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PAIN IN THE HEAD: THE OFFICIAL HELMET COMPANY OF THE NFL'S POTENTIAL LIABILITY IN THE CONCUSSION LAWSUITS

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ABSTRACT

This presentation discusses the current lawsuits filed by thousands of former NFL players and their spouses against the official helmet manufacturer of the NFL, Riddell. Part I discusses the current disposition of the lawsuits and describes the procedural history as to how the lawsuits reached the Eastern District of Pennsylvania. Part II addresses Riddell's history and its most recent innovations in concussion technologies. Part III walks through the causes of action filed against Riddell by the players and their spouses in the combined Master Complaint. Part IV focuses on the Motion to Dismiss filed by Riddell and the manufacturer's potential affirmative defenses should the litigation continue.

INTRODUCTION

As of the publication of this Note, many readers will be well aware of the existence of concussion litigation currently pending across the United States of America, but most may have only focused or known about said litigation against the National Football League ("NFL")filed by the former NFL players and their spouses as plaintiffs. However, many of those same players have also filed suit against Riddell, the official helmet manufacturer of the NFL. The purpose of

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this Note is to shed light on the pending litigation against Riddell, which will naturally include discussion about the claims made against the NFL, because these two defendants have been joined together in multi-district litigation.

I. RIDDELL'S PATH TO MULTI-DISTRICT LITIGATION

The litigation against Riddell has previously been combined into the multi-district litigation ("MDL") case, *in re National Football League Players' Concussion Injury Litigation*.[1] The purpose of MDL is for the judiciary to combine cases that have various similarities in order to speed up the pre-trial process, including the typically time-consuming discovery period. Over two hundred (200) cases with more than four thousand (4,000) plaintiffs have been combined into the Eastern District of Pennsylvania.[2] The number of plaintiffs equates to over one-third of former players that have ever participated in the NFL.[3] Further, not only former players involved in the litigation; many spouses have joined based on a claim for damages as a result of the suffering that their spouses have endured throughout time.[4]

As of this Note's publication, the Plaintiffs are facing a motion to dismiss by both the NFL and Riddell. The fate of the aforementioned four thousand (4,000) plus Plaintiffs rests in the hands of Judge Anita Brody of the Eastern District of Pennsylvania. The motions to dismiss are largely based on jurisdictional grounds.[5] That is, the NFL and Riddell believe that this subject matter is an improper item for a court of law to address and instead should be handled within the mandatory arbitration system agreed upon through the collective bargaining agreements signed between the players (as part of a union) and the various owners throughout many years of the NFL's existence.[6] The

1. Plaintiffs' Amended Master Administrative Long-Form Complaint, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. July 17, 2012).

2. *Court Documents*, NFL Concussion Litigation, http://nflconcussionlitigation.com/?page_id=18

3. *Id.*

4. Plaintiffs' Amended Master Administrative Long-Form Complaint at 69, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. July 17, 2012).

5. Riddell Defendants' Notice of Motion and Motion to Dismiss Plaintiffs' Amended Complaints Pursuant to Rules 8 and 12(b)(6); Memorandum of Points and Authorities, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. March 29, 2012).

6. Reply Brief in Support of Riddell Defendants' Motion to Dismiss Based on Lmra § 301 Preemption, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. December 17, 2012).

players have filed their response to the NFL's Motion to Dismiss, and oral arguments were heard on April 9, 2013. As of this Note's publication, Judge Brody has yet to rule on said oral arguments, and the parties anxiously await her Order. No matter how Judge Brody rules, it will most likely be appealed, and thus, this case is likely to be dragged out for quite some time.

How did Riddell end up in the MDL alongside the NFL, fighting a battle in court against the NFL's former players? The procedural background begins with *Maxwell v. National Football League*.[7] *Maxwell* was filed in California State Court on July 19, 2011, and included over seventy (70) former NFL players.[8] It was the first lawsuit that named Riddell as a defendant in the same concussion Complaint as the NFL. The *Maxwell* case was followed by two more California cases: *Pear v. NFL*,[9] and *Barnes v. NFL*.[10] On August 17, 2011 (Shortly after *Maxwell* was filed), the first federal lawsuit that included Riddell as a defendant, *Easterling v. NFL*, was filed in Eastern District of Pennsylvania, which is the same jurisdiction wherein the MDL proceedings reside.[11]

The NFL and Riddell successfully removed *Maxwell* to federal court.[12] Then, the United States Judicial Panel on Multidistrict Litigation selected the Eastern District to be the forum for the instant MDL litigation.[13] Each of the complaints that have been removed has now been joined in the MDL and the lawyers have an executive committee tasked with the duty of controlling the direction of the litigation. While the Eastern District is the forum for this litigation, the respective state laws of the states where the complaints were filed may still apply (depending on how Judge Brody rules on the Motion to Dismiss).

