma in hockey differs from head trauma in football?; (2) Do you dispute that the documented CTE of former NHL players, like Derek Boogaard, is linked to injuries sustained while playing in the NHL?; (3) What changes could be made to the game to better protect athletes' long-term health? Has the NHL considered eliminating fighting from the game? How can the league reduce fighting?; (4) Have you considered adopting changes to the game similar to those recently implemented by the International Ice Hockey Federation, such as establishing penalties that more seriously aim at eliminating fighting? Why or why not?; (5) Can you outline the process by which a player is disciplined for an illegal headshot, starting immediately after the incident occurs?; (6) Can you speak to any education the league has provided for officials to be better equipped to call illegal plays that often end up with players getting hurt?; (7) Do you believe players are adequately informed about the risks of concussions in the league when they join? What could the league do to ensure that players understand this risk?; (8) Do you believe that if there was more information about how players would be disciplined for illegally hitting another player that it would reduce the incidence of head trauma in the NHL?; and (9) What is the current protocol for diagnosing and treating concussions? Will the NHL commit to using the latest concussion diagnosing standard, as recommended by the Centers for Disease Control and Prevention?).

¹⁴⁵ Gary Bettman, *Letter to Richard Blumenthal*, SCRIBD (July 22, 2016) https://www.scribd.com/document/319586880/Bettman-Response#from_embed (responding to Senator Richard Blumenthal's questions pertaining to the NHL and a link between concussions and their alleged long-term effects).

Boston University's CTE Center), that a causal link between concussions and CTE has not been demonstrated. And, as of today, the CTE Center researchers admit that the study of CTE remains in its 'infancy'.¹⁴⁶

Bettman's denial is geared towards the opinion that football and hockey are vastly different sports, and that the relatively new study on hockey and CTE is insufficient to provide a "causal link between concussions and CTE."¹⁴⁷

On October 6, 2016, five members of the Senate Committee on Energy and Commerce wrote an additional letter to Bettman asking him seven questions pertaining to the NHL Concussion Protocol, CTE, and fighting in the game.¹⁴⁸ Jan Schakowsky, who spearheaded the questionnaire, did so after speaking with two NHL concussion suit plaintiffs, Dan LaCouture and Dale Purinton.¹⁴⁹ In the letter, the Committee explained, "[t]here is significant evidence to support a link between the types of concussive and sub-concussive hits inherent to the game of hockey and brain damage."¹⁵⁰ "Repetitive hits to the head—even in the absence of the clinical signs of concussion—can have cumulative, long-term effects on brain function and physiology."¹⁵¹

¹⁴⁶ *Id.*

¹⁴⁷ See Marissa Payne, *NHL Commissioner Refuses to Believe There's a Link Between Concussions and CTE*, WASH. POST (July 26, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/07/26/nhl-commissioner-refuses-to-believe-theres-a-link-between-concussions-and-cte/> (highlighting Gary Bettman's various responses to Senator Blumenthal's questionnaire in regards to the link between NHL hockey and the long-term effects of concussions).

¹⁴⁸ See Ken Campbell, *Congress Member Says Bettman "Like Tobacco Industry" When It Comes to CTE*, THE HOCKEY NEWS (Nov. 3, 2016), <http://www.thehockeynews.com/news/article/congress-member-says-bettman-like-tobacco-industry-when-it-comes-to-cte> (summarizing the response given by Gary Bettman to the Senate Committee on Energy and Commerce, led by Jan Schakowsky. The questions were as follows: (1) How will the NHL's new concussion protocol for the 2016-2017 season differ from earlier policies?; (2) Who is responsible for implementing and enforcing the concussion protocol during practices and games?; (3) What is the penalty if a team fails to enforce the concussion protocol?; (4) How does the NHL document diagnosed concussions both in games and practices?; (5) What recent rule changes have been implemented to reduce the risk of head injury?; (6) In 2011, the NHL broadened its rule prohibiting illegal hits to the head. What led the NHL to impose more stringent penalties regulating head contact?; (7) What new programs, initiatives and protocols is the NHL considering for the 30 NHL teams and its affiliated development leagues to protect players from the risks of repetitive head trauma?; and (8) How does the NHL work with youth hockey leagues to ensure players and parents understand the risks posed by the game?).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

