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2013 Jeffrey S. Moorad Sports Law Journal Symposium: "Concussion Conundrum"

Marc Edelman

Michael Marino

Cailyn Reilly

Gordon Cooney

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Jeffrey S. Moorad Sports Law Journal Symposium

“CONCUSSION CONUNDRUM”: PANELS 2 & 3

Panel 2:

PROFESSOR MARC EDELMAN, DR. MICHAEL MARINO, AND
CAILYN REILLY

Panel 3:

GORDON COONEY, PAUL ANDERSON, AND SOL WEISS

Moderator:

ANDREW BRANDT

PANEL 2: BUILDING THE CASE – A LEGAL AND MEDICAL BACKGROUND OF CONCUSSIONS

Andrew Brandt – We’re going to begin with Panel 2. What I’d like to do here I hope we can delve into a little bit of the medical and legal and academic issues surrounding concussions. Let me introduce the panel and then have them talk about their specialties as we sort of continue to drill down. To my right is Marc Edelman, Associate Professor of Law at Barry University, one of the leading scholars on this issues and he will explain some of the impressive work he’s doing especially with regarding amateur athletics specifically the NCAA. To my left is Dr. Mark Marino. He is with the Moss Rehab Center. He has researched and done a lot of work with brain injury and he will be our medical expert and I know a lot of people have questions about diagnosis, treatment, and return to play issues. And to my far left is Cailyn Reilly who is a student here at Villanova Law School who has not only had experience with concussions, but has written a very impressive article at UCLA Law Journal, which he’ll talk about as well. So we’ll start with Mark.

Professor Marc Edelman – Good morning. Thank you for having me here. As Professor Brandt mentioned, my full time line of work is as a professor of law, but my expertise is in sports and to write on any issue involving a given industry, it’s important to first really understand the history and the background of the industry. One thing I learned was while the issue of concussions in sports have really been spoken about over the past five years, head injury in sports and particularly head injuries in football is not a new issue.

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We could turn back over a hundred years. In 1906 – by a show of hands, how many people here are familiar with the NCAA as an organization? Of course we are. We think about them as being the organization that purportedly protects amateurism or ensures profit for an association. Well, the NCAA was founded in 1906 at the request of President Theodore Roosevelt primarily for the purpose of minimizing head and neck injuries in football. At the point in time, there was already a widespread concern about this growing game of college football and mind you in 1906 there was no professional game. There was concern that the sport was too dangerous and head and neck injuries lead to 11 deaths, severe concussions, and neck problems for a whole host of players. The NCAA in its early days really was exactly what they purported to be, an organization that existed to protect the interests of the athletes. And in the early years, they took a few steps to make the game of football safer. For example, these are plays that you've never seen, but in the early days of football players used to grab hands and attach themselves to each other to prevent players from being tackled. What this actually created though was a situation where as the players got tackled they all fell on each other leading to severe head and neck damage. Another play and Mr. Westbrook can be thankful as a running back that it is no longer part of the books, was known as the flying squirrel. The flying squirrel was a college football play I believe used primarily on a third and one, fourth and one situations where the running back would be lifted up by the offensive lineman and then hurled over the defensive line on the other side to get a first down. The NCAA, however, again said that this was too dangerous. This was causing severe neck damage and led to the end of that play. For the period of time right through the 1910s, 1920s, and 1930s, the NCAA did just that. They were the leading organization for keeping football safe and as they learned about problems in the game, they worked to protect head injuries in sports. Again, there was no such thing as the NFL until the year 1920. In the early years of the NFL, the league did not have the reputation it did today. In fact, in 1926, Red Range, the galloping ghost, when he went to enter the NFL, he was talked out of it by his coach, but ahead of Big 10 football, and by his father. At the time, football was seen to be on a professional level a game of disrepute, but of course that's changed. The NFL has become big business, extremely profitable in part through their media contracts and by the 1950s the NCAA had recognized that professional sport was big business. So while they continued to purport to be amateur, the NCAA at that point

shifted a lot of its focus into broadcasting rights and making profits as well detracting attention that they once placed on protecting the game from head injuries. Now, today it's created an unusual situation because in the sport of boxing Congress stepped in the year 2000. In the 2000, Congress said that the sport of boxing has too great a risk of head injuries and passed the Mohammed Ali Act. One of the requirements of the Mohammed Ali Act was entirely to separate the role of league ownership or which would be known as the managers and the boxers and their promoters. The Mohammed Ali Act as a matter of federal law has required there to be outside doctors that oversee the boxing events and totally separated the interests of the athlete from the interests of those that profited from the event, but we don't have that in football. We don't have that in professional football perhaps because Congress feels that the collective bargaining agreement between the teams and the players' association sufficiently protect players' rights. As to why we don't have that collegiate sports, well, I leave it to you to make your own assessments about how college sports are treated and governed in this country, but the time seems to be overdue especially since one can question whether the NCAA really today serves primarily for the purposes that it was created to protect athletes especially football players from head injuries or that the interests of the association are no longer aligned with the athletes itself. But these are issues we'll have to look at, whether the federal government should get involved or whether the lawsuits that will spoken about later today will be playing an ample role in creating change, and thus we don't need federal law.

Andrew Brandt – Dr. Marino? I'll give you wide berth here to talk about diagnosis, treatment, and return to play issues.

Dr. Michael Marino – Yeah. I could use a wide berth. First of all, I'm very happy that this event is going on so that we can really raise awareness of all of these issues and at the same time that I'm happy that this event is going on, I am totally and completely disheartened at the stories of the gentlemen who are up here before us. You know, my role as a physician is to protect my patients and their brains and their heads and, unfortunately, too often in the past and even ongoing now that's not happening. I could address those issues that those players brought up and I could talk for two hours, but there's no time for that so I'm going to try to hit the highlights and hopefully there will be time for questions as well. If there are two points that I want everybody to take away from this, the two main things I want people to know are that concussions

happen in every single sport. It doesn't matter if it's a contact sport, a non-contact sport, a team sport, and individual sport. They happen to all athletes of all ages and all levels whether it's amateur, semi-pro, or pro and they happen of course outside of the sporting arena as well, but no athlete is immune from the risks of concussion. The other thing that I want everyone to know is that every case should be treated individually and how one person responds and how one player responds could very different from any other person. And while there are some overlying guidelines and concepts that dictate our treatment, every single case should be handled individually and thought of as unique.

What is a concussion? I think that's something that people really struggle with and I think people also get frightened when they hear the term traumatic brain injury because that's really what a concussion is. It's a trauma to the brain so there is force that is applied to the brain. It can be applied to the body or to another part of the neck and then transmitted up to the brain and it results in a functional injury, not a structural injury, and this is something that people also have a really hard time understanding because our conventional methods of measuring brain injuries with CAT scans and MRIs, which are going to show skull fractures and areas of bleeding and swelling within the brain. We don't see that in concussion and that's because the injury itself is at truly a microscopic level, but it's a microscopic level affecting hundreds of thousands or millions of neurons in the brain. Without going too much into the gory details, what happens is there's a force applied to the brain. There is a stretch force applied to the neuron, which is each of the individual brain cells. When the neuron is stretched, some of the charged particles that are supposed to stay outside the cell go inside the cell and it sets of a cascade of events that leads to damage to the cells' energy making capabilities. So in essence, a concussion is an energy crisis of the cell.