7. Complaint, *Maxwell v. National Football League*, Case NO.: CV aa-8394 (Cal. Super. L.A. Co. July 19, 2011).

8. *Id.*

9. Pear v. National Football League, C.A. No. CV 11 08395 R (C.D. Cal. Dec. 9, 2011).

10. *Barnes, et al. v. National Football League, et al.*, C.A. No. BC468483 2011 WL 3791910 (Cal.Super. L.A. Co. Aug. 26, 2011)

11. Class Action First Amended Comlaint, *Easterling v. National Football League, Inc.*, Case No. 11-cv-05209-AB (E.D. PA Aug. 17, 2011)

12. Paul Anderson, *Helmet to Helmet: Riddell's Role in NFL Concussion Litigation* p. 3 (2012), *available at* http://nflconcussionlitigation.com/wp-content/uploads/2012/08/Helmet-to-Helmet-copy.pdf.

13. *Id.*

II. RIDDELL'S HISTORY AND INNOVATIONS

Who is Riddell, and why have the players named the helmet manufacturer as defendant along with the NFL in a number of cases? The company was first founded in 1927.[14] Riddell then became the official helmet maker of the NFL in 1989, and was established as a private company in 1991, with net revenues about thirty-five million dollars ($35,000,000).[15] Currently, about eighty percent (80%) of NFL players use Riddell helmets.[16] Because the vast majority of players wear Riddell helmets, and Riddell has deep pockets, Riddell is quite an appealing defendant alongside the NFL.

Many, including Riddell itself, would argue that Riddell has helped players prevent and avoid the long-term risks of head injuries. In the early 2000's, Riddell began researching head injuries and creating new helmet technologies.[17] One of its developments is the "Revolution" helmet, which implemented new Riddell technologies such as the Head Impact Telemetry System ("HITS"), and was believed to help reduce concussions.[18] HITS is a system that monitors and records head impacts sustained by the players.[19]

The crux of the players' case is their claim that Riddell advertised to players and to the general public that their helmets not only reduced the risk of head injuries, but that its helmets actually could reduce concussions by thirty one percent (31%).[20] The helmet would not reduce the number of helmet-to-helmet collisions, or knee-to-helmet collisions, but rather the Revolution helmet could actually prevent concussions. Since its release, Riddell has adjusted its warnings to say that no helmet can prevent concussions, but this negligent misrepresentation is the main claim against Riddell, even though it is only one of several counts against the helmet manufacturer.

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14. *Riddell Sports Inc. History*, Funding Universe, http://www.fundinguniverse.com/company-histories/riddell-sports-inc-history/

15. *Id.*

16. Alan Schwarz, *Helmet Standards Are Latest N.F.L. Battleground*, New York Times online (Dec. 23, 2009), http://www.nytimes.com/2009/12/24/sports/football/24helmets.html?pagewanted=all&_r=0

17. *Innovation History*, Riddell.com, http://www.riddell.com/innovation/history/.

18. *Innovation HITS Technology*, Riddell.com, http://www.riddell.com/innovation/hits-technology/

19. *Id.*

20. Darren Heitner, *Why Football Helmet Manufacturer Riddell Should Be Very Concerned About Concussion Litigation*, Forbes (June 21, 2012), http://www.forbes.com/sites/darrenheitner/2012/06/21/why-football-helmet-manufacturer-riddell-should-be-very-concerned-about-concussion-litigation/.

III. THE PLAINTIFFS' CLAIMS AGAINST RIDDELL

The several claims that the players and players' spouses have made against Riddell are as follows: (1) design defect, (2) manufacturing defect, (3) failure to warn, (4) negligence, (5) civil conspiracy, (6) fraudulent concealment and (7) loss of consortium.[21] The loss of consortium claim was filed by the players' spouses in an attempt to find relief based on the damage and suffering that the players had to incur.[22] The most compelling causes of action may be the civil conspiracy and fraudulent concealment counts.