In its totality, there seems to be warranted pressure from various members of Congress, the courts, and the NFL, for the NHL to concede to a link between hockey, concussions, and long-term effects on brain function.¹⁵²

2. The NHL Collective Bargaining Agreement and the NHL Concussion Protocol

The 2012 NHL CBA is between the NHL and the union representing the players, the NHLPA.¹⁵³ The 2012 NHL CBA was ratified by the two parties on January 12, 2013, at the end of a four-month lockout following the expiration of the 2005 NHL CBA.¹⁵⁴ The CBA provides the terms and conditions of employment of all NHL players, the rights of the NHL clubs, the NHL, and the NHLPA.¹⁵⁵ The 2012 CBA is in effect until September 15, 2022, although both parties have the option to terminate after eight years.¹⁵⁶ The Joint Health and Safety Committee, (the Committee) a joint advisory committee that makes all recommendations regarding player health and safety, is established under the NHL CBA.¹⁵⁷ The Committee, comprised of five NHL voting members and five NHLPA voting members, is authorized to form “working” groups to address specific issues within the context of the NHL CBA.¹⁵⁸ The NHL Concussion Protocol is a derivative of the NHL Concussion Subcommittee.¹⁵⁹

The NHL Concussion Protocol, first enacted in 2010, provided guidelines for “concussion evaluation and management” developed by the NHL and the NHLPA in the form of the NHL Concussion Program.¹⁶⁰ The NHL Concussion Protocol has been amended in 2001, 2004, 2008, and 2012. The NHL Protocol provides guidelines for clubs to follow “regarding

¹⁵² *Id.*; *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438, 443 (3d Cir. 2016), *as amended* (May 2, 2016); McCann, *supra* note 116 (Note: This hypothesis might be reflected in the NHL's newest amendments to the NHL Concussion Protocol made on October 11, 2016. *See Concussion Evaluation and Management Protocol 2016/17*, NHL (Jan. 12, 2013), <https://nhl.bamcontent.com/images/assets/binary/282574512/binary-file/file.pdf>. (noting that the NHL's amendments appear to be in response to the NFL's acknowledgement and own implementation of concussion protocol amendments)).

¹⁵³ *See Collective Bargaining Agreement*, NHLPA, <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement> (last visited Sept. 15, 2016) (containing information regarding NHLPA and CBA).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See NHL Collective Bargaining Agreement*, at Article 43.9(a) (defining the duties of the NHL Joint Health and Safety Committee).

¹⁵⁸ *Id.* at Article 43.9(b) and (c).

¹⁵⁹ *See Concussion Evaluation and Management Protocol 2016/17*, NHL (Jan. 12, 2013), <https://nhl.bamcontent.com/images/assets/binary/282574512/binary-file/file.pdf>.

¹⁶⁰ *Id.*

concussion education, testing, identification, evaluation, and management.”¹⁶¹ The NHL Concussion Protocol expressly states that the diagnosis and management is an “individualized decision made by the [c]lub [p]hysician based on the principles set forth in the [p]rotocol and on all information available to him or her.”¹⁶² Additionally, the NHL Concussion Protocol “requires the mandatory removal of a player from play for an acute evaluation as soon as possible if a concussion is suspected.”¹⁶³ The NHL Concussion Protocol is strikingly similar to that of the NFL’s new concussion protocol, also implemented for the 2016-2017 season.¹⁶⁴

The newest modifications to the NHL Concussion Protocol include:

(1) the addition of Central League Spotters to the Concussion Spotter Program; (2) the empowering of on-ice officials to mandate the removal of a player for a concussion evaluation; (3) the adoption of a policy barring any player designated for mandatory evaluation from re-entering the game unless and until he is evaluated by his Club’s medical staff and cleared to play in accordance with the Concussion Protocol; and (4) the formal implementation of specified sanctions for non-compliance with the Concussion Protocol.¹⁶⁵

Again, this is patently similar to the NFL’s implementation of sanctions against NFL clubs for failure to abide by the NFL Concussion Protocol, which provides for the NFL Commissioner’s “absolute discretion” to impose sanctions.¹⁶⁶ By imposing mandatory sanctions on NHL clubs for failure to follow the NHL Concussion Protocol, the NHL would essentially assign itself a duty within the four corners of a collectively bargained agreement, and, moving forward, might preempt state law claims that would relate to concussion injuries against the NHL. For the current plaintiffs, the fact that the league is imposing mandatory sanctions on NHL

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *NFL, NFLPA Announce Policy to Enforce*, *supra* note 121 (noting the similarities between the NFL and NHL concussion protocol amendments).