The brain cell cannot come up with enough energy to do its job correctly. So whenever you then task this cell, whenever you ask your brain to work or to think, it can't meet up with demands and it results in the symptoms that people experience with a concussion and exercise and thinking and using your brain, these are the demands of the brain, which is why athletes and patients with concussions are told to rest. I'll briefly touch on the signs and symptoms of concussion. I think that this is a fairly very well-educated group in fact, but all too often these signs of concussion are missed or overlooked. If you're waiting to see a loss of consciousness at the

time of an injury, you are going to miss more than 90 percent of sports related concussions because 10 percent or less of sports related concussions result in loss of consciousness. So instead what we should be looking for is these kinds of transient alterations in brain function: confusion, loss of memory, athletes who are unsure of their assignments that look like they're in a daze or a fog. They don't know what's going on in the game. They don't know the time, what half it is, who they're playing, what the score is. They of course could get a headache. They don't look as coordinated as they did. They appear that their balance is off. They can have some changes in their vision. They may feel nauseous or alternatively it could be they see stars for a second and then it goes away. That could be a concussion. It could be that they quote, unquote got their bell rung and you see that all the time. A guy kind of stands there for a second, shakes his head, and then you know he says, "No. No. No. I'm fine." That player should be identified, pulled to the side of field, and evaluated by a trained professional and there's a variety of sideline tools. One in particular is recommended. It's called the SCAT 3 or the sideline concussion assessment test and that's a tool to help to identify an injured player who should then be removed from play and evaluated by a professional. That's what happens at the time of injury and then people go on to develop a spectrum of symptoms that include headaches, difficulty sleeping, changes in vision, nausea, again changes in balance, mood changes, irritability, depression, disordered sleep cycles, and tired all of the time and really having a difficult time concentrating and thinking. People say when I use my brain, when I try to think, I feel like I have to work that much harder to do things that were easier before. These are all signs of an active and ongoing concussion. These are symptoms that need to be monitored for their resolution.

So once someone is identified, what do we do with them? Well, the main prescription is rest and it's cognitive rest and physical rest. Physical rest people get. Okay, don't run. Don't jog. Don't exercise. Don't go swimming. You know, you may not even want to go out too much for long walks. Pretty much hang out around the house and don't exert yourself at all. People understand that. It's the cognitive rest that people have a lot more difficulty with. No TV. No texting. No cell phones. No computers. No schoolwork. No homework. No work of any kind. Limit time doing TV. Limit even time reading magazines. It's got to be as close to sitting in a dark room and doing nothing for as long as

possible. It's not possible to do, but I tell my patients the closer they can come to doing that we believe that the faster they will recover.

And how do we determine when someone is recovered because this is going to factor in on their return to play or their return to activity levels? Well, they should have a full neurologic evaluation and that should be asymptomatic. It should be completely normal. They should have no symptoms at rest whatsoever. If baseline neuropsychological testing is available, it is a fantastic tool. These are things like impact testing that maybe some of you have heard about. It is just that it is a tool. It is not the end all, be all. It is not the only thing that used to determine if someone has recovered, but when it's available and when used correctly it is an excellent tool that a clinician will use to help determine if a patient has recovered to their baseline. Once they've completed resting, they're asymptomatic, they've returned to school or work, and they're not having any of their symptoms, they're neurologic exam is normal, their testing has returned to baseline, and they're not on any medications that could interfere or you know mask some of the symptoms, then that would be a time to consider return to play. There is a host of other factors that go into that including age, possibly gender, how many concussions they've had in the past, and that's why I say it's a very individual decision, but once you reach the decision that somebody is ready then they should undergo a graded return to play process through a professional. The best case scenario would be an athletic trainer and you guys have probably heard about some of this about working with athletic trainers particularly you know in the NFL and their athletes and the stages that they go through, which includes you know, first the first stage is all rest and then it's going to be light exercise and then sport specific training and then sport specific training with drills. So that would be you know dribbling or throwing or using a puck in hockey and then it would go on to full contact practice and then full contact game. All of the time, they're being evaluated for a return of symptoms. If at any point they have a return of symptoms, then exercise is stopped. They're told to rest for a day and then they will return to this protocol the next day, but just at a lower level and each of those steps takes place over the course of one day, so one day rest, the next day would be light exercise. The next day would be moderate exercise and so on.

Now, I tell all of my patients that I anticipate that they will have a full neurologic recovery and that the goal would be to return

them to their normal activities and hopefully to their sport. Unfortunately, the gentleman that we saw before us, these individuals have not had a full neurologic recovery and I'm not sure if we'll have time during my talk because I want to give Cailyn enough time to talk, but with each successive concussive injury typically the recovery time becomes longer and longer. The amount of trauma needed to the brain to induce a concussion gets lower and lower and the risks of permanent neurological sequelae increase. The magic number is three. It's not to say that everybody that has three concussions isn't going to recover, but evidence tells us that once you reach that third concussion level the chances of you having permanent long-lasting symptoms greatly increases and that's information you want to use to determine if return to play is really advisable or not.

The last thing I want to say is that there is a difference between permanent neurologic sequelae from multiple repeated traumatic brain injuries and this entity called chronic traumatic encephalopathy. So chronic traumatic encephalopathy is a distinct pathologic entity in which there is an abnormal protein that is released into the brain that causes atrophy and loss of brain tissue. It can only be diagnosed by a biopsy, which means you have to take a piece of brain. So it's not done until someone has died, but there is a spectrum of symptoms that include depression, loss of interest, irritability, problems with memory, and we don't know how many injuries, how many concussions it takes someone to develop this. It's very difficult to diagnose and it should be a diagnosis of exclusion meaning you need to work up other issues before you tell someone they have chronic traumatic encephalopathy. So it's very difficult to determine if somebody is having just issues with mood or memory that is related to multiple concussions or this distinct pathologic injury, but anybody who is experiencing these signs should be seen and evaluated by a trained professional and have a full neurologic workup.

There's a lot more that I'd like to say, but I'm going to step aside so Cailyn has plenty of time and if there are more questions hopefully we can answer them afterwards.

Andrew Brandt – Cailyn, as I mentioned, is a student here at Villanova Law School.

Cailyn Reilly – Thank you and I noticed that that's all the program says about me, but I did write an article on concussion problems in the NCAA. I brought some copies with me. I published it in the UCLA Entertainment Law Review and after the sym-

posium I think Mr. Moorad is going to sign baseballs and Mr. Westbrook is going to sign footballs and I'd be happy send you home with a signed copy of mine. Don't tell them I said they were going to be signing anything after this.

In my paper I argued for many of the things that you all heard the first panel talk about. I argued that the NCAA needs implement a nationwide specific concussion management protocol, an education program for student athletes, coaches, athletic trainers, professors, and advisors, and for a bright-line rule for when it's appropriate if ever for an athlete that's suffered a brain injury to return to play. But I think that the main reason that I was asked to sit on this illustrious panel here is that because of my personal experience with concussions and my brother's personal experience with concussions, we all played Division I sports and had some experience. And in researching for the article that I wrote, I talked to a lot of people who had similar experiences and just this week I spoke to one of my former coaches who reminded me of her son's experience and that story kind of captured some of the most salient points I think from all the stories that I heard in the two years that I was working on this paper.

So what happened there was I remember her son well. He was an all-star athlete in high school. He was honor roll, president of his class. He was really going places. He went to a top school and applied for and got into one of the most competitive academic programs in that school. He also played lacrosse and you heard Taylor earlier say, "No, it's not just football. It's soccer. It's lacrosse. It's not just boys' sports. It's girls' sports also." And he did really well. He was a huge contributor on the team and then one spring he suffered a series of three concussions in a four-week period. You just heard Dr. Marino it's kind of a magic number, but these concussions went undetected and unreported until he got the third one and it knocked him out. It was a hit from a guy who was 50 pounds lighter than he was and relatively light. It was just practice, but it knocked him out. So at that point he really couldn't hide that he had been suffering concussions and symptoms of concussion. So he came out of practice. The trainer told him to rest. You know, he said he wouldn't go back for a little while and you know he did that. You know he didn't go into practice, but he was still expected to show up at afternoon practices and stand under the lights for three hours every day. He was still expected to go to the morning lifts and morning workouts. So you know he was kind of doing the opposite of what you again just heard Dr. Marino say is

the prescription for people suffering symptoms of concussion. He was also still trying to keep up with his schoolwork. Remember he was in a really competitive academic program and it was hard for him to do. He really struggled and eventually it reached the point where he just kind of ceased functioning academically. Again, it's a functional injury. At that point, he decided to take a year off from school, went home and rested and recovered or so it seems I guess. He went back to school the next year, reenrolled in the academic program, and he was also able to walk back onto the lacrosse team. So I think that's a huge problem there, but there was nothing that anyone could do to stop him from doing that. There was no rule that said once you've taken an academic leave of absence because of suffering head injuries you shouldn't go back to play. There was nothing that any of the doctors or you know like a parent could do to stop him from going back, and the coaches weren't helpful. He was a huge contributor. They wanted him to go back and play so he did risking near certain further brain injury and it wasn't very easy for him to go back. He lost interest in playing his sport. He had been a huge contributor and he was moved to the practice squad. He struggled academically. He had to withdraw from the program that he was in. He changed his major. It was really hard for him and based on other stories that I've heard and my experience I know and what we just heard this morning in the first panel, these things aren't unique to that situation. Lots of athletes feel this way. Lots of people struggle with that and that's kind of the reason that I wrote the paper for those kinds of athletes. And again, the NCAA says that there should be a concussion management protocol for each team, but it goes no further than that. I think that there needs to be a very specific protocol that's uniform amongst all schools so that student athletes realize or can expect that they're going to receive the same treatment after they suffer a brain injury whether they're at the University of Maryland or at UCLA. You heard this first panel say this is also about education. It's not the huge knockout hits that do the most damage. It's the multiple sub-concussive hits that over time and throughout an athlete's career are the most damaging and the ones that go undetected. So ultimately, it's got to be the athlete who realizes that you know these are the problems that I may face later on down the road and it's not worth two more years of a collegiate athletic career when I'm facing potential problems for the rest of my life.