First, with regards to the product liability claims, the players are trying to recover based on a theory of strict liability.[23] A design defect is when the product itself is inherently dangerous in the way that it was created and manufactured. The players claim that the Riddell helmets were defective in their designs, and were unreasonably dangerous and unsafe for the intended purpose that was described in Riddell's advertising, its promotional materials and on labels that have been placed on past Riddell helmets.[24] In fact since the concussion litigation was instituted, Riddell changed the labels placed on its helmets in an effort to try to limit its liability.[25] The new labels state that Riddell is not responsible for any kind of damage that may occur while wearing its helmets and that Riddell is not claiming that the usage of its helmets will, in fact, prevent a concussion.[26] The players' claim for manufacturing defect almost mirrors their design defect cause of action.

There are two tests for a design defect: (1) the risk utility test, and (2) the consumer expectation test.[27] Generally, the consumer expectation test applies when an ordinary consumer has enough knowledge about a product's design to have a reasonable expectation for its safety.[28] The players need to prove that (1) it is within the knowledge of the players to understand how a helmet is designed, and (2) that with this knowledge, it is reasonable for the players to expect the hel-

21. Plaintiffs' Amended Master Administrative Long-Form Complaint at ii and iii, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. July 17, 2012).

22. *Id.* at ¶ 366-69.

23. *Id.* at ¶ 397-405.

24. *Id.*

25. Darren Heitner, *New Concussion Warning Label Won't Be A Big Score For Retired NFL Players Suing Helmet Manufacturer Riddell*, Forbes (Aug. 26, 2012), http://www.forbes.com/sites/darrenheitner/2012/08/26/new-concussion-warning-label-wont-be-a-big-score-for-retired-nfl-players-suing-helmet-manufacturer-riddell/

26. *Id.*

27. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431 (Cal. 1978).

28. *Id.*

mets to prevent concussions. A potential issue is that the players also claim that they relied on Riddell's research, and therefore an ordinary player is unlikely to know how much force a football helmet needs in order to be able to withstand or prevent a head injury. Even if this knowledge is within the scope of an ordinary player's knowledge, the players then must convince a jury that it was reasonable to believe a helmet would prevent a concussion and that any design defect resulted in their head injuries. If the consumer expectation test cannot be applied, then the Court will use the risk-utility, or risk-benefit test.[29]

Under the risk-utility test, the players' first must answer the question, "was the helmet the cause of the injury, or was there something else that caused the injury?" It is difficult to show at any given time what caused the injuries to the players;was it when they were playing Peewee football,or was it possibly when they played football in high school or college? Further, what helmet were they using at that time of injury? If the players can prove that Riddell's designs were a substantial factor contributing to the players' injuries, Riddell could be liable, unless the company can then show that the benefits of the design outweigh the risks. The factors a court examines to determine whether the benefits outweigh the risk are: (1) the gravity of potential injury and (2) the likelihood that injury would occur versus the feasibility of an alternative design.[30]

Some other companies with alternative designs that the claimants may reference are Guardian, Bulwark, and Xenith.[31] In fact, the aforesaid companies are a part of a business of concussions, which is now booming.[32] The Guardian device is a gel filled helmet cover currently used in some high schools, which shows promise in reducing the severity of concussions.[33] The Bulwark is a helmet designed with multiple plates on the exterior of the helmet so that the force will be dispersed throughout the helmet instead of within the head.[34] However, these are recent designs, and analternative design must have been labeled as a true alternative option in proximity to when the Riddell

29. *Id.*

30. Judicial Council of California Civil Jury Instructions 1204

31. Scott Malone, *Football Turns To Helmet Technology To Tackle Head Injuries*, Reuters online (Apr. 2, 2012), http://www.reuters.com/article/2012/04/02/sports-football-helmets-idUSL2E8E8CKY20120402

32. Darren Heitner, *The Booming Business of Concussions*, Forbes (March 6, 2013), http://www.forbes.com/sites/darrenheitner/2013/03/06/the-booming-business-of-concussions/

33. Scott Malone, *Football Turns To Helmet Technology To Tackle Head Injuries*, Reuters online (Apr. 2, 2012), http://www.reuters.com/article/2012/04/02/sports-football-helmets-idUSL2E8E8CKY20120402

34. *Id.*

helmets in question were manufactured. Therefore, the players may point to Xenith, which uses air capsules instead of cushioning, and was known by Riddell since the 1970's.[35] These alternative designs, which may help reduce the risk of a head injury, demonstrate that Riddell may have been capable of designing an economic alternative that was safer than the Revolution helmet or any other helmets that Riddell manufactured in the past. Of course, these other companies have also had the opportunity to learn from Riddell, and have made it very clear in their warnings that they do not claim to stop concussions.[36]

As previously mentioned, the players also have a claim based on manufacturing defect, which mirrors the design defect claim. A manufacturing defect means that the design may not have been faulty, but it was defected during manufacturing.[37] To prove this claim, the players are going to need to show how their individual helmets were incorrectly manufactured. The players will have difficulty in proving this claim, because they have not alleged specific instances precisely detailing when their injuries occur. The players would need to present each helmet from which an injury resulted to show that these helmets in fact were manufactured with a defect.