¹⁶⁵ *Concussion Evaluation and Management Protocol*, *supra* note 159.

¹⁶⁶ *NFL, NFLPA Announce Policy to Enforce*, *supra* note 121.

teams might lead to an argument that the NHL has, in fact, acknowledged such a link through its policy reforms.

Although the NHL's efforts to assign itself a duty that mandates sanctions against clubs failing to adhere to the NHL Concussion Protocol has likely protected itself from liability outside the CBA, there still may be other available avenues for players who seek legal remedies.¹⁶⁷ The NHL Concussion Protocol fails to mention or address any sort of long-term effects that may result from repetitive concussions, such as CTE.¹⁶⁸ This is likely due to the fact that the NHL has refuted claims that there are links between concussions and CTE.¹⁶⁹ As the court said in *Boogaard*, the NHL's silence, or refusal to acknowledge, a link between concussions and their long-term effects may serve to *implicitly* communicate to the players either that no long-term effects exist or that they are minor.¹⁷⁰ With the abundance of studies contradicting the NHL's stance on concussions and the long-term effects thereof, it seems as though players who suffer from the long-term effects of concussions sustained while playing in the NHL might have recourse available to them.¹⁷¹

IV. PROPOSAL

This section proposes that the NHL will need to concede to a link between hockey and the long-term effects of concussions, including CTE. Further, this section proposes that the NHL and NHLPA should amend the current CBA, taking note of the NFL's settlement plan, to include recognition of CTE as a valid brain disease for which players may be awarded compensation if they show they have symptoms in relation to a baseline assessment.

A. In the Interest of Protecting Players, The NHL Should Recognize That a Link Between NHL Hockey and CTE Exists.

The first step in addressing the long-term effects of concussions endured while playing in the NHL is for NHL Commissioner Gary Bettman to concede that a link exists between hockey,

¹⁶⁷ See *Boogaard v. Nat'l Hockey League*, 126 F. Supp. 3d 1010, 1022 (N.D. Ill. 2015) (noting that the players still may be able to have merit on the implicit communication that is absent from the NHL CBA).

¹⁶⁸ See *Concussion Evaluation and Management Protocol*, *supra* note 159.

¹⁶⁹ Prewitt, *supra* note 142.

¹⁷⁰ *Boogaard v. Nat'l Hockey League*, 211 F. Supp. 3d 1107, 1112 (N.D. Ill. 2016).

¹⁷¹ Note: This creates an avenue for court litigation.

concussions, brain injuries, and CTE.¹⁷² The NHL has been left little alternative due to pressure placed upon the NHL by on-going CTE studies, Congressional committee probes, and acknowledgement by the NFL.¹⁷³ The NHL must follow in the NFL's footsteps to make the game safer and, in turn, make current players aware of the actual risks an NHL player faces.¹⁷⁴ Ironically, the NHL Concussion Litigation acts as a barrier to the NHL conceding to a link between hockey and CTE because an admission at this stage would be detrimental to the NHL's legal posture.¹⁷⁵ Regardless of the concussion suit's outcome, in order to address these long-term effects, the NHL must also educate the players on prevention, inform the players about treatment options, and present long-term care choices.¹⁷⁶ Second, the NHL should cooperate with the on-going studies at various research facilities that recognize those findings as genuine and emerging.¹⁷⁷ Third, just like the NFL, the NHL should pledge funding to studies and research on concussions and CTE in its sport.¹⁷⁸

¹⁷² See Prewitt, *supra* note 142 (noting Senator Richard Blumenthal's strong opposition to NHL Commissioner Gary Bettman's denial of a link between hockey and CTE. "I was surprised and appalled, because I thought the response would be more receptive . . . I would've welcomed an acknowledgement for stronger action and a commitment to determining whether the game is causing these heartrending injuries with such painful consequences, rather than dismissing the link between hockey and CTE.").