And lastly, there needs to a bright-line rule. I know Taylor said that it's difficult to kind of draw the line where enough is enough

and an athlete can't ever return to play, but certainly in this case where the athlete had to withdraw from school for a year because of what his sport had done to him, to his functioning, there's no way he should have gone back.

Andrew Brandt – Thanks, Cailyn, and these stories are heartfelt and emotional and I just want to say when we announced this symposium, I've got literally a dozen emails similar to this story. People just want to express what they've gone through, what they're kids are going through, what they're family members are going through. Professor Edelman, listening to all of these and of course we're going to talk about the NFL case next, but duty of care, NCAA, amateur organizations, other sports, what is the responsibility of these leagues, of these teams, of these coaches, of these trainers, to prevent situations like this?

Professor Mark Edelman – Frankly, I believe the duty of care is extremely different for the NCAA than it would be for the NFL and for people that are following the NFL litigation, which I know will be spoken about in a lot more detail in the next panel. If the NFL might have problems, with respect to the NCAA, we haven't seen anything yet. In torts, the duty of care is the obligation that one party has onto another, and is a situational obligation, meaning that the duty of care is not identical for every party, but certain behavior and actions that you take could create a heightened or increased duty of care. The NFL's relationship with its players is one as employer and I believe the next panel will discuss how there might be certain contacts with respect to the NFL that could elevate their duty of care such as the access to certain information, but if we look at the way the NFL operates today since the late 1960s, I believe 1968 to be exact, the NFL players have been unionized and absent a couple of short periods of time where the players' association has decertified, the union has bargained on behalf of the players with respect to hours, wages, and working conditions. That doesn't mean by any stretch that the NFL does not have a duty of care to the players, but the NFL's duty of care would be similar to that of another employer in a unionized industry. With respect to NCAA however, we're talking apples and oranges. All you need to do is go to the NCAA's own webpage and look at their history and they will say first that they're a body that exists to protect the safety of student athletes and second, the story which I told before about Theodore Roosevelt encouraging the creation of the NCAA for purposes of preventing head injuries, that's on the NCAA's very own website. Now, by purporting that they're an organization that exists

to protect student athletes for head injuries, in my opinion they create a heightened duty to protect student athletes from head injuries. It's true the NCAA has changed its role since 1953 since when they elected Walter Byers as their first executive director. And the way we look at the NCAA today, we might say first and foremost they're about whatever the NCAA calls amateurism, and second that they're about frankly making profits internally for the institution and for top coaches, but by taking on that obligation and standing behind that obligation, in many ways it has precluded others from serving in that same role with respect to protecting the student athlete. My opinion is we have reached a point in time where the NCAA has strayed so far from truly protecting the safety of student athletes and so much of their incentive has become maximizing profits that we cannot go back the other way. We need a separate outside party to be determining the health and safety of student athletes, and we've reached the point in time where the obligation is on the NCAA to totally separate itself from that particular role because, as you remind yourselves that unlike the professional football players and professional athletes in other sports where at least the union has the opportunity to bargain on these issues, the NCAA purports that they are to protect student athletes and, thus, by not doing so it would create a breach.

Andrew Brandt – Dr. Marino, what would you advise leagues, teams, the NCAA, amateur associations? We're not talking about professional sports right now and their duty of care. What would be the adequate level?

Dr. Michael Marino – I would advise for – first of all, I am a proponent of baseline neuropsychological testing and not full spectrum neuropsychological testing, which is a process that takes several hours or sometimes several days to actually do, but what I'm talking about is some of these computer based tests, which I alluded to before like IMPACT, which is not the end all, be all, but is a fantastic tool when utilized correctly. I think that it goes a long way to help to protect athletes. Additionally, I think that each concussed or injured athlete should be identified and evaluated by a trained professional prior to their return to play, and what does that mean? Does that mean, you know for the NFL, I know you don't want to talk about the professional athletes, but you know, does that mean an independent physician who is not employed by the team? Well, that's probably the best way to go, but for a college athlete does that mean somebody other than the campus-based sports medicine doctor? I don't think so. I think that the campus-

based sports medicine doctors really have the best interests of athletes in mind, but it needs to be somebody who has experience and training in head injuries and concussion. Now, in our state of Pennsylvania, that is mandated to be – it can include neurologists, my specialty, which is physical medicine and rehabilitation, and my fellowship training in brain injury rehabilitation. It can be sports medicine subspecialty trained physicians, or it can be clinical neuropsychologists. The importance is that it needs to be somebody who knows what they're doing and knows what to look for because as I said before each case is highly individual and there is a host of factors that goes into determining whether or not somebody is ready or it's advisable that they should play. And again, it can be age. It could be gender. It could be history of concussions. It could be their other medical history. Do they have a history of headaches or psychiatric disturbances or attention deficit hyperactivity disorders, or what is their style of play? Are they a particularly aggressive athlete that has been known to frequently get injured? All of these things need to be taken into consideration so that they can be addressed and properly assessed and treated before somebody is allowed to put themselves back out there where we know you know they're going to be at risk again no matter what we do.

Andrew Brandt – Cailyn, in your article you outlined three steps you thought the NCAA should take. Do you want to talk about those?

Cailyn Reilly – Sure. Again, the NCAA kind of takes the step of saying schools need to implement management, concussion management protocol, but goes no further. It's kind of a regulation with no teeth. The NCAA I think everyone knows is very good at compliance and making sure that their rules are followed, but in this area they really haven't done anything and they've allowed for a really wide range of different kinds of adequate and inadequate kinds of concussion protocols to be implemented by the schools. Again, I think that if the NCAA is going to take the kind of step to say schools need to have a kind of protocol, they need to go a little bit farther and make sure that that protocol is complied with and adequately serves the student athletes. And at the risk of sounding redundant, education is very important. You know when you're experiencing symptoms, you're the only one that knows that you're experiencing these symptoms, and if you can realize what the long term potential implications of playing through a concussion are, you know, hopefully, you're going to make the right decision and get some help. And then I guess just finally, I'd like to say that –

like I said before – the elements of these stories are not unique. You know they're pretty common throughout all the stories that you've heard today and I think it's important that people tell their stories and realize that other athletes feel this way and you can get help and you can help others by telling your story. So I admire the maturity of the athletes that have come forward and told their stories and the wisdom I guess that they've shown in doing so.

Andrew Brandt – You questioned the optimal standard of care, the optimal duty that everyone has sometimes butted up against: the issue of money and resources, and again, when we talk about NFL, when we talk about major league sports, they have the resources for numbers of trainers, a number of independent doctors. What about not only NCAA amateur sports, but sports that kids and parents here have their children in and don't have the resources to have trainers on the sideline and don't have the resources for independent examinations and baseline? Where is the duty of care there and where should it be?