The next claim is failure to warn.[38] The players claim that Riddell knew or should have known that there were substantial dangers involved with the use of Riddell helmets.[39] This claim is very similar to what the players allege against the NFL: that the NFL knew of these risks and purposefully hid said risks from the players.[40] Here, the players claim that because Riddell knew or should have known of the risks, Riddell had the duty to and failed to provide the necessary, adequate safety materials, failed to provide adequate information, and failed to warn the players of the risk of long term brain injury.[41]

First, Riddell will argue that the information regarding concussions was publicly available or even common sense, and that the players knew and understood the risks involved with suiting up and entering

35. Daniel Kaplan, *Helmet Maker Uses Safety As Sales Tool*, SportingNews.com (May 8, 2012), http://aol.sportingnews.com/nfl/story/2012-05-08/nfl-concussion-conundrum-helmet-maker-uses-safety-as-sales-tool

36. Tom Foster, *The Helmet That Can Save Football*, PopSci.com (Dec. 18, 2012 at 1:07 PM), http://www.popsci.com/science/article/2012-12/helmet-wars-and-new-helmet-could-protect-us-all?single-page-view=true

37. *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 429 (Cal. 1978).

38. Plaintiffs' Amended Master Administrative Long-Form Complaint at ¶ 406-15, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. July 17, 2012).

39. *Id.* at ¶ 9, 107.

40. *Id.* at ¶ 220-41.

41. *Id.*

the field of play. However, the players will point to the conflicting research conducted by the Mild Traumatic Brain Injury ("MTBI") Committee through the NFL, as evidence that the risks involving concussions was not widely available.[42] Riddell will also argue that, even if the players' allegations are true, the culture of football shows that players would not have heeded the warnings that Riddell should have provided. If Riddell can show that the players either knew the inherent risk in continuing to play football, or that any warning would not have been effective, then the players either assumed of the risk or could be found comparatively negligent, which may serve as a partial, if not complete, defense for Riddell.

The next count is the civil conspiracy and fraudulent concealment claim that the players have filed against both the NFL and Riddell.[43] The players are claiming that the Defendants, along with those employed by the NFL and the MTBI Committee, acted to fraudulently conceal the long-term harmful effects of concussions from NFL players. The Defendants, through their research, are claimed to have understood how concussions caused dementia and various other harms arising from playing football, but actively hid that information from the players. Further, the players allege that the MTBI Committee provided information that controverted independent research concerning the long-term effects of concussions. The problem for the players is that Riddell was not a part of the MTBI. The MTBI was an organization established by the NFL in 1995 to conduct concussion-related research.[44] This is a matter that will be fleshed out in the discovery process (if the underlying action survives the Motion to Dismiss and/or a settlement is not reached between the parties in advance of the discovery phase). Unless the players find that the NFL provided all its research to Riddell, and then Riddell in turn concealed and misrepresented the research from the players or made an effort to dissuade the players from believing independent studies that the players may or may not have ever received, then the players will have a very difficult time proving this claim of conspiracy against Riddell. The Plaintiffs have a lesser burden when it comes to the NFL, because the MTBI Committee was sponsored by the NFL, paid for by the NFL, and the information was provided from the NFL to the players.

42. *Id.* at. ¶ 227-28.

43. *Id.* at ¶ 422-425.

44. *Id.* at ¶ 2.

IV. RIDDELL'S MOTION TO DISMISS AND ITS AFFIRMATIVE DEFENSES

Riddell's Motion to Dismiss is based on three elements: (1) statute of limitations, (2) failure to meet the requirements of Rule 8, and (3) preemption.[45] In California, the statute of limitations to file a claim after the time that injury occurred is two years.[46] The vast majority of former NFL players embroiled in the pending litigation have been out of the NFL for more than two years and should be barred from recovery; however, there is an exception labeled the "Delayed Discovery" rule, which states a plaintiff need only file a claim within two years from the date that the plaintiff knew or should have known of the injury and its cause through due diligence.[47] A statute of limitations defense could come down to a case-to-case evaluation of which players understood the injury that they had sustained and which did players did not understand the consequences of receiving a concussion.