¹⁷³ *Id.*

¹⁷⁴ See *Commissioner Gary Bettman Denies Link Between Concussions, CTE*, SPORTS ILLUSTRATED, (July 27, 2016), <http://www.si.com/nhl/2016/07/27/commissioner-gary-bettman-denies-link-between-concussions-cte> (acknowledging the research on CTE by Boston University, and the NFL's acknowledgement of a link between the NFL and CTE in regards to Gary Bettman's lack-luster response to Senator Richard Blumenthal inquiries regarding concussions and CTE in the NHL).

¹⁷⁵ *Id.*

¹⁷⁶ See *Senator Blumenthal Calls On NHL To Fund Concussion Study; NHL's Response: It's 'Media Hype'*, HARTFORD COURANT (Aug. 15, 2016), <http://www.courant.com/sports/hockey/hc-blumenthal-nhl-concussions-0816-20160815-story.html> (discussing Senator Blumenthal's probe into the NHL's denial of a link between concussions and Blumenthal's suggestion that the NHL should "fund research and scientific study, impartial and independent research that will explore and establish the link between concussions and brain disease later in life. I'm calling on the NHL to fund an independent foundation that will support this research because they are a role model, for good or ill. They lead by example. Their dismissiveness of the evidence already sends a message to others who play and coach and support hockey.").

¹⁷⁷ See *id.* (noting Senator Blumenthal's suggestion that the NHL fund studies revolving around brain injuries derived from playing in the NHL).

¹⁷⁸ *Id.*; see also Bernie Augustine, *NFL Pledges \$100 Million to Concussion Research*, N.Y. DAILY NEWS (Sept. 14, 2016), <http://www.nydailynews.com/sports/football/nfl-pledges-100-million-concussion-research-article-1.2791823> (discussing the NFL Commissioner Roger Goodell's pledge to provide \$60 million to technological development, \$40 million to medical research, and funding for concussion research).

Beyond the NFL and NHL, concussions are a crucial issue being addressed and acknowledged in sports such as boxing, as well as other team sports.¹⁷⁹ Previous email exchanges between Bettman and NHL Deputy Commissioner Bill Daly, which have surfaced in the wake of the NHL Concussion Litigation, have become necessary puzzle pieces to this situation.¹⁸⁰ “Fighting raises the incidence of head injuries/concussions, which raises the incidence of depression onset, which raises the incidence of personal tragedies,” Daly wrote to Bettman.¹⁸¹ The acknowledgement by other sports leagues and the admission made by Daly to Bettman, *inter alia*, may arguably serve as putting the NHL on notice of the long-term effects of concussions and CTE derived from playing in the NHL.¹⁸² Thus, the NHL’s failure to acknowledge the link may implicitly communicate to the players that there is, in fact, no link, or that the link is insubstantial.¹⁸³ To constrain concussions, their long-term effects, and CTE to the NHL CBA—by way of Section 301 preemption—the NHL must at least concede to a link.¹⁸⁴ This way, the league can move forward in addressing concussions’ long-term effects, and provide notice to the players, which will have the consequence of preempting any claims relating to these matters.¹⁸⁵

B. The NHL Should Take Note of the NFL’s Settlement Plan for Retired Players

The NFL’s acknowledgement of a link between football and CTE has left the NHL standing alone; they are fighting an uphill battle within the courts that seem to agree a link

¹⁷⁹ See Steve Fainaru & Mark Fainaru-Wada, *Latest Studies: Brain Disease From Contact Sports More Common*, ESPN (Mar. 16, 2016), http://www.espn.com/espn/otl/story/_/id/14982032/nfl-admission-football-lead-brain-disease-came-amid-new-science-suggesting-sports-related-trauma-becoming-more-common (noting that studies of CTE around the United States indicate a connection to repetitive head trauma endured in sports such as boxing, soccer, high school football, rugby, and wrestling).