Professor Marc Edelman – If I could take both pieces of the question separately. You first mentioned, Professor Brandt, about the NCAA and then about everywhere else. With respect to the NCAA, I don't believe because of the fact that they're not quote, unquote "professional" that it in any way reduces their duty of care. If anything, it should increase it. Just the other day I happened to have been on the website of the highest paid New York State employees. This is as of two years ago. The highest paid professional in the entire S.U.N.Y school system was the basketball coach at that school. So without paying their student athletes, there is a huge fund of money that gets allocated internally. Right now, we have basketball coaches and football coaches and athletic directors that make several millions of dollars because that's where the profit goes, so it doesn't look like profit at the end of the day if it's allocated back. So the reality is if we substantially increase the expenses for the NCAA in terms of care and protection of the student athlete, it likely will be shifted away from the free rides or any additional wealth that they garner based on the fact that they don't pay their student athletes. With respect to kids' sports and true amateur sports, it's a much more difficult issue. I certainly believe with more education on the issue, there would be opportunities for those with the medical background who either have children that are playing the sport or who recognize the importance of this in communities where there might be less parents who work in the medical profession to play in role on the sidelines. And ideally, I

think if as these issues come to light and esteem and appreciation is played towards those that really protect against head injuries, ideally people would volunteer their time at least in their communities or communities in need to provide some of these services.

Andrew Brandt – Dr. Marino?

Dr. Michael Marino – Yeah. That's a common question in healthcare, in journals, when you're talking about resources and you know, how are we going to utilize our resources best for the greater good as you mentioned. Some sports that don't have the money basically to support – whether it be based on testing or not. You know, the example is if we gave everybody in American you know a full body MRI every year, we'd probably find more cancers and be able to treat them sooner. Right? But there's no way our health system could afford that and it would be an improper utilization of our resources. So I think it goes back to the question of well, you know, is it a proper utilization of our resources to institute baseline testing and independent medical examinations for all of these athletes and that's certainly a policy level question and I'm not sure if I'm really appropriately qualified to answer that. Of course, I definitely would again advocate for at least baseline neurologic testing, and it really doesn't cost the district or an institution any money to have somebody seen in an outpatient office by a physician or any clinician trained to deal in concussion care. You know there's not a great expense that goes into that, into a single office visit or even you know reported office visits. So at the very least if there are not really resources to institute baseline testing, really having every concussed athlete identified and assessed by a professional is really the way to go. And each state varies in its laws regarding what needs to be done. You know, luckily in Pennsylvania that is the case, but it varies state to state and is that something that has to come from a state level or from a federal level? I think there's other people here who might be more qualified to answer that question.

Andrew Brandt – On the medical issue, let me follow up with liability as we're talking about liability from the league and team and amateur association point of view. What about the medical? What about the malpractice issue? Does that with concussions now being so prevalent in the news, are there worries about overtreatment, under-treatment, over diagnosis, those kinds of things going on?

Dr. Michael Marino – I think it doesn't enter my mind truthfully when I'm treating patients. I can't speak for all physicians, but

I think that the general concept is that you can never be wrong in being overcautious. You can only be wrong if you send an athlete back too soon and that's why we need to examine the whole picture and take each case individually particularly with young athletes. For the most part, you know, parents are happy to go to a doctor and have the doctor say, "I don't think you should go back yet. I think that you should continue to rest and you should work on these things." It certainly changes when you move up the spectrum into even collegiate and professional athletics, but I think even at those levels the only mistake that you can make is to bring somebody back too soon when they're not ready and if you're acting in good conscience and you were using, you know, all of your skills and you're acting to protect a patient, then there is really no liability issue from a medical standpoint.

Andrew Brandt – Final comments, Marc?

Professor Marc Edelman – I think this is an important step in the right direction. While I've managed probably ad nauseam today that the NCAA since 1906 was supposed to be involved in protecting head injuries in sport, it's only in recent years that we've started having the discussions of concussion and protection and liability and how do we protect the athlete and the student athlete discussed at sports law symposiums and the ongoing litigations that are taking place by the NFL players against the league, as well as the earlier lawsuits that were filed against the players' association I think are critically important win or lose. Win or lose irrespective of result, we are finally getting the mass mainstream attention and not only in law schools, but in the media about the issue of safety and football. And for the first time we're having professional athletes and the mainstream public ask the question, "Is it safe?" Would we want our kids playing this sport? And if nothing else at the end of the day merely by asking these questions might lead us to making some changes albeit how minor they may be in the game just to make it a little bit more safe moving forward. And if the NCAA has moved away from that mission, it looks like society overall is picking it up and that's why I think we should feel very good about and very thankful for those people who have been discussing these issues far longer than I have. They've been on many of these panels over recent years.

Andrew Brandt – Thanks, Professor. Doctor?

Dr. Michael Marino – Thank you. I'll sum up by reiterating the main two points that I wanted you guys to take away from this and that is that concussions and sports related concussion affect every

single athlete at every single level and every single sport. No one is immune to the risk and I think people have a feeling that some of us folks who are advocating better identification and better treatment, some of us are anti-sport and that's not the case at all. You know I'm a huge sports fan and as are all of the other clinicians I work with who treat these athletes and we want to see athletes succeed. We want to get them back to playing, but just because somebody is returning to rowing doesn't mean that you can return them sooner if they're not fully recovered than you can if you're returning somebody to be a football quarterback. So again, each case is unique. It needs to be treated individually and by a professional who has experience in these matters.

Andrew Brandt – Thanks, doctor. Cailyn?

Cailyn Reilly – Thank you. I agree. I'm certainly not up here advocating for the end of contact sports, but I think that there has to be a better way to manage concussions that are inevitable in all sports and, again, I think that the people who are coming forward and sharing their stories and letting athletes who are struggling know that they're really not alone and that there are ways to kind of cope with what's going on and educate other people who are feeling that way. It's very important.

Andrew Brandt – Thanks, Cailyn. Thanks for sharing and thanks to this informative panel. We really appreciate it. Thank you. Now, we're going to move right along with our NFL concussion litigation panel.

PANEL 3: CONCUSSION INJURY LITIGATION V. NFL: LOOKING AT BOTH SIDES

Andrew Brandt – We'll continue with what I hope is an extremely informative and interesting event. This panel we want to discuss may be the most public litigation going on in America, which is the NFL concussion litigation with 4,000 former players suing the NFL to be heard here in Philadelphia, at least the next round, which is going to be the dismissal argument for CBA purposes of the players' case. With 4,000 players suing, that is one-third of all former NFL players that have joined this lawsuit. Here to discuss it, I do want to say we did offer the NFL an opportunity to send a lawyer or representative. At one point, they did accept and then they declined with the case being so sensitive and I know our representative of the plaintiffs' side is going to be limited in what he can say with it being an active litigation, but let's talk about it. To my right is J. Gordon Cooney, one of the managing partners at

Morgan Lewis and distinguished alumna of this law school. Again, he is not an NFL attorney. He is representing that side for us. He has been gracious enough to do that having handled defense work for class actions.

To my immediate right is Paul Anderson, founder of NFLConcussionLitigation.com. Paul has become a cult hero to people studying this issue, people studying this litigation, and a real example that I can use to my students, someone fresh out of law school that has made a name for himself in the industry. We're happy to have him. And to my left is Sol Weiss, Anapol Schwartz, distinguished alumni of this law school, one of the lead co-counsels in the litigation against the NFL. I will let each of them talk about their feelings on the case and then we'll have a discourse about it. Gordon?

Gordon Cooney – Thank you, Andrew. Good morning. Let me set the stage a little bit so that people understand what is a multidistrict litigation in Philadelphia. First, there are a large number of individual personal injury claims brought by former players and second, there is a class action on which Mr. Weiss is lead counsel that's brought on behalf of all the players if you will, in which the relief being sought on behalf of all those players is a medical monitoring fund for those players and for the future. And so you have an individual litigation and you have the class litigation. I want to address two buckets of issues that relate to what's happening in the litigation. And first, there's an issue concerning whether or not these claims, whether class claims or the individual claims, can be brought in the court system in court or whether the collective bargaining agreement between the players and the team essentially preempts the claim and sends the claims off to arbitration. So I think an important thing to remember here is the NFL's position on this is not the claim shouldn't be heard; it's they shouldn't be heard in the court system, that they're a subject of the collective bargaining agreement and they ought to be heard in arbitration, which is where the collective bargaining agreements send disputes.