Next is the claimed failure to meet the requirements of Rule 8. Essentially, Rule 8 requires that a plaintiff provide a short, plain statement of the facts in the complaint and explain why the pleader is entitled to relief.[48] The players' claims are very broad, and they fail to allege specific instances in which the injuries occurred. Further, not all of the Plaintiffs overtly claim to have worn Riddell helmets during their careers, much less at the time an injury occurred. As stated *supra*, approximately eighty percent (80%) of NFL players wear Riddell helmets.[49] In order to obtain relief from Riddell, the players need to at least allege that they wore a Riddell helmet when injured. In *Ashcroft v. Iqbal*, the court held that a pleader does not need to state detailed factual allegations, but instead show plausible factual allegations that, accepted as true, "state a claim to relief that is plausible on

45. Riddell Defendants' Notice of Motion and Motion to Dismiss Plaintiffs' Amended Complaints Pursuant to Rules 8 and 12(b)(6); Memorandum of Points and Authorities, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. March 29, 2012). *See also* Reply Brief in Support of Riddell Defendants' Motion to Dismiss Based on Lmra § 301 Preemption, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. December 17, 2012).

46. Aaron Larson, *California Statute of Limitations for Civil and Personal Injury Actions - An Overview*, Expert Law (Jul, 2004), http://www.expertlaw.com/library/limitations_by_state/California.html

47. Memorandum of Plaintiffs in Opposition to Riddell Defendants' Motion to Dismiss Based on Lmra § 301 Preemption, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. Oct. 31, 2012).

48. Fed. R. Civ. P. 8.

49. Alan Schwarz, *Helmet Standards Are Latest N.F.L. Battleground*, New York Times online (Dec. 23, 2009), http://www.nytimes.com/2009/12/24/sports/football/24helmets.html?pagewanted=all&_r=0

its face."[50] Alternatively, there is the issue of proving but-for causation. If the injury was sustained in high school wearing a Schutt Sports helmet[51], then Riddell may not be the but-for cause of a player's claimed injury. The players may be able to survive the Motion to Dismiss based on the fact that they pled the necessary minimum elements to the causes of action,but the but-for analysis may be an important issue moving forward.

Finally, Riddell wishes to remove the action based on the Labor Management Relations Act's preemption provision.[52] If a state law claim requires the judge to interpret a collective bargaining agreement, then the court is preempted and the agreement's dispute resolution procedure must be employed.[53] However, Riddell is not a party to any collective bargaining agreement ever signed between the NFL players' association and the franchise owners. Riddell argues that if any of the players' state law claims against a non-party, such as Riddell, are so inextricably entwined with a collective bargaining agreement and the judge needs to interpret the collective bargaining agreement, then the state law claims are preempted.[54] In this case, if Judge Brody decides that she needs to interpret the collective bargaining agreement in order to determine the health and safety grievance procedures, or what duty if any Riddell owes the players, then the claims against Riddell, a non-party to the CBA, may still be preempted. One case both Riddell and the NFL will cite is *Stringer v National Football League*, where both the NFL and Riddell got a wrongful death claim preempted on these same grounds.[55] However, that court said that while Riddell could have its state law claims preempted, the products liability claims only required the court to examine the collective bargaining agreement and not interpret it, and thus preemption would not be necessary be the answer.[56] The Court in the MDL proceeding will have to determine whether it is examining or interpreting the collective bargaining agreement. If it is an interpretation, then the claims may be preempted and dismissed on those grounds.

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50. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

51. A helmet manufacturer and competitor of Riddell.

52. Reply Brief in Support of Riddell Defendants' Motion to Dismiss Based on Lmra § 301 Preemption, *in re National Football League Players' Concussion Injury Litigation v. National Football League*, No. 2:12-md-02323-AB, 2012 WL 2045382 (E.D. Pa. December 17, 2012).

53. Labor Management Relations Act, § 301.

54. Paul Anderson, *Helmet to Helmet: Riddell's Role in NFL Concussion Litigation* p. 19 (2012), *available at* http://nflconcussionlitigation.com/wp-content/uploads/2012/08/Helmet-to-Helmet-copy.pdf.

55. *Stringer v National Football League*, 474 F. Supp.2d 894, 914-15 (S.D. Ohio 2007).

56. *Id.*

Conclusion

While the case discussed has been moving slowly, the industry concerning head injuries is booming. Millions upon millions of dollars are being allocated to the testing and creation of new products and services.Unfortunately there are players who have suffered throughout history due to head injuries, and soon will be the time for appropriating liability if liability exists at all.