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From the Field of Sports Law

Awareness of the dangers associated with repeated head injuries in athletics has increased dramatically over the past few years. In just the past 12 months, concussions have sidelined marquee professional football, hockey and baseball players. Even Hollywood has gotten into the act: NBC recently aired an episode of the drama "Harry's Law" that focused on whether the parents of a high school football player who died on the field had the right to sue the school for failing to adequately warn that the game could potentially lead to brain damage or death.

Both amateur and professional leagues have responded by instituting new protocols for handling concussions, changing the rules of the game, and mandating the use of more protective safety equipment. Although today's professional athletes undoubtedly have a greater appreciation of the risks associated with repeat head injuries, this does little to help athletes who suffered head injuries in the past.

Some of these athletes have initiated lawsuits against the NFL and helmet manufacturer Riddell. Both entities face a spate of lawsuits brought by former professional football players claiming that the NFL and Riddell concealed information and failed to warn players about the long-term effects of repeated head trauma. On Jan. 31, many of these cases were coordinated and assigned to Judge Anita B. Brody in Pennsylvania federal court. She will be called upon to decide a number of issues.

One of the first issues that will be presented is whether the players' claims are barred by their collective-bargaining agreements. The agreements place primary responsibility for player health and safety on individual team physicians. For this reason, the NFL has argued that the players' lawsuits should be dismissed. In addition, CBAs typically call for arbitration of player safety disputes. These provisions may serve as a basis for remanding the players' cases from court to a private arbitrator. Ironically, the CBAs that are intended to protect players' rights may leave them outside the steps of the courthouse.

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About the Author

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Another issue is whether the players assumed the risk of injury by playing a contact sport where such a risk is inherent. As former Supreme Court Justice Benjamin Cardozo once wrote, "[o]ne who takes part in … a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball."

In the past, courts have dismissed claims for injuries brought by professional athletes under what is known as the "assumption of risk" doctrine. For example, former New York Yankees' center fielder Elliot Maddox sued the city of New York after suffering a career-ending knee injury in 1975 when he fell into a mud puddle in center field at Shea Stadium. (The Yankees played home games at Shea Stadium in 1974 and 1975 while Yankee Stadium was being renovated.) Maddox alleged that the stadium's drainage system was negligently designed, constructed and maintained. New York's highest court upheld the dismissal of Maddox's case on the ground that the inherent risks of baseball included those associated with the construction and maintenance of the field. Given these precedents, the NFL players may find themselves without a remedy in the courts.

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The NFL players' cases also present questions that are unique to Riddell as the helmet manufacturer. Generally speaking, product manufacturers are obligated to warn consumers about the dangers that are associated with foreseeable uses of their products. The NFL players say that Riddell failed to provide adequate instructional materials and warnings of the risk of concussive brain injuries while playing football. The NFL players' ability to succeed on this "failure-to-warn" claim will turn on what Riddell knew regarding the risks, when they knew it, whether they adequately warned of the risk, and whether the players independently possessed knowledge of the risks.

The players also say that Riddell's helmets were defectively designed, unreasonably dangerous, and unsafe for their intended purpose because they did not provide adequate protection against the foreseeable risk of concussive brain injury. To prevail on this "design defect" claim, the players must prove that a feasible alternative design existed and that the alternative design did not detract from the helmet's utility. For example, a design that increases protection from head injuries, but is too heavy and bulky for players to safely and effectively wear on a football field may not be an adequate alternative.

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Both the sports industry and product liability lawyers will be watching the outcome of these lawsuits carefully. In the meantime, the good news is that professional leagues and amateur athletic associations

will dedicate more of their resources to educating their constituents about the effects of concussive brain injuries, and product manufacturers will strive to design innovative new protective gear with both improved safety and performance in mind.