What the league essentially says is and federal law provides that if a dispute involves the interpretation of a collective bargaining agreement, that that claim is preempted by federal law, Section 301 of the Labor Relations Act, and that those claims should be heard pursuant to the dispute resolution mechanism established in the collective bargaining agreement. And so the league's position is all of the cases involve an interpretation of the collective bargaining agreement. That's going to be the critical issue or one of the critical issues that Judge Brody is going to have to decide on the Motion

to Dismiss. And so the position of the league is that the collective bargaining agreement deals with issues concerning player safety, deals with issues concerning player medical care, and in fact, you heard a lot during the previous panels this morning about return to play. The collective bargaining agreement specifically addresses return to play issues and so the NFL's argument at this point is this case at its heart involves interpretations of the collective bargaining agreement and so this dispute doesn't belong in the tort system in courts. It belongs in the arbitration system as established by the collective bargaining agreement. So that's one thing to keep in mind.

The second issue about how these disputes are going to be resolved really have to do with whether these disputes have to be determined on a player-by-player, situation-by-situation basis, or whether the class action provides an appropriate means for resolving the controversy. Again, the issue is not whether the claims can or cannot be heard. The issue is really how they should be heard. Can they be all aggregated together in a class action or do they have to turn on the individual facts and circumstances of each player including, for example, what their history of injury was before they got to the league, how much time they actually played in the league, what the extent of any head injury or head trauma they experienced in the league, and how their situation was actually managed by the team doctors and the teams. Did the team rush them back into play? Did the team follow the kinds of protocol that you heard from Dr. Marino? How were their individual circumstance managed? The league's view on all of this will be that these are inherently individualized issues and that the circumstances of each player, what they brought to the league before they got there, what their experience was in the league, what their injuries were, and how they were treated. Those are all incredibly important issues in this controversy and they can't all be aggregated in the context of a class action. Now, Andrew wanted me to talk for a minute just to give you an overview of the class action rule. I'm going to take what could be a couple-hour conversation and try to really speed through it.

But the federal class action rule is Rule 23 and it basically has two pieces to it, Rule 23(a) and Rule 23(b). Rule 23(a) says that in order for a class to be certified there has to be numerosity of plaintiffs and that is clearly true here. There are a large number of former players and current players that would satisfy the numerosity requirement. A critical question though is whether there are com-

mon questions of law or fact, and I'm going to come back to that, but the Supreme Court in the *Wal-Mart v. Dukes* case from a couple of years ago really elevated the standard for commonality and will become a very important issue in the NFL litigation. The plaintiff also has to show that the named plaintiffs, the representatives who are suing on behalf of the class, have claims that are typical of the claims of the class members. And finally, that the class members will fairly and adequately – or the class representatives will fairly and adequately represent the interests of the class. Now, commonality and this question of whether the claims of the named plaintiffs are common to the class will be an incredibly important legal issue and factual issue if the case gets passed to preemption, a collective bargaining agreement argument. Here's where the Supreme Court's decision in *Wal-Mart v. Dukes* from a couple of years comes into play. There, Justice Scalia writing on behalf of the majority of the Court announced a standard for commonality that quite frankly is higher than had been interpreted for a number of years and what Justice Scalia said among other things is that the plaintiff has to demonstrate that the class members have suffered the same injury and not just that their claims depend on the same common contention of law. And what he essentially says is the proof as to one claimant has to be the same as the proof as to the members of the class. What he says is the common contention "must resolve an issue that is central to the validity of each one of the claims in one stroke." So if the evidence that proves the claim as to one player would prove as to the others, that's a common question.

What he also said is when a plaintiff is seeking monetary relief in a class action, that is probably not appropriate for the provision of the class action rule that deals with injunctive relief and I'm going to get to that in a minute, but this *Wal-Mart v. Dukes* case will be an incredibly important piece of the issue for the class action determination if the case gets past the preemption stage.

The other thing that the plaintiff has to do in a class action is satisfy one of the provisions. Rule 23(b) has three subparts, two of which are potentially applicable here. Rule 23(b)(2) deals with claims for some-called injunctive relief and that is where the plaintiff is seeking for an Order compelling the defendant, in this case the NFL, to cease doing something or to perform a certain type of activity, a command to stop or a command to take action. Rule 23(b)(3) deals with claims for damages where the plaintiff is actually seeking money. And the question of what type of class action will be involved here whether this is a (b)(2) class, which is what the

Complaint in the case pleads, or whether it's going to be a (b)(3) class, a damages claim, will be an important legal determination that Judge Brody is going to have to make. Most people think that the standard for (b)(2) certification, although the relief that you can get is more limited, is a lower standard than (b)(3) certification because to get damages under (b)(3) you have to not only show commonality and the other aspects of Rule 23(a), but you have to show that the common issues predominate in the case. In a class action, the superior means of resolving the controversy and a class action would be manageable.

A couple of final thoughts to frame this, the Third Circuit Court of Appeals decided a case involving Roman Haas. It was a toxic tort case called *Gates* that was decided after the *Wal-Mart* decision. That case casts considerable doubt over whether a medical monitoring case can satisfy the test for 23(b)(2), perhaps a lower form of relief, the lower standard of proof type of class action, but even there what the court ended up determining was that a medical monitoring case involving a toxic tort situation, the release of pollutants into a neighborhood. What the 3rd Circuit held was the amount and nature of the exposure that each of the residents in the neighborhood experienced differed from class member to class member and so therefore, the question of whether all of the residents of the neighborhood were entitled to medical monitoring couldn't be resolved on a class wide basis because there wasn't sufficient commonality and cohesiveness. I think you can expect that if the case gets to the class certification stage, what the NFL will argue is number one, (b)(2) doesn't apply, but even if it does, the amount and nature of time that the players played in the league, the amount and nature of any head trauma that they experienced, the manner in which their head trauma may have been addressed by the teams and the team doctors, those are inherently individual issues. They aren't common and common issues don't predominate.

To the extent that the case is a 23(b)(3) case, you have the heightened standard of predominance and so that same argument really exists on steroids if you will. The league is going to say not only aren't there common questions, they clearly don't predominate. You heard Dr. Marino say that all of these cases are individual and it's not one size fits all. The league is going to say what these various players experienced, whether they had an injury, how those injuries were treated; those all go to the question of number one, whether the teams or the league violated a duty to

these players, and number two, whether the players actually suffered any injury as a result of the way in which they were dealt with by the league. So those are really the main arguments that are going to be made. I think a lot really depends on certainly – the key opening question is going to be whether or not these claims are preempted and how it would be sent to arbitration. And that will be the initial dispositive issue because if Judge Brody concludes that the claims involve an interpretation of the collective bargaining agreement, essentially all these claims will be left for arbitration.

Andrew Brandt – Paul?

Paul Anderson – That's going to be tough to follow. Thank you. All right. Well, I'm going to give you brief history of about how the litigation started and then touch generally on the allegations. I'll let Mr. Weiss get into more detail and he can advocate for his side and then I'll touch on the preemption issue.

So starting in July of 2007 that's whenever the first concussion lawsuit was filed and it was a personal injury action that was filed out in Los Angeles in California. Shortly thereafter, Mr. Weiss and his law firm filed the first federal class action here in the Eastern District of Pennsylvania. From there, the plaintiffs' lawyers took note and they said, "Hey, they're trying to take on the NFL. The NFL is a nine billion dollar industry. Let's start rounding up players and let's take on the NFL." So lawsuits started being filed all across the country and the NFL was like, "Uh oh. We have a problem on our hands. We need to get this thing consolidated into one single forum." And so the federal courts have a mechanism called multidistrict litigation that allows for consolidation of all these lawsuits. So in January of 2012, the NFL's Motion was granted that brought every lawsuit, whether it is filed in Florida, California, Missouri, wherever – now Philadelphia has become the battleground for this litigation.

And so now we're at 4,000 players and over 216 Complaints, and the first threshold issue is this issue of preemption. This issue could potentially be a billion dollar issue and the NFL knows that a lot is at stake here. If the players win on this issue and they're able to successfully to defeat the NFL's Motion to Dismiss, the NFL is going to have to open up their pocketbooks, not necessarily their pocketbooks, but they're going to have to open up their treasure box as Mr. Weiss would say.