¹⁸⁰ See John Branch, *N.H.L. Commissioner Gary Bettman Continues to Deny C.T.E. Link*, N.Y. TIMES (July 26, 2016), http://mobile.nytimes.com/2016/07/27/sports/nhl-commissioner-gary-bettman-denies-cte-link.html?smid=tw-nytsports&smtyp=cur&referrer=&_r= (proffering Gary Bettman’s response to Senator Richard Blumenthal and excerpts from emails discovered between Gary Bettman and Bill Daly showing acknowledgement of a link between fighting in the NHL and the long-term effects of concussions).

¹⁸¹ *Id.*

¹⁸² See *Boogaard v. Nat’l Hockey League*, 211 F. Supp. 3d 1107, 1108 (N.D. Ill. 2016) (distinguishing Boogaard’s second amended complaint from the initial complaint in that the former contained a viable claim that the NHL implicitly communicated to the players that repetitive head trauma was safe or that it had minimal long-term impact, and was not preempted by the NHL CBA).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

between concussions, other brain injuries, and CTE does, in fact, exist.¹⁸⁶ Irrespective of the outcome of the NHL Concussion Litigation, after conceding to a link between hockey, brain injuries, and CTE, the NHL and NHLPA should devise a plan to remedy retired players suffering from the effects of concussions endured while playing in the NHL, similar to the NFL's plan.¹⁸⁷

The NHL should structure a four-part remedy for retired players that includes: (1) an uncapped monetary fund compensating retired players who qualify or are diagnosed with certain brain injuries, including CTE; (2) a baseline assessment provided to retired players to diagnose those who might be suffering from brain injuries or CTE; (3) an initiative to fund, study, and educate hockey players from youth to professionals about concussions, resulting brain injuries, and CTE; and (4) the introduction of a transitional program for retired players to aid in assimilating into life after hockey.¹⁸⁸

The qualified brain injuries under the monetary award should include the following: (1) Level 1.5 Neurocognitive Impairment; (2) Level 2 Neurocognitive Impairment; (3) Alzheimer's Disease; (4) Parkinson's Disease; (5) Amyotrophic Lateral Sclerosis (ALS); and (6) CTE.¹⁸⁹ In contrast to the NFL's settlement plan, the NHL should recognize CTE as a distinct, recognized qualification that should be left uncapped just as all other recognized brain injuries.¹⁹⁰ The NFL settlement provided less favorable treatment to those purported to have CTE because it limited recovery to those who died with CTE before April 22, 2015. Hence, retired players suffering from CTE who die after April 22, 2015 are essentially barred from recovery if they do not meet other qualifications.¹⁹¹ The NFL Concussion Litigation Court reasoned that the study of CTE

¹⁸⁶ See *Appeals Court Upholds*, *supra* note 112 (discussing the NFL's acknowledgement of a link between football and CTE after NFL's Executive Vice President cited to CTE research as support during a House Energy & Commerce Subcommittee on Oversight & Investigations discussion. The court noted, "[t]he sheer number of deceased players with a post-mortem diagnosis of CTE supports the unavoidable conclusion that there is a relationship, if not a causal connection, between a life in football and CTE.").

¹⁸⁷ See *id.* (noting that the NFL's settlement plan is a step in the right direction to providing relief to retired players suffering from the effects of CTE and other brain injuries seeing as the evidence does in fact point to a link).

¹⁸⁸ See *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438, 423 (3d Cir. 2016), *as amended* (May 2, 2016) (discussing the adopted NFL concussion litigation settlement that provides (1) an uncapped Monetary Award Fund that provides compensation for retired players who submit proof of certain diagnoses; (2) a \$75 million Baseline Assessment Program that provides eligible retired players with free baseline assessment examinations of their objective neurological functioning; and (3) a \$10 million Education Fund to instruct football players about injury prevention).

¹⁸⁹ See *id.* (listing the various qualifying injuries in the settlement plan).

¹⁹⁰ See *id.* (noting that the qualifying injuries are left uncapped and that the settlement terms do not mention CTE).

¹⁹¹ *Id.*

was “nascent, and the symptoms of the disease, if any, are unknown.”¹⁹² After the NFL acknowledged the link between football and CTE, the court recalibrated and acknowledged a link between football and CTE based upon the overwhelming numbers of deceased players that were found to have CTE.¹⁹³ Implementing a settlement plan for retired NHL players is, monetarily speaking, more likely than the NFL’s settlement plan because of the smaller class members involved in the NHL suit.¹⁹⁴ It is appropriate to recognize CTE as a very real condition that must be studied, funded, developed, and incorporated into a remedy for retired NHL players.

C. Amend and Implement Concussions, Brain Injuries, and CTE into the NHL CBA

In order to keep concussion-related suits within the limits of mandatory arbitration, the NHL must address the risks of concussions, brain-related injuries derived from NHL hockey, and the very real consequences of CTE explicitly within the confines of the NHL CBA.¹⁹⁵ Beginning in the 2016-2017 NHL season, the NHL took steps towards addressing concussions and their long-term effects into the NHL CBA by amending the Concussion Protocol to its most current form.¹⁹⁶ Additionally, the NHL now has the power to oversee the enforcement of the NHL Concussion Protocol, and to fine teams that violate the protocol.¹⁹⁷ These amendments to the protocol do, in fact, make the game safer; however, moving forward, the amendments might preempt any concussion-related injuries to within the NHL CBA.¹⁹⁸

¹⁹² *Id.* at 441.

¹⁹³ *Id.* at 443 (“Before concluding, we address developments during the pendency of this appeal. In a March 2016 roundtable discussion on concussions organized by the House Energy & Commerce Subcommittee on Oversight & Investigations, the NFL’s Executive Vice President cited the research of Dr. McKee and agreed that there was a link between football and degenerative brain disorders like CTE. The NFL’s statement is an important development because it is the first time, as far as we can tell, that the NFL has publicly acknowledged a connection between football and CTE. On the other hand, the NFL is now conceding something already known. The sheer number of deceased players with a post-mortem diagnosis of CTE supports the unavoidable conclusion that there is a relationship, if not a causal connection, between a life in football and CTE.”).

¹⁹⁴ *See id.* at 425 (noting the estimated total class members in the NFL suit is 20,000); *but see* Dave Campbell, *105 Former NHL Players Are Plaintiffs in Class-Action Concussion Lawsuit Against League*, BOSTON.COM (Feb. 6, 2016), <https://www.boston.com/sports/boston-bruins/2016/02/06/105-former-nhl-players-are-plaintiffs-in-class-action-concussion-lawsuit-against-league> (noting the class member size of the NHL is roughly 4,800).

¹⁹⁵ *See* Boogaard v. Nat’l Hockey League, 211 F. Supp. 3d 1107, 1112 (N.D. Ill. 2016) (holding that Boogaard’s claims that the NHL’s silence on concussion related injuries may have served to implicitly communicate to the players that there were no long-term effects or that they were immaterial, had merit).

¹⁹⁶ *See Concussion Evaluation and Management Protocol*, *supra* note 159 (noting the NHL Concussion Protocol changes for the 2016-2017 season).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

However, the NHL has still neglected to address the implicit “communication” made to the players by failing to acknowledge a link between NHL hockey and long-term brain injuries such as CTE.¹⁹⁹ After conceding to a link between NHL hockey, concussions, and the long-term effects thereof, the NHL needs to adopt recognition of CTE and other brain-related injuries into the NHL CBA.²⁰⁰ This will effectively preempt any claims related to concussion injuries to within the NHL CBA, and will serve as effective notice to the players of the risks associated with playing in the NHL.²⁰¹

The NHL and NHLPA can collectively bargain a long-term plan to address brain injuries, including CTE, derived from playing in the NHL, and to stipulate the means of proper compensation to current players who may in the future suffer from the long-term effects of concussions.

Article 23 of the NHL CBA sets forth the “Career Ending Disability Benefit” and “Serious Disability Benefit” available to players who qualify.²⁰² These articles define the various types of career-ending injuries and serious disabilities covered, coupled with a one-time benefit amount provided to the player, as detailed in the following chart:²⁰³

Serious Disability Benefits	
Type of Disability	Benefit Amount (in U.S. Dollars) \$5,000,000
Loss of Brain Functions	\$5,000,000
Paralysis	\$5,000,000
Organ Failure	\$3,000,000
Diagnosis of Terminal Illness	\$3,000,000
Loss of a Limb*	\$2,500,000

¹⁹⁹ See Boogaard, 211 F. Supp. 3d at 1112 (holding that the NHL’s implicit communication that head trauma was not dangerous had “the seed of viable, non-preempted claim.”).

²⁰⁰ See *id.* (noting that the court in Boogaard probably would have held explicit references to CTE in the CBA as preempted).

²⁰¹ *Id.*

²⁰² See The Collective Bargaining Agreement, at Article 23.3(a)(b) (establishing the covered disability benefits available to NHL players on a “Club’s Insured Roster”).

²⁰³ See *id.* (“(a) The Clubs and the NHLPA shall also maintain a career ending disability policy providing for a one-time benefit, subject to the release requirements set forth in Sections 23.3(d) and 23.3(e), in the event a Player who is on a Club’s Insured Roster suffers a career ending disability as set forth below and in the policy. Disability must be due to an injury or illness which results solely and independently of any other cause, with exclusions as detailed in the policy. Disability shall be considered career ending if the Player is continuously disabled for a period of 12 months and permanently prevented from playing professional hockey.” “(b) The Clubs and the NHLPA shall also maintain a serious disability policy providing for a one-time benefit, subject to the release requirements set forth in Sections 23.3(d) and 23.3(e), in the event a Player who is on a Club’s Insured Roster suffers a serious disability as set forth below and in the policy.”).

Loss of Two (2) Limbs*	\$4,000,000
Loss of Sight in Both Eyes	\$4,000,000
Loss of Sight in One (1) Eye	\$2,000,000
Loss of Hearing or Speech	\$750,000
Loss of Hearing and Speech	\$1,000,000
Loss of one hand or one foot*	\$750,000
Loss of both hands or both feet or one hand and one foot*	\$1,000,000
* Loss includes loss of use	

The NHL and NHLPA should stipulate to an additional subsection under Article 23 labeled “Concussion Disability Benefit” that includes the following types of disabilities: (1) Level 1.5 Neurocognitive Impairment; (2) Level 2 Neurocognitive Impairment; (3) Alzheimer’s Disease; (4) Parkinson’s Disease; (5) Amyotrophic Lateral Sclerosis (ALS); and (6) CTE. Rather than requiring the player be “on a Club’s Insured Roster” to qualify for the benefit, the subsection should remain open to NHL players who develop symptoms of the qualifying disabilities up to twenty-five years after retirement. This additional time period will allow any long-term brain injuries to become apparent. The following benefit amounts should apply: (1) Level 1.5 Neurological Impairment - \$750,000; (2) Level 2 Neurological Impairment - \$1,000,000; (3) Alzheimer’s Disease - \$2,000,000; (4) Parkinson’s Disease - \$2,000,000 and; (5) CTE - \$3,000,000. These amounts should be paid contemporaneously with the current NHL CBA’s compensation allowances for various career-ending injuries.

The “Concussion Disability Benefit” would also be controlled by Article 23.3(a) which conditions that “[f]or Players with less than forty-one (41) NHL Games played in their career (including games dressed for backup goaltenders) the maximum benefit would be \$500,000 U.S.”²⁰⁴

Additionally, the “Concussion Disability Benefit” should be subject to all other conditions imposed by Article 23 including 23(c), “[i]n the event that the career ending disability benefit set forth in Section 23.3(a) is larger than the serious disability benefit set forth in Section 23.3(b), and the Player qualifies for such career ending disability benefit, only one benefit will be payable (in the amount of the larger career ending disability benefit).”²⁰⁵

²⁰⁴ *Id.*

²⁰⁵ *Id.*

V. CONCLUSION

The NHL concussion problem is not new. The NHL Concussion Litigation mimics that of the NFL's concussion litigation. The NFL's settlement structure proves to be a powerful push toward remedying retired players and protecting current and future players. The NHL needs to concede to the overwhelming evidence that there is, in fact, a link between hockey and the long-term effects of concussions. The amended NHL CBA should specifically require NHL and NHL clubs to protect, advise, and treat current and former NHL players to keep expensive litigation and the possibility of enormous settlements out of the courts. Lastly, the amendments to the NHL CBA should be constructed with Section 301 preemption in mind to keep the liability of concussions and their long-term effects within the realms of the CBA and the CBA's arbitration dispute resolution.