And it's going to grant the plaintiffs' lawyers an opportunity to go fishing. They're going to go on an expedition of discovery and they're going to be able to look into all the reasons why the NFL cre-

ated the Mild Traumatic Brain Injury Committee. The plaintiffs' lawyers will have an opportunity to depose Dr. Elliot Pellman among others and find out what exactly the NFL knew and when and how they responded to that.

So the NFL is going to do everything possible to get this case dismissed without even having to get to the merits of it. So the NFL went out and hired one of the most supreme litigators in all of the country, Mr. Paul Clement. He argued the losing side of the Obamacare case. He's been active in multiple sports law cases. So the NFL hired Paul Clement and the plaintiffs' lawyers also hired an appellate law firm in D.C., a gentleman by the name of David Frederick, who probably wrote the majority of the brief and David Frederick kind of has an interesting relationship. David Fredrick was a Supreme Court law clerk for Justice Byron Whizzer White and, as you may know, Whizzer White was also a professional football player for two or three years and so I think that symbolism is great. You're going to have David Fredrick, whose mentor was Justice White, and David Fredrick will be arguing the players' side.

And so on April 9 oral arguments will take place and I'd certainly advise all the law students here, if you can get out of class, to make it for those arguments because that's going to be a Supreme Court-like showdown at the district court level and a lot is riding on that issue. From there, Judge Brody will take the matter under consideration to determine whether the players' claims are really inextricably intertwined with the terms of the collective bargaining agreement or if, as the players allege, these are separate common law claims that do not have anything to do with an interpretation of the collective bargaining agreement. And for Judge Brody, it will probably take her a couple of months because this is an extremely difficult issue, the matter of preemption. One professor once said that federal labor preemption is one of the most difficult issues in all of American jurisprudence.

And then of course, following Judge Brody's decision, it's more than likely that this case will then be appealed to the Third Circuit. I'm sure the defendants, the NFL, will seek to try to file a Motion to stay, to continue, to prevent the plaintiffs' lawyers from engaging in discovery, but I doubt Judge Brody will grant that and will allow discovery to proceed as this case is pending at the Third Circuit. There is also a potential of this case, certainly on the preemption issue, ending up at the Supreme Court level. It'll probably take a few years for that to work its way out, but that's the preemption

issue and I guess I'll let Mr. Weiss get into the allegations of their Complaint.

Andrew Brandt – Thanks, Paul. Sol, the world awaits.

Sol Weiss – Well, I can start. Can you hear me? Is the mic on?

Andrew Brandt – Yeah.

Sol Weiss – Forty-one year ago, I graduated from Villanova. I thought I had a solid legal background. I know I was trained to one day be a leader in what I did. The old law school was just up the hill from where we are today and we had intramural rough touch football teams, and we played nearby where the parking lot is. I've been active on the Board of Consultants for many years and was instrumental along with Gordon and others to raise the funds for this building. So when Andrew asked me to speak it was a no brainer. I'm back at Villanova and I'm still connected to football. So let me say, Andrew, and to Jeff, thank you for the invitation. It's a privilege and an honor. More importantly, it's a privilege and an honor to be chosen as the co-lead counsel for more than 4200 retired football players in the NFL and let me correct one statement. We are only representing players who retired from the game before August 4, 2011. That's the date of the CBA group. Now, I was amazed at the panel number one and it's not about lawyers. It's about those four athletes who opened up their hearts to all of us about this terrible condition that affects a lot of athletes and that is they suffer from the effects of brain injuries, either subconcussive or concussive. And so my dreams have come true from the time I graduated from law school. I'm a leader in leading edge litigations and this is one lawsuit that has captured the hearts and minds of most Americans. Every day we read or see something about someone commenting about the plight of these poor players. So I want to start by telling you our clients do not want to destroy football. They want to preserve the game they love and that can be accomplished if the league takes steps to protect the players who suffer from brain injuries and they can do it. And you can see from some of the things that happened recently that the league is taking some steps. It's a little late, but we're going to talk about it, but not only is it about football. This litigation and the public dialog about concussions has changed a lot of sports. You heard Taylor talk about how soccer has changed. Keith Primeau talked about how hockey has changed, lacrosse, not just at the professional level starting high school, junior high schools, and in college. Sports are an important part of our educational process, and we have to make sure that the kids who engage in sports do it in a safe manner.

So let me tell you a little bit before I jump in and talk to the specifics of what Gordon says about what the hurdles are for the players in litigation to what the case is about. The case is about providing security and care to retired players and their families, and you heard from a linebacker. You heard from Brian Westbrook, and I can tell you that I have heard from a lot of players and their wives and their children who talk about how different their lives have become 10, 15, 20 years removed from the sport of professional football. Now, a lot of these players weren't paid a lot of money and they suffer injuries from chronic headaches, depression, dementia, onset of early Alzheimer's disease, and a disease process known as CTE and you heard one of the doctors talk about CTE. Now, for decades there has been published literature that talks about a problem long term with repeated concussive and sub-concussive impacts. It started in the '20s with boxers, but it has been in the medical literature for quite some time. The lawsuit takes the position that the NFL was well aware of this scientific evidence and they also knew of the risks of repetitive traumatic brain injuries. Now, in our Complaints, we say that the NFL had a duty to look at this problem and to protect the players, but instead they deliberately ignored and they actually concealed some of the information from the teams and the team physicians and they're the ones that were trying to help the players. Okay, so what did the NFL do?

They created what is called a Mild Traumatic Brain Injury Committee in 1994. I believe over the course of seven or eight years, they issued 16 different papers all of which said there is no direct evidence or link to concussive injuries and long term neurological defects. Now, they did studies and didn't release their studies and the studies showed that I think the players who had these impact are six times greater than the general population to have long term neurological defects. And that's what this case is about. It's about making the NFL accountable for not being truthful and not protecting the players when they knew there was a big issue. And of course we all watch TV and we used to love to watch the most violent hits that the NFL films would show you every week.

Now, this is a league that has an annual revenue of nine billion dollars and growing. It's an incorporated association, not for profit. Its sole existence is to create revenue for its constituent team members and that's what it does and so when the NFL says, "Hold on. We have immunity. You can't sue us because there is something somewhere in a collective bargaining agreement that

says if you have a grievance, you go do arbitration.” But wait a second. Most of the retired players never signed a contract that was signed with the NFL. That contract was signed with the teams. There are only two instances where a CBA has a signature of the NFL. So that’s a legal question. That’s a legal defense to the request for preemption and I can’t find a single word in a single CBA agreement that discusses fraud, that discusses legal consequences for hiding safety information from the players. I can’t find an opinion anywhere in the legal system that says that fraud should be preempted and that’s one of the arguments we’re going to make on April 9 in front of Judge Brody.

The second thing I want to talk about is that the class actions are only to seek medical screening. They’re not to seek personal injury and the law is pretty clear. That’s a pretty tough burden and after *AFCAM*, which is a Supreme Court decision involving asbestos claimants, I don’t think you can get a certification for personal injury claims, but you can get certification for medical screening and in fact, one of the first cases allowing for medical screenings was *Redland Soccer* right here in Pennsylvania. So we believe that we can meet (b) (3) or (b) (2) when it comes to medical screening or medical monitoring and the law is not clear whether that’s a remedy or legal theory. But in any event, there have been cases in which these claims have been certified and we want to talk about commonality. Well, every single player has the same gripe and that is, “I need to be screened. I need to be tested. I don’t know if my memory loss,” as the linebacker said, “at age 35, 36, or 40 years old is because I’m that old.” And by the way, I’m 66 and my memory is going, but is there another reason? Is it because I played professional football and I got my bell rung more than one time and there are tests that can be done and the players should have them and they shouldn’t have to pay for them. The league that makes nine billion dollars a year and glorifies violence, that’s who should be paying for the medical screening. Now, once a player is found to have a problem, then he should file a lawsuit, an individual lawsuit against the league, and over 4200 players of approximately – I think there’s over 16,000 entire players that are still living, maybe more, they want their day in court and they should have their day in court and they shouldn’t have to go to arbitration and I’ve got to tell you what’s more efficient. Having one lawsuit to resolve these issues or have 4,000 mini arbitrations where you’re going to have different decisions by different arbitrators and guess what? The Federal Arbitration Act says when you have that and you want take appeal, you

go back to district court. They're going to be in the same place they want to escape from.

So from an efficiency point of view, I think having the case in federal court will save money and save time and some of these players don't have the time. So that's my initial response to what Gordon had to raise.

Andrew Brandt – I think rather than me ask questions, I'd like maybe to hear the response from Gordon and Paul in terms of what you've heard from the arguments. I know you're limited on what you can say with ongoing litigation, but you've heard the arguments. How do you respond?

Gordon Cooney – I appreciate that. So I think the first thing I'd say is the case is not about immunity and the defense position is not about immunity. The NFL is not arguing that the claims can't be heard and shouldn't be heard and shouldn't be decided on the merits. The question is where and under what standards and what the league is essentially saying is this case involves workplace safety in a unionized setting in which workplace safety including return to play and medical care issues are addressed in the CBA. They've long been a subject of bargaining and then as a result, this case will involve an interpretation of the CBA and so, therefore, the place where these disputes should be resolved is in the arbitration setting pursuant to the collective bargaining agreement.

Second, the fact of non-signature is not at all dispositive. The *Stringer* case and other cases have essentially said that that is not relevant to this issue, that if the case involves an interpretation of the CBA, the claims are preempted.

In terms of medical monitoring, if the case proceeds in federal court and is not part of an arbitration, the claims are going to be governed by state law and under state law, not only are the factual issues in this case highly individualized, there are going to be extremely predominating and different issues of law that are applied because medical monitoring is a relatively recent creation of the law and state law treats it very differently from one place to the next. In some places, medical monitoring is recognized. In some places, it is not recognized. In those places where it is recognized, some see it as a remedy that's provided if another cause of action is established. In some places, it's an independent cause of action and frankly, the elements of what you need to satisfy to get medical monitoring vary from state to state. One of the critical issues from the defense perspective in the class action is the court is going to have to apply the law of perhaps all 50 different jurisdictions in

looking at these player claims from different states and that's an additional reason why individual issues predominate.

A couple of final points that Mr. Weiss talked about is that what they're seeking is screening and then if the screening shows a problem, the players would have a lawsuit for damages. There are a couple of significant issues there. It is hardly clear that if the players litigate the claims in the class action and it goes to judgment, it's not clear that they will get a second bite at the apple. That may be dispositive of all their claims and so there's an interesting and significant issue about what would be the preclusive and final effect of any judgment in the class action.

Secondly, if you were to assume for purposes of discussion that that judgment was not preclusive and all that we're doing in the class action is setting the stage for more individual cases, there's a legitimate question as to whether any efficiency is served by that. So again, the question here is not whether the merits of these disputes are going to be reached. It's how. Are they going to be reached with some discovery, with expert witnesses in the context of the arbitration under federal labor law in the CBA? And if it proceeds in federal court, do these cases have to turn on the individual facts and the individual applicable law including such things as what was the player's experience and injury history before becoming part of the league? How long were they in the league? What was their head trauma? Was there a head trauma if any treated properly by the players? Those are individual issues. The question of whether the players suffered an injury and whether there was a breach of a duty of care of those treating the player, they are inherently individual and not appropriate for class certification, so goes the legal argument.

Andrew Brandt – Great. Thanks. Paul?

Paul Anderson – Well, Mr. Weiss' opening statement was certainly great and that's what a jury may get to hear some day. There's no doubt the equities of this case almost scream injustice. Whenever you read, you open up the paper every day and you hear sad stories about former NFL players suffering. It tugs at our heart strings. No doubt, but the biggest issue right now, and it could be that dispositive issue, is this issue of preemption. That's the biggest hurdle right now facing the players. Right now the courtroom door is slightly open and if the players are able to successfully defeat the NFL's Motion, it's a ticket for them to remain in court and then to engage in this long process of discovery.

And there are two bodies of law that Judge Brody can follow generally and you have almost a long line of sports law cases where players have tried to sue individual teams, the NFL, and major league baseball, and generally conclusion of those cases are that they are preempted and they have to go to arbitration. And then on the other side of the coin, you have this Third Circuit precedent, and it's in favor of the plaintiffs' side especially on the fraud claims. So it's up in the air on how Judge Brody rules on that issue, even though there is also a gap period where there was never a CBA in place, and that should almost take out this whole issue of preemption and that is prior to 1968; there was not a CBA in place and then between 1988 and 1993 there is also not a CBA in place. So let's assume for the sake of argument that Judge Brody does decide to grant the NFL's Motion to Dismiss whenever the CBA was in place. There is a chance that the players that only played prior to 1968 and during that specific gap period of '88 and '93 just those claims alone could survive. Now, it's a small chance, but it certainly is a chance nonetheless. The briefing on that issue really wasn't brought to light and I suspect that Judge Brody will ask a lot of questions wanting to address that issue.

And then secondly, I guess, we can touch briefly on the science of concussion. As we all know, the science has advanced significantly just in the past few years and the players' argument is essentially that the NFL has been aware of the long term risk of concussions all the way since the inception of football, since the 1920s; however, the medical community they were in great flux. The medical literature in the '70s all the way up until the '90s, unfortunately, the medical community did not really know and there are specific statements in these learned treatises and textbooks of neurology that say concussion is a benign injury that quickly heals itself. Of course, we clearly know that's not the case, but that's something that the players are going to have to show that the NFL had a duty to warn the players and nonetheless, they breached that duty. But to point back and say that the retired players or the guys that played in the '50s, '60s, and '70s, you know, I think it's going to be a very difficult argument and that circles back around to the retirees. You know these are the guys, especially the pre '93 guys that were never paid millions and millions of dollars, these are the guys that are suffering the most and yet again, they may end up being left without compensation in not having a strong claim like the guys in my opinion that played from the '90s, probably from 1994 up until 2009 and 2010 whenever the medical science was re-

ally starting to evolve, but again, that will certainly be an issue that will be litigated throughout this case.

Andrew Brandt – You've heard what everyone says, what people say to me, I'm sure they say to you. These guys know. They're not going out there to play tiddlywinks. They're going to hit their head. That's what they do and then you heard the panel this morning, guys that ignore baseline testing. They want to go back in. They're worried about the next play, the next contract, the next practice. They're certainly not worried about 20 years from now. How do you respond to that and what are the legal arguments to that?

Sol Weiss – Well, that's a good question. I can do it in two parts. Professional football players knew when they played the game there was a risk of physical injury and they bargained for that risk by getting paid. No one told them that there was a risk that when they were in their 40s and 50s they would have dementia, early onset memory problems. They would have rage and depression issues that far exceed the number of such problems of the general population. So they didn't know it and just look at Alex Smith. He's the perfect illustration. He chose not to go back to play because he wants to have a productive life after football. That's number one.

And number two, if you look at all of the CBA contracts from the beginning until even 2011, not one of those contracts mentions repeated head impacts, what their risks were, or protocols for removing players from the game who've had their bell rung. So what I like about this litigation and I like about the civil justice system is that we get to air this out and the players may not win, but they can. But we as a society will benefit because the young kids are going to be protected while these old guys pay the price and that's my argument.

Andrew Brandt – Gordon?

Gordon Cooney – I do think, and this is just from my perspective as a father of a young son, that the debate that is fostered here is a very important one. Regardless of the legal consequences in lawsuits like the one that's sought and brought on behalf of the former players, the bright light that this litigation, the NCAA litigation, and the well-publicized stories like some of the ones you heard this morning, I think it is doing a lot of good for all kinds of parents, for programs at the amateur level. You know I happen to think that from a class standpoint these are very tough claims from the plaintiffs' perspective, but sometimes litigation has the indirect con-

sequence of raising sensitivity and raising awareness and maybe the litigation isn't the answer to addressing the problem, but it certainly raises awareness and causes all of us to think about how we act and we what we do to make sure we protect our children and to make sure that sports are as safe as they can be.

Andrew Brandt – Paul, what are your reactions when you hear Sol talk about the case and chances for success?

Paul Anderson – Yeah. I certainly agree. Mr. Weiss hit it right on the head. Society, all of us in society, have benefitted from this litigation. I think the best thing about this litigation has already occurred. It has brought awareness about concussions and the serious risks that go along with concussions. So that's a plus. So regardless if they're successful or not, we're talking about concussions on a daily basis.

Secondly, I guess, Professor Brandt, in regard to the assumption of risk defense you know I think, again, Mr. Weiss is probably correct on that. I think the players assume the risk of physical injuries, of knee injuries; however, they may have not been specifically warned nor did they have knowledge of the potential risk of traumatic brain injuries and long term neurological problems.

So I think the players will succeed on the assumption of risk argument. Nonetheless, there are still multiple other legal hurdles that they are going to have to overcome that will be played out.

Andrew Brandt – For me this all kind of all bubbled up with the 2009 Congressional hearings where Commissioner Goodell and union head DeMaurice Smith were called on the carpet and accused of not doing enough, being lax, even being compared to the tobacco industry. Is it your theory that the, pardon the pun, smoking guns that came out with the tobacco industry will also be exposed here?

Sol Weiss – You're right about that, and some of those documents have been made public. I believe Roger Goodell testified that the league didn't know about some of the events that took place while they're doing their committee work between '94 and 2008. Documents were mentioned in our Complaint. They show a different side of the story and I think that's the tipping point, Andrew. The congressional hearing I believe was the tipping point for all this coming out and that De Smith and Roger Goodell don't see eye-to-eye. The union and the league don't see eye-to-eye about this, but the pawns have been the players and that's the problem and so their courage in coming forward, and it is courageous to do that. To put their private lives in public is remarkable. Ray Eas-

terling who was our client, we talked to Ray a lot. He couldn't take it. He killed himself. Duerson killed himself. Junior Seau killed himself. You're talking about people taking their lives. Kevin Turner who played fullback here in Philadelphia, I've met Kevin a couple of times over the years. He's got ALS. Steve Smith who is much younger than Kevin Turner doesn't have much longer to live and the way he is living is horrible. He's on a ventilator stuck in a bed. There are so many stories about these players, about what they suffered, that something has to be done and I think that's what this is all about.

Andrew Brandt – But what didn't the NFL do for them that caused these traumatic events?

Sol Weiss – Well, I can say it this way. If you look at the collective bargaining agreements over the years, they have strengthened the payments for players who need for example knee replacements, have back problems. They just neglected the brain side of the equation. It's got to be fixed.

Andrew Brandt – But as the panel said before us that Dr. Marino – we don't know the signs, correct? We haven't known. We still don't.

Sol Weiss – Well, I can tell you that Ann McKee and Bob Cantu and Chris Nowinski up in Boston and you know them, Andrew. Ann published in *Brain* in December of 2012 a definitive study. I think they looked at sixty-six or eighty-some brains of deceased people who had suffered some sort of concussive type injury either in the service or playing football or soccer. I believe thirty-four of them were professional football players from the AFL or NFL. Thirty-three of the thirty-four had demonstrative CTE and then they went out and they had independent psychologists interview the families and they developed a set of criteria and they can classify between CT1, 2, 3, and 4, with 4 being the worst, what the symptoms are. So some of these players in all sports are presenting with these symptoms. They're showing definitive signs of CTE. There is a study that was published two days ago in *Radiology* where they can actually see brain atrophy one year after a concussion, which is a symptoms of CTE.

There are doctors who use PET scans and other types of diagnostic studies in which they can show brain changes in living people. This is a serious problem.

Andrew Brandt – I quickly want to ask Paul. You talked about where is the union in all of this. Okay. Where is the NFL PA? A lot of attention is on the liability of the NFL, but what about the union?

Paul Anderson – Yeah. You know, the union is created to protect the players and the question becomes if the NFL was concealing or misrepresenting the link between repeated hits to the head and later in life cognitive decline, where was the Players' Association? Why didn't they stand up? Why didn't they negotiate the better benefits? Where have they been? They've been on the sidelines not saying a thing because they know that there's a chance that they could be dragged into this litigation also.

The Players' Association was privy to those exact same studies published in the 1920s all the way up until now that linked repeated hits to the head and later in life cognitive decline. Why didn't the Players' Association bring that to the table? Why didn't they negotiate, and that falls into labor issues. One thing that I will touch on – it goes back to it seems like the retirees tragically are always the ones that are left to fend for themselves and it's unfortunate. There's no doubt about that, but one thing that I mean just from the most recent CBA. The players and the NFL negotiated a new neurocognitive benefits plan and part of this, and I think it's so poorly negotiated it's almost ridiculous. Part of this neurocognitive benefits is a player can receive \$1,500 to \$3,000 a month if they're showing mild or moderate cognitive impairment; however, the benefits stop at the age of 55 whenever you would presume that brain injuries are going to get worse. So I think that's just another matter of the NFL PA failing their players and the retirees.

Andrew Brandt – Thanks, Paul. What I'd like to do. I know we're running out of time. Your predictions? I don't mean to make this like the odds, but they're taking odds on who is the next pope so why not? What will happen in this lawsuit both on the preemption argument April 9 and potentially beyond and where does this lawsuit go? Are we going to be talking about this for years?

Gordon Cooney – It's always tough to predict how an individual judge is going to rule in an individual case. I think the NFL has very strong arguments in favor of preemption, but MVL judges often think that their job is to manage the discovery that is necessary in an MVL to try to package a resolution and so it will take some political will on Judge Brody's part to say, "You know what? I think this whole dispute turns on an interpretation of the collective bargaining agreement at least in part and so therefore, I'm going to disband the MVL and send everybody off to arbitration." And so I think the arguments are very strong, Andrew, but it will take considerable will.

If the case goes past preemption, I think that the NFL's argument against class certification are extraordinarily strong and it will be very difficult for the plaintiff to get class certified, which doesn't mean the individual cases don't go forward. It just means it won't go forward as a class.

Andrew Brandt – Even with Sol Weiss representing it?

Gordon Cooney – That's the best thing that the plaintiffs have going for them.

Andrew Brandt – Paul, predictions?

Paul Anderson – Yeah. This preemption issue is almost a coin toss and you know I would definitely suggest everybody to go watch this argument because it's going to be great, but I do see, it's probably a fool's errand to predict this, but I do see the fraud claims surviving and also the claims between that gap periods also surviving. The players will go into discovery and if they're able to find that smoking gun, then I think a global settlement will be reached. I do not see class certification occurring here. I just think it's too difficult, too many individualized issues. I mean the quintessential fact of concussion is that there is an individual issue and it affects each person differently, but I really think after this preemption issue is decided, it'll be kind of telling. If the NFL immediately wants to start talking about a settlement, then I think that'll show that maybe the NFL does have some dirty laundry that they don't want the plaintiffs' lawyers seeing, but on the other hand, I think if that's not the case and global settlement isn't reached or discussed, the discovery process will be long, drawn out. There will be multiple fights. I mean the parties were arguing over how long a brief can be. That's just one issue and you can imagine how wide-ranging the discovery disputes will be and this thing will drag on. I think the NFL initially said that they're going to need up until 2018 just to complete the discovery stage. Of course, that's way, way too much time. It'll probably take four years to finish the discovery and all of the pretrial proceedings and then the case may be sent back to their originating district for trial and we may see. We may have an indicator case or a bellwether case that's tried to see exactly how these cases will work out, and I think a great case for that would be Junior Seau, his wrongful death case. I think he played in an era in which concussion was generally known and the equities of his case also scream injustice to an extent and I think that'll be a great case for the parties to really determine how does the jury respond to these arguments and if the case – if there is a jury verdict in favor of the plaintiff, then I think that will certainly force the global settle-

ment altogether, but if let's say, for example, that the bellwether case is a defense verdict, then I think the NFL will continue to try cases in the next 15 to 20 years.

Andrew Brandt – Thanks, Paul. Sol, last word on this?

Sol Weiss – This is a unique litigation. There will be a lot of twists and turns and there will be a lot of opportunities for a long period of time for the parties to try to get together. It took a long time to bring the tobacco companies to the table. It took a long time early on to get the pharmaceutical companies to the table and it could take years to bring the NFL to the table, but I can tell you that the players have the will and the desire to see it through. And so I can't predict when or how this case will resolve. All I can tell you is we're going to give it our best shot every step of the way.

Andrew Brandt – We'll be watching. Fascinating panel. Let's thank everyone.

[End of Panel 